THE WAGNER
LAW GROUP

One Financial Center
Suite 3610
Boston, MA 02111
Tel. 617-357-5200
www.wagnerlawgroup.com

September 17, 2026

Submitted electronically via Federal eRulemaking Portal
http://www.regulations.gov

Legislative and Regulatory Division
Office of General Counsel
Pension Benefit Guaranty Corporation
445 12th Street SW
Washington, DC 20024-2101

Re: RIN 1212-AB50 – Penalties for Failure to Provide Certain Notices or Other Material Information

Dear Sir or Madam:

The Wagner Law Group (the "Firm") welcomes the opportunity to comment on the proposed rule (91 Fed. Reg. 45739) that the Pension Benefit Guaranty Corporation ("PBGC") issued on July 21, 2026, concerning penalties for failure to provide certain information under Sections 4071 or 4302 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Firm submits these comments on its own behalf, based on its extensive experience advising plan sponsors, administrators, fiduciaries, and other members of the employee benefits community.

These comments were developed primarily by two Firm Partners, Harold J. Ashner and Israel Goldowitz, who in the aggregate served more than 50 years in legal positions with PBGC:

- Mr. Ashner served as PBGC's Assistant General Counsel for Legislation and Regulations. In that capacity, he supervised the development and publication of PBGC's 1995 Statement of Policy governing penalties under ERISA Section 4071 as well as related penalty policies issued in 1996 to include information requirements relating to PBGC premiums, and in 1997 to provide penalty relief relating to filings of post-distribution certifications. The 1995 and 1996 policies continue to constitute PBGC penalty guidance, and the proposed rule, once finalized, would effectively supersede them to the extent they address the assessment and waiver of information penalties governed by the new rule. The substantive post-distribution certification relief announced in the 1997 policy was incorporated into § 4041.29(b) of PBGC regulations later in 1997, as part of a final rule he supervised. He also supervised the development and publication of a 2001 proposed rule that would have codified in PBGC's regulations an expanded version of PBGC's penalty policies.

- Mr. Goldowitz served both as PBGC's Chief Counsel and as PBGC's Deputy General Counsel for Program Law and Policy and supervised the development and publication of the agency's initial 1992 Statement of Policy on ERISA Section 4071 penalties.

These Firm Partners' PBGC service gives them unusual familiarity with the statutory framework and the history of PBGC's penalty policies, as well as with the practical considerations involved in PBGC's administration of information penalties.

The comments also were reviewed by, and reflect comments from, the following other members of the Firm's PBGC-Focused Practice Group, who previously served in a variety of positions at PBGC for an aggregate of nearly 90 years, including in senior roles involving legal, ombuds, actuarial, financial, and benefit policy functions:

- Linda Rosenzweig, a Firm Senior Counsel, formerly PBGC's Executive Assistant to the General Counsel;

- Camille Castro, a Firm Of Counsel, formerly PBGC's Senior Associate Participant and Plan Sponsor Advocate;

- John Langhans, the Firm's Senior Actuarial Advisor, formerly Deputy Manager of PBGC's Actuarial Services Division;

- Jonathan Henkel, the Firm's Senior PBGC Negotiations Advisor, formerly Supervisory Auditor for PBGC's Plan Termination Insurance Program; and

- Ellan Spring, the Firm's Senior PBGC Benefits Advisor, formerly PBGC's primary program official on benefit policy.

As the preamble to the proposed rule notes, the main purpose of these civil penalties is to encourage compliance with the reporting and disclosure requirements of Title IV and applicable provisions of ERISA's minimum funding requirements. That has been the agency's consistent view since it issued its initial Statement of Policy in 1992. Though the potential for a penalty assessment may result in greater compliance, the purpose of an actual assessment has rarely, if ever, been punishment.

Based on PBGC's data, the number of PBGC-covered single-employer defined benefit plans declined from 29,605 in 2005 to 22,196 in 2025, a reduction of approximately 25 percent, while the number of PBGC-covered multiemployer plans declined from 1,571 to 1,304 during that period, a reduction of approximately 17 percent. PBGC Pension Insurance Data Tables 2024, Tables S-21 and M-5 (both covering 1980-2025).https://www.pbgc.gov/sites/default/files/documents/2024-pension-data-tables.pdf There are, of course, many reasons for this, including globalization, investment volatility, longevity improvements, and changing workplace expectations. Compliance costs are also frequently cited. See, e.g., John H. Langbein, ERISA's Role in the Demise of Defined Benefit Pension Plans in the United States, 31 Elder Law Journal 44-49 (2023). If those pressures become too great, more employers, including creditworthy sponsors, may decide to terminate their defined benefit plans. PBGC's historical approach to civil penalties has, we believe, implicitly taken this reality into account. The agency should do so explicitly in finalizing the rule to help guard against further declines in the number of such plans.

The Firm supports PBGC's decision to replace the 1995 Policy with a rule. Codification should improve transparency as well as predictability and consistency, while retaining the discretion needed to distinguish routine errors from noncompliance that is knowing and willful or otherwise serious enough to warrant the assessment of penalties. The proposal also appropriately sets ordinary Section 4071 penalties substantially below the statutory maximum by initially retaining the $25/$50 general daily amounts without an upward adjustment to reflect inflation and codifies key principles regarding penalty waivers, although the preamble contemplates annual review of the daily amounts and adjustment for inflation as needed. The preamble also appropriately states that PBGC generally intends to continue its "notice and cure" approach to Section 4302 penalties. The revisions recommended in this comment letter would, we believe, help to reinforce these strengths, better promote voluntary compliance, and encourage both self-reporting and prompt correction.

I. SUMMARY OF RECOMMENDATIONS

1. **Outside Advisors.** A filer's use of an outside advisor shouldn't automatically relieve it of any responsibility. (Throughout this comment letter, as a simplification, we use the term "filer" to refer to the person required to provide the information and the term "filing" to refer to the provision of the information, whether the requirement at issue is to "file" with PBGC or instead, for example, to "notify" all plan participants and beneficiaries.) At the same time, an outside advisor's error shouldn't automatically establish reasonable cause, but PBGC should consider the filer's ordinary business care and prudence in selecting, instructing, supplying information to, and overseeing the advisor, at least in those circumstances where the filer has acted appropriately and the fault lies solely with the advisor, as a strong mitigating factor when

deciding whether to assess a penalty and, if so, in deciding whether to significantly reduce the amount of the penalty.

2. Mitigating Factors. Apart from its treatment of identical information requirements, the proposal explicitly identifies only two mitigating factors: "Self-correction" (where the filer promptly, upon discovery, corrects the noncompliance and notifies PBGC of the noncompliance before PBGC notifies the filer of possible noncompliance) and "Preventive measures" (where the filer cooperates with PBGC in taking steps to ensure future compliance). The final rule should make clear that the conditions for mitigation based on self-correction apply where the filer promptly provides PBGC with a preliminary notice of discovered noncompliance before PBGC contacts the filer about the noncompliance and, within a reasonable period thereafter, investigates and corrects the noncompliance and accordingly supplements its notice to PBGC. Where PBGC contacts the filer about the noncompliance after the filer began its good-faith investigation but before the filer gave PBGC a preliminary notice, if the interval was short and the filer promptly completed correction, relief may be appropriate under the general waiver provision. In addition, the final rule should treat it as a mitigating factor that the filer had reasonable procedures in place and followed them and had a strong prior compliance history.

3. Small Plan Relief. PBGC proposes to provide penalty relief for small plans with respect to certain information requirements but should broaden that relief to apply it generally to all information requirements, with the possible exception of those for advance reportable-event notices under ERISA Section 4043(b) and missed-contribution notices subject to the lien provisions (formerly ERISA Section 302(f)(4), now Section 303(k)(4)). In addition, PBGC should generally limit the total penalty for a violation to $100 multiplied by the number of plan participants, for both plans with fewer than 100 participants and larger plans, potentially retaining different treatment for those same two particularly time-sensitive information requirements.

4. Related Deficiencies. PBGC should consider whether multiple deficiencies arise from a common underlying act or omission. The number of affected participants, recipients, plans, entities, or data elements shouldn't, standing alone, determine the number of penalized incidents.

5. Clarification and Supplementation. A request for clarification or for nonmaterial supplementation shouldn't, by itself, establish that an otherwise timely submission remained delinquent. The question should be whether the original submission materially satisfied the applicable requirement.

6. Aggravating Factors. PBGC shouldn't count the same characteristic both in establishing a particular base penalty and as an aggravating factor, unless the characteristic is present to a materially greater degree than usual. Repeat-offender treatment should require a meaningful pattern or a relevant prior violation within a reasonable lookback period, and willfulness should continue to require conscious and purposeful noncompliance.

7. Explanation of Upward Departures. When aggravating factors cause a material increase above the generally applicable Part 4071 amount, the initial determination should identify the factor, the principal supporting facts, and principal basis for the increase.

8. Consideration of the Absence of Actual or Reasonably Expected Harm. The proposal repeatedly refers to the potential for harm regardless of whether there is any actual harm. Although PBGC shouldn't have to establish actual harm as an element of a violation, it shouldn't use harm only in one direction, by allowing the *hypothetical potential* for harm to increase a penalty while giving no express mitigating weight to the demonstrated absence of any *actual harm*. A first inadvertent violation or first related set of inadvertent violations ordinarily should result only in a written warning, with no monetary penalty, where the violation caused no material harm, created no reasonably foreseeable material risk during the period of noncompliance, left no material continuing risk after correction, and the filer promptly corrected the violation, fully cooperated with PBGC, and adopted reasonable preventive measures. As for any later inadvertent violations, the absence of actual or reasonably expected harm should affect both whether PBGC will assess a penalty and whether PBGC will reduce it below the guideline amount. These shouldn't be mechanical safe harbors but should nonetheless be rebuttable presumptions affecting PBGC's approach to penalty assessments.

9. Error of Law and PBGC Delay. The final rule should align its error-of-law provisions with the preamble's reasonable-and-defensible standard and should state objective beginning and ending points for periods attributable to PBGC delay.

10. A Reasonable Limit on Penalty Days. The final rule should establish a set of presumptions calling for reasonable limits on the number of days for which the penalty continues to accrue or calling for a diminishing level of accrual where appropriate. Although the length of a delinquency is relevant, the seriousness of a violation does not always increase in direct proportion to the number of days of lateness. PBGC also should clarify that the proposed rule does not modify § 4041.29(b), by providing that no penalty accrues during its protected period, that the first day after that period is Day 1 for penalty-assessment purposes, and that the $50 daily rate begins only on the 91st penalty-assessment day.

11. Part 4302 Notice and Cure. Because PBGC—in proposing to assess the statutory maximum once a Part 4302 violation becomes subject to penalty—relies largely on its practice of ordinarily providing notice and a reasonable opportunity to cure before assessing a penalty, the regulation should codify that practice.

12. Transition and Effective Date Guidance. The final rule should address how PBGC intends to deal with violations that commenced before the final rule's effective date and continuing violations. In our view, newly specified higher assessment amounts should apply only to periods of noncompliance occurring on or after the effective date.

II. DETAILED DISCUSSION OF RECOMMENDATIONS

1. Outside-Advisor Errors.

The rules governing the requirements that could lead to Section 4071 or Section 4302 penalties are complex and routinely require specialized assistance from advisors with expertise in legal, actuarial, financial, administrative, and other areas. Much of the work associated with compliance with these requirements is necessarily entrusted to such advisors. The Firm agrees that this shouldn't eliminate the filer's legal responsibility to comply with these requirements, but that does not mean that the filer should always be responsible for violations caused by advisor errors.

The preamble states that PBGC will impute an outside advisor's acts to the filer and that the filer's care in selecting and interacting with the advisor is not relevant to reasonable cause; the proposed text states that PBGC generally treats outside advisors as part of the filer. That approach can produce the same result for a filer that exercised careful oversight but experienced an isolated professional error as for one that outsourced work without controls, supplied information late, ignored warnings, or retained an advisor with known recurring failures. Those situations do not involve comparable culpability.

Even if PBGC retains its proposed imputation rule for reasonable-cause purposes, the final rule should make the filer's conduct relevant to the discretionary assessment amount and to waiver under proposed §§ 4071.26 and 4302.26. The filer would remain responsible for compliance, but its own conduct would bear on the penalty.

The inquiry for PBGC in deciding whether to assess a penalty should be whether the filer exercised ordinary business care and prudence. If the filer reasonably selected a competent advisor, communicated responsibilities to the advisor, timely supplied necessary information to the advisor, maintained reasonable oversight in dealing with the advisor, responded appropriately to warning signs, and acted promptly after discovering the failure, the filer ordinarily shouldn't face a penalty based solely on advisor error. If PBGC were to decide to assess a penalty in such circumstances, it should be a significantly reduced penalty. PBGC should recognize that, if the filer were to be subjected to a penalty in such circumstances, it wouldn't always be clear that the filer could be reimbursed by the advisor for the penalty or for the costs associated with the filer's pursuit of any such reimbursement.

Relief would depend on what the filer itself did. A filer that supplied information late, ignored warnings, exercised no meaningful oversight, or continued to use a provider with known recurring failures would not qualify merely because an advisor made the error. The Firm recommends language substantially as follows:

> *Outside advisors. A filer's use of an outside advisor does not relieve the filer of responsibility for compliance with an information requirement. In determining whether to assess a penalty and the amount of any such penalty, PBGC will consider all relevant facts and circumstances, including, where applicable, whether the filer exercised ordinary business care and prudence. Relevant circumstances include the filer's procedure for the selection and instruction of the advisor, timely provision of necessary information, reasonable oversight, appropriate response to warning signs, and actions after learning of the noncompliance. If the filer exercised ordinary business care and prudence and the noncompliance was solely the fault of the advisor, PBGC generally will not assess a penalty or, if it does, will assess a significantly reduced penalty.*

2. Mitigating Factors.

The proposal provides that the "self-correction" mitigating factor applies where the filer promptly, upon discovery, corrects the noncompliance and notifies PBGC of the noncompliance before PBGC notifies the filer of noncompliance. When a filer identifies noncompliance, it can take some time to investigate the noncompliance, to determine what corrective steps are appropriate, and to initiate and complete those corrective steps.

The final rule should make clear that the "self-correction" mitigating factor fully applies where the filer promptly provides PBGC with a preliminary notice of noncompliance it has discovered before PBGC notifies the filer of possible noncompliance, and supplements that notice within a reasonable period to inform PBGC of the corrective steps taken. The preliminary notice should identify the requirement, apparent failure, date of discovery, and expected timetable for providing PBGC with further information. This would preserve the incentive for voluntary disclosure without demanding immediate, potentially incomplete conclusions or "solutions."

If PBGC contacts a filer about the noncompliance after the filer has discovered it and has begun a good-faith investigation but before the filer provided PBGC with a preliminary notice, that circumstance shouldn't receive full self-correction treatment automatically. It should nevertheless remain relevant under the general waiver provision, particularly where the interval was short and the filer promptly completed correction.

The proposal explicitly identifies only one mitigating factor other than self-correction, *i.e.*, "Preventive measures" (where the filer cooperates with PBGC in taking steps to ensure future compliance). The final rule should also treat as a mitigating factor that the filer had reasonable procedures in place and followed them and had a strong compliance history. Such a filer should be treated more leniently than one who did not have, or did not follow, reasonable procedures or one who did not have a strong compliance history. Recognizing those efforts would give filers a reason to invest in compliance procedures before a failure occurs.

3. Small Plan Relief. The 1995 Policy, which remains in effect and which the proposed rule, once finalized, would effectively supersede, generally provides penalty relief for plans with fewer than 100 participants through a proportionate reduction based on the number of participants. That Policy also generally limits the total penalty for a violation to $100 multiplied by the number of plan participants, a limitation applicable to both small and larger plans. The Policy provides different treatment for two particularly time-sensitive information requirements: advance reportable-event notices under ERISA Section 4043(b) and notices of missed contributions subject to the lien provisions (formerly ERISA Section 302(f)(4), now Section 303(k)(4)).

PBGC's proposal adopts a version of this relief for such small plans but applies it only with respect to certain information requirements, denying that relief in other cases either because the applicable information requirement "generally" is waived for such small plans or "generally" does not apply to such small plans, or because "very few" of such small plans are subject to the applicable information requirement. PBGC should apply the small plan relief broadly as a general rule, including to information requirements likely to be applicable to relatively few small plans, potentially retaining different treatment for advance reportable-event notices and missed-contribution notices subject to the lien provisions. The consequences of a violation of reporting and disclosure requirements are generally far less significant for such a small plan than they are for a larger plan, and PBGC's penalty policy should generally take that into account, subject to any retained different treatment for those two particularly time-sensitive information requirements.

The Firm recommends that PBGC adopt the same general approach in the final rule: a general limit on the total penalty for a violation of $100 multiplied by the number of plan participants, applicable to both small and larger plans, potentially retaining different treatment for those same two particularly time-sensitive information requirements. As under the existing policy, this would be a general guideline rather than an absolute cap, permitting higher assessments where the facts and circumstances warrant a departure.

4. Related Deficiencies. The proposed rule's provisions on reportable events, Section 4062(e) events, plan termination information, and Section 4010 reporting raise similar counting questions. A single programming, mailing, template, or data-extraction error can affect many recipients, multiple plans or controlled group members, or multiple data elements. At the same time, a single filing can implicate multiple reporting obligations.

PBGC has recognized the need to avoid duplicative reporting requirements in its reportable events rule, specifying instances where satisfaction of one reporting requirement also satisfies a separate but similar reporting requirement. For example, under § 4043.30(b)(3), notice of a liquidation event is waived if reporting is also required under § 4043.35(a)(3) or (4) and notice has been provided timely to PBGC for the same event under that section. Conversely, under § 4043.35(b)(3), notice under § 4043.35(a)(3) or (4) is waived if reporting is also required under § 4043.30 and notice has been provided timely to PBGC for the same event under that section. Similarly, the requirement to file a reportable event notice relating to the failure to make a minimum funding payment is deemed satisfied if, with respect to the same failure, a filing is made in accordance with 29 CFR § 4043.81 (for missed contributions subject to the lien provisions of IRC Section 430(k)).

The proposed rule acknowledges the need to avoid duplicative penalty assessments but does so expressly in only one setting. Proposed §§ 4071.25(d) and 4302.25(d), under the heading "Mitigating Factors," provide that the agency "generally treats noncompliance with a requirement to provide multiple persons with notices that contain identical information requirements as a single incidence of noncompliance." If this principle is appropriate for identical notices to, for example, all plan participants and beneficiaries, PBGC should consider a comparable rule where reports to the agency require identical or substantially identical information.

The agency typically opens a file when it receives a reportable event or similar notice and contacts the filer for additional information, as it is entitled to do under ERISA § 4003(a). The agency's investigatory powers are backed up by subpoena authority, § 4003(b), and it has ample enforcement authority, ultimately including an involuntary plan termination. The agency's focus, we suggest, should be on investigating and resolving the underlying substantive matter, not on proliferating penalties.

In our view, therefore, PBGC should provide guidance for the regulated community and its own staff regarding the considerations governing determinations about whether a common underlying event should result in multiple reporting penalties. The Firm recommends that PBGC identify the following nonexclusive considerations:

- whether the deficiencies arose contemporaneously from the same operational act or omission;
- whether the requirements called for identical or materially different information;
- whether the information was owed to the same or different recipients;
- whether separate corrective action was required for each deficiency;
- whether the deficiencies created distinct risks to participants, plans, or PBGC; and
- whether later failures continued after the filer discovered the initial error.

A presumption that substantially identical deficiencies produced by a single contemporaneous error constitute one incidence would promote consistent administration without collapsing independent compliance failures.

5. Clarification and Supplementation. PBGC also should distinguish between a materially incomplete filing and one that is materially complete but for some additional information PBGC has requested. A request for clarification or nonmaterial supplementation shouldn't establish that an otherwise timely filing was deficient.

The relevant inquiry should be whether the timely submission contained enough accurate information for PBGC to identify the event or obligation, understand its material features, and perform the function for which the information was required. A submission that omits essential information, is materially misleading, or prevents PBGC from evaluating the matter shouldn't receive that treatment. The final rule or preamble should state this distinction expressly, particularly for Part 4010 submissions and reportable-event notices, where complicated corporate, financial, and actuarial information may reasonably lead to follow-up questions.

6. Aggravating Factors

The Firm agrees that unusually high potential for harm, repeated offenses, and willfulness may justify more serious treatment. But if a specialized base amount already reflects PBGC's view that an information requirement's ordinary importance, urgency, or potential for harm is greater than that applicable to other information requirements, the information requirement's importance, urgency, or potential for harm in a particular case shouldn't support an additional increase unless it is materially more serious than is typical of the category.

The proposed repeat-offender text is broader than the preamble's reference to a pattern of noncompliance: read literally, it covers any previous instance involving an information requirement subject to the same statutory penalty provision, without an express lookback period or materiality threshold. PBGC instead should consider similarity, frequency, passage of time, prior warnings, overall filing volume, common causes, and corrective measures. The Firm recommends a five-year presumptive lookback, with discretion to consider older violations where the same serious conduct recurred after an express warning. A remote, unrelated violation that was voluntarily disclosed and promptly corrected shouldn't brand the filer as a repeat offender indefinitely.

Willfulness should mean conscious and purposeful noncompliance and not inadvertence or accident, as the proposed rule states. It should also be distinguished from negligence and from a reasonable misunderstanding of the filing obligation even if the filer was aware of the underlying facts. In a large organization, knowledge held by one employee shouldn't automatically establish a purposeful organizational decision not to comply; instead, attribution of an employee's knowledge should take account of the employee's responsibility and authority, applicable escalation duties, and the organization's response after responsible personnel learned of the obligation.

7. Explanation of Upward Departures. When aggravating factors cause a material upward departure from the generally applicable Part 4071 amount, the initial determination should briefly identify the factor and the principal supporting facts, and why those facts are more serious than circumstances typical of the reporting category. This would promote consistency and permit meaningful reconsideration without requiring an extensive adjudicatory opinion.

8. Consideration of the Absence of Actual or Reasonably Expected Harm

The proposal makes it an aggravating factor when noncompliance has the potential for significantly more harm than is typically associated with the information requirement, whether or not harm ultimately occurs. The Firm agrees that PBGC shouldn't be required to prove actual harm as an element of a reporting violation. Timely reporting can preserve an opportunity to investigate, monitor, or intervene, and the loss of that opportunity may itself be significant. But the final rule also should recognize circumstances showing that the violation caused no material harm, created no reasonably foreseeable material risk during the period of noncompliance, did not deprive PBGC or participants of a meaningful opportunity, and left no material continuing risk after correction.

When deciding whether to assess a penalty and, if so, the amount of the penalty, PBGC should consider all such circumstances rather than just the potential for harm resulting from a particular instance of noncompliance. There will be circumstances in which there is no actual harm or expected actual harm. Consider the following examples.

For each example below, assume that the applicable reporting requirement was not waived and that no extension or alternative filing satisfied that requirement.

- Active participant reduction "single-cause" events. Assume that a reportable-event filing concerning an active participant reduction "single-cause" event is overlooked and not made until a year after the ratio of the aggregate number of individuals who ceased to be active participants because of the single cause to the number of active participants at the beginning of the plan year exceeded 20 percent; that the single cause was the discontinuance of a set of operations that were performed at various unrelated facilities in different locations; that the discontinued operations were money-losing operations; that all remaining operations were and continue to be significantly profitable; that all members of the controlled group are and have always been financially strong; and that there is no question about the ability of the responsible controlled group to maintain and fund the pension plan going forward. On the assumed facts, timely reporting wouldn't reasonably have been expected to lead to protective action by PBGC, and the delay caused no material investigative or enforcement prejudice.

- Late quarterly contribution events. Assume that a quarterly contribution is paid late, just a few days too late to qualify for the 30-day grace period waiver; that the total of missed contributions never reaches the level that would result in the creation of an IRC Section 430(k) lien; that the requirement to file a reportable event notice was simply overlooked and was thus done a year or so late; that there was full compliance with all other aspects of the minimum funding rules; and that there is no question about the ability of the sponsor and its controlled group to maintain and fund the pension plan going forward. On the assumed facts, timely reporting wouldn't reasonably have been expected to lead to protective action by PBGC, and the delay caused no material investigative or enforcement prejudice.

- Change in controlled group events. Assume that a reportable-event filing concerning a change in controlled group is overlooked and not made until a year after there is a transaction that results, or that will result, in a reportable change in controlled group; that the entities that are leaving the controlled group are financially weak; that there are remaining members of the controlled group, other than the contributing sponsor and the highest-level U.S. parent, that are financially strong; and that there is no question about the ability of the remaining responsible controlled group to maintain and fund the pension plan going forward. On the assumed facts, timely reporting wouldn't reasonably have been expected to lead to protective action by PBGC, and the delay caused no material investigative or enforcement prejudice.

- Loan default events. Assume that a reportable-event filing concerning a loan with an outstanding balance of at least $10 million to a member of the plan's controlled group is overlooked and not made until a year after the lender waived a technical covenant before any actual default occurred; that the waiver itself constituted a reportable event because it avoided a breach that would trigger a default; that the technical covenant issue was understandably of no concern to the lender; that all scheduled debt-service payments have at all times been current; that all members of the controlled group are and have always been financially strong; and that there is no question about the ability of the responsible controlled group to maintain and fund the pension plan going forward. On the assumed facts, timely reporting wouldn't reasonably have been expected to lead to protective action by PBGC, and the delay caused no material investigative or enforcement prejudice.

ERISA Section 4071 says PBGC "may" assess penalties. PBGC therefore has discretion to respond to a technical violation without imposing a monetary sanction. PBGC's proposal also properly emphasizes individualized consideration, proportionality, voluntary compliance, and avoidance of unduly harsh results.

For all of these reasons, it would ordinarily be appropriate for PBGC, in the case of a first violation or related set of violations, to issue a written warning and assess no monetary penalty where:

- no material harm occurred;
- the violation created no reasonably foreseeable material risk during the period of noncompliance and left no material continuing risk after correction;
- the violation was not knowing, willful, or reckless;
- the filer did not conceal the failure or make a materially false or misleading statement;
- the filer corrected the violation promptly after discovery; and
- the filer cooperated with PBGC and adopted reasonable preventive measures going forward.

PBGC should be able to depart from this presumption where, for example, a filing is exceptionally late or the requirement is particularly time-sensitive.

Such a warning wouldn't be consequence-free. It would identify the violation, require any remaining corrective or preventive action, eliminate any future uncertainty about the requirement, and strengthen the justification for penalties if the violation were to recur. Such an approach wouldn't be a wooden rule, but rather a presumption as to how PBGC would act, in the absence of exceptional circumstances involving extreme lateness, reckless disregard, obstruction, failure to correct, or an exceptionally time-sensitive requirement.

For a later non-willful violation, the absence of actual or reasonably expected harm shouldn't compel a penalty waiver but should expressly affect both whether PBGC assesses a penalty and whether it reduces the penalty below the guideline amount. Relevant considerations should include whether the later violation:

- involved the same requirement or underlying control failure;
- occurred soon after the earlier violation or much later;
- followed an express warning;
- reflected a failure to implement appropriate corrective measures;
- was independently discovered, disclosed, and corrected; and
- caused or foreseeably could cause material harm.

A recurrence of the same error shortly after an explicit warning properly warrants different treatment from a harmless, unrelated violation many years later.

"Harm" may reasonably include financial loss, material investigative or enforcement prejudice, loss of a meaningful opportunity to intervene, impaired participant decision-making, inability to collect an otherwise recoverable amount, or a continuing material risk not eliminated by correction. But the lateness itself, or PBGC's routine cost of processing a late filing, shouldn't automatically establish harm. Otherwise, every violation necessarily causes harm, and the factor has no limiting function.

Similarly, harm that is reasonably expected should mean that there is a realistic material risk based on the available facts, not just a theoretical consequence. That assessment should address the period of noncompliance as well as any continuing risk after correction. The final rule should distinguish among the filing category's inherent potential for harm, the case-specific probability that harm would occur, and its likely magnitude.

The Firm recommends adding language substantially as follows to both Parts 4071 and 4302:

> *Actual or reasonably expected harm. In determining whether to assess or waive an information penalty and the amount of any penalty, PBGC will consider whether the noncompliance caused material harm, created a reasonably foreseeable material risk during the period of noncompliance, or left a material continuing risk after correction, in each case to participants, a plan, PBGC, or PBGC's insurance programs.*
>
> *For a filer's first instance of noncompliance, including related deficiencies arising from a common underlying act or omission, PBGC generally will issue a written warning and assess no monetary penalty if the noncompliance caused no material harm, created no reasonably foreseeable material risk during the period of noncompliance, left no material continuing risk after correction, the noncompliance was not knowing, willful, or reckless, and the filer promptly corrected the noncompliance, cooperated with PBGC, and adopted reasonable preventive measures going forward. PBGC may assess a penalty where exceptional circumstances otherwise warrant.*
>
> *For a later instance of non-willful noncompliance, the absence of actual or reasonably expected material harm, taking account of the period of noncompliance and any continuing risk after correction, is a mitigating factor in determining whether to assess a penalty and whether to reduce the penalty below the otherwise applicable amount. PBGC will consider the relationship, similarity, timing, materiality, and causes of the current and prior instances and the filer's corrective and preventive measures.*

Reporting would remain mandatory. The change would expressly give mitigating weight to the demonstrated absence of harm, just as the proposal gives aggravating weight to unusually high potential for harm. Filers would also have more reason to review prior filings, disclose errors, cooperate with PBGC, and improve their controls.

9. Error of Law and PBGC Delay

The Firm strongly supports the preamble's stated objective of avoiding penalties for filers that take "reasonable and defensible (even if ultimately incorrect) legal positions." Proposed

§§ 4071.23 and 4302.23, however, provide relief for reasonable reliance on an erroneous interpretation only if the interpretation was non-frivolous and timely disclosed to PBGC or was supported by substantial weight of authority. The final rule should state that a reasonable and defensible interpretation qualifies, with timely disclosure and substantial authority identified as important but nonexclusive evidence. A filer should comply within a reasonable period after a final PBGC resolution of the issue (including upon reconsideration, where applicable).

PBGC also should clarify that a period attributable to PBGC delay begins when PBGC receives sufficient information to consider a non-frivolous legal, factual, or procedural issue and ends when PBGC communicates its determination sufficiently to identify the required action. Where compliance reasonably requires action afterward, PBGC should allow a reasonable additional period before accrual resumes. Periods caused by the filer's unreasonable failure to supply necessary information need not be excluded.

10. A Reasonable Limit on Penalty Days

The final rule should establish a set of presumptions calling for reasonable limits on the number of days for which the penalty continues to accrue or for a diminishing level of accrual over time where appropriate. Although the length of a delinquency is relevant, the seriousness of a violation does not always increase in proportion to the number of days of lateness.

A filing that is one year late is not necessarily twelve times as serious as one that is one month late or 365 times as serious as a filing that is one day late. Yet a mechanical formula that relies solely on the number of days of lateness can result in unreasonably large penalties based principally on elapsed time rather than culpability, harm, or the importance of the information.

The final rule should therefore include a reasonable presumptive limit on the number of penalty days, at least for an ordinary, non-willful violation. PBGC could cap accrual after a specified period, with different limits for different types of filings, or adopt a graduated structure under which the per-day amount declines or ceases after certain periods of time. PBGC could retain discretion to assess additional days or a higher total amount upon a finding of willfulness, repeated disregard after notice, unusually serious potential harm, or another material aggravating circumstance, provided that PBGC provides a brief explanation for doing so in a particular case.

Such a structure wouldn't equate long delinquencies with short delinquencies. Assessments would still ordinarily increase substantially with continued delays, and failure to comply after PBGC notice could remain an aggravating factor. A presumptive cap would give PBGC a point at which to consider whether further daily accrual remains proportionate to the violation. The most severe penalties would still be available where the facts and circumstances justify them.

PBGC also should clarify the interaction between proposed §§ 4071.11(c) and 4071.15(b)(1) and existing § 4041.29(b). Where the plan administrator has filed the standard termination notice in accordance with § 4041.25(a)(1), § 4041.29(b) protects a late post-distribution certification from penalty if the required information is filed within 90 days after the distribution deadline (including extensions) under § 4041.28(a). This relief originated in PBGC's March 14, 1997, policy, which explained that, if the distribution deadline were March 1 and the certification were filed May 31, the filing would be treated as only one day late for penalty-assessment purposes. See 62 Fed. Reg. 12521 (Mar. 14, 1997). The substantive relief was incorporated into § 4041.29(b) by the November 1997 final rule. See 62 Fed. Reg. 60424, 60427 (Nov. 7, 1997).

Although proposed § 4071.15(b)(1) cross-references § 4041.29, proposed § 4071.11(c) and the preamble's discussion of an untimely Form 501 do not expressly identify when penalty days begin. PBGC should clarify in the final rule that the proposal does not modify § 4041.29(b), by providing that no penalty accrues during the period it protects, including where the filing remains outstanding after that period, that the first day following the protected period is Day 1 for penalty-assessment purposes, and that the $50 daily rate under § 4071.11(c) does not begin until the 91st penalty-assessment day. This would preserve the existing relief and avoid counting protected days either retroactively in the penalty amount or toward the $50 rate.

11. Part 4302 Notice and Cure

ERISA Section 4302 was enacted as part of the MPPAA reforms in 1980. Congress did not increase the maximum penalty under Section 4302 when it enacted Section 4071 in 1987. By the mid-1990s, when PBGC had issued and revised its Section 4071 penalty policies, multiemployer plans had largely stabilized, and the agency's multiemployer insurance program had a surplus. See, e.g., Report to Congress Required by the Pension Protection Act of 2006 (Jan. 22, 2013), Multiemployer Pension Plans, at 2-3.

It would be a decade before Congress enacted PPA's funding improvement and rehabilitation plan requirements, and another decade and a half before Congress enacted ARPA's rescue of the most troubled plans. These developments brought new reporting requirements, such as the annual funding notice, the notice of endangered or critical status, and the annual statement of compliance of a plan receiving special financial assistance, though only the latter is governed by Title IV of ERISA and PBGC rules.

In the preamble to the proposed rule, PBGC explains that, for filings required under the multiemployer plan insolvency insurance program, it historically has relied on notice and voluntary compliance and generally intends to continue that practice. Although the preamble describes the agency as "codifying" this practice for those filings, proposed § 4302.11 does not refer to the notice-and-cure process. The preamble also explains that PBGC generally will assess the maximum daily amount, as specified in proposed § 4302.3, once a violation is subject to penalty, largely because the filer did not comply through that notice-and-cure process.

Because notice and cure is central to PBGC's justification for using the maximum as the general Part 4302 assessment, that process should be expressly codified in the rule itself. The Firm recommends language substantially as follows:

> *Notice and opportunity to cure. Except where PBGC determines that the facts and circumstances warrant otherwise, PBGC generally will notify a filer of apparent noncompliance and provide a reasonable opportunity to furnish the required information before assessing an information penalty. PBGC generally will not assess an information penalty where the filer timely cures the noncompliance in response to such notice.*

Such a notice should identify the applicable information requirement, the failure, the cure deadline, and the potential consequence of failing to cure. A filer that independently corrects the failure under proposed § 4302.25(b) should receive treatment at least as favorable as a similar failure that is corrected only after agency detection.

PBGC should retain authority to assess a penalty without notice and cure where aggravating factors are present, including willful withholding, repeated noncompliance after warning, materially false or misleading submissions, or unusually serious potential harm from further delay.

The Part 4302 provisions should otherwise receive the same refinements recommended above concerning outside advisors, error of law, self-correction, mitigation, PBGC delay, repeated offenses, willfulness, actual or reasonably expected harm, and a presumptive limit on penalty days. These protections are especially important where each additional day is assessed at the statutory maximum.

The Firm supports proposed § 4302.25(d), which generally treats identical notices to multiple persons as one incident. That provision properly distinguishes multiple recipients from multiple independent compliance failures.

Finally, we have three technical comments on the proposed regulatory text for Part 4302:

a) The preamble states that "[u]nder §§ 4071.5 and 4302.5, a filer aggrieved by PBGC's initial determination with respect to information penalties would have the opportunity to request reconsideration in accordance with PBGC's regulation on Rules for

Administrative Review of Agency Decisions (29 CFR Part 4003).” Proposed § 4302.5 affirmatively allows such requests under Part 4003, Subpart C, by exercising the authority in 29 CFR 4003.1(c)(1), which addresses determinations to which Part 4003 does not otherwise apply. Existing § 4003.1(d)(3), however, lists Section 4071 penalties but not Section 4302 penalties. Although proposed § 4302.5 itself generally allows reconsideration, PBGC should also add Section 4302 penalty determinations to § 4003.1(d)(3) to make the scope of Part 4003 expressly consistent with that provision.

b) Proposed § 4302.21(b) refers to Sections 4302.22 through 4302.26 but does not refer to § 4302.27 (regarding aggravating factors) when describing PBGC’s discretion to waive information penalties, while the parallel Part 4071 provision (§ 4071.21(b)) does refer to § 4071.27 (regarding aggravating factors) when describing PBGC’s discretion to waive information penalties. The final rule should make the provisions parallel if PBGC intends the same substantive framework.

c) The table of contents should be revised to include a reference to proposed § 4302.27, “Aggravating factors.”

12. Transition and Effective Date Guidance

The final rule should make clear that the new rules will not apply to noncompliance beginning and ending before the effective date, and that they will apply fully to noncompliance beginning on or after the effective date.

For noncompliance beginning before and continuing after the effective date, the final rule should specify whether PBGC will apply the prior policy through the day before the rule becomes effective and the final rule thereafter or instead apply the more favorable of the two to the matter as a whole. Newly specified higher assessment amounts, including the specialized $100 and $1,000 daily amounts, should apply only to periods of noncompliance occurring on or after the effective date of the final rule. Clear transition rules are especially important in light of PBGC’s informal, internal non-enforcement policy for Section 4010 information and reportable events while the proposed rule was being developed, as well as PBGC’s non-enforcement of penalties for certain other filing violations described in the preamble.

That prospective approach also would avoid attaching newly stated consequences to conduct that occurred while PBGC’s non-enforcement practices were in place. In particular, PBGC should make clear that it will not assess penalties under the final rule for pre-effective-date violations of filing requirements that were subject to PBGC’s non-enforcement practices while the proposed rule was being developed, even where PBGC discovers the violation after the final rule becomes effective.

Nothing in this recommendation would preclude application of the final rule to periods of continuing noncompliance occurring on or after the final rule's effective date.

III. CONCLUSION

The Firm supports PBGC's basic direction. A final rule that retains ordinary Part 4071 amounts below the statutory maximum, that codifies waiver standards, and that preserves individualized judgment should improve transparency and consistency. Our principal concern is how those standards will operate when a filer makes an inadvertent error. Express consideration of actual or reasonably expected harm, a rebuttable warning-first presumption under the conditions described above, and reasonable limits on daily accrual would help PBGC assess a penalty proportionate to the particular violation.

Filers should have a reason to find and disclose errors, correct them promptly, and prevent a recurrence. The recommended changes would reinforce those incentives while preserving PBGC's ability to respond strongly to knowing, willful, repeated, obstructive, or unusually harmful noncompliance. PBGC should expressly give weight to the demonstrated absence of harm when deciding whether to assess or reduce a penalty.

* * * * * * * * * * *

The Wagner Law Group respectfully requests that PBGC adopt these targeted changes and clarifications. We appreciate PBGC's consideration and would welcome an opportunity to discuss the recommendations with the agency.

Respectfully submitted,

THE WAGNER LAW GROUP

Marcia S. Wagner,
Founder and Managing Partner