

February 4, 2019

Ms. Hilary Duke
Assistant General Counsel for Regulatory Affairs
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, DC 20005-4026

Subject: Response to PBGC's Request for Comments on Information Collection in Proposed Coverage Determination Request Form and Instructions, *83 Fed. Reg. 62629 (Dec. 4, 2018)*

Dear Ms. Duke,

The American Retirement Association ("ARA") is writing in response to the request for comments on proposed form and instructions that will enable the Pension Benefit Guaranty Corporation ("PBGC") to obtain information the PBGC needs to make determinations as to whether a plan is covered under title IV of the Employee Retirement Security Income Act of 1974. ARA thanks the PBGC for the opportunity to provide comments as coverage determinations are critical to many ARA members in the creation and administration of their clients' plans.

ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the ASPPA College of Pension Actuaries ("ACOPA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement savings plans and are dedicated to expanding on the success of employer provided plans. In addition, ARA has more than 25,000 individual members who provide consulting and administrative services to American workers, savers, and sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of American's private retirement system.

While our comments focus on recommendations on the proposed form and instructions themselves, we would like to note that there are some issues relating to the process of receiving a coverage determination that are integrally related to the proposed form itself. For instance, the proposed form appears to presume that a plan has been fully established before a coverage determination can be made (i.e., a plan document has been executed). We note that whether or not a plan is covered by the PBGC is often a question raised before the decision to create a plan has been made, and this question can impact the decision itself to create a plan as well as its

design. Therefore, **ARA recommends** additional flexibility to allow prospective coverage determinations before a plan is fully established, that can be requested at the option of the plan sponsor filing for the coverage determination.

In addition, some plan sponsors are reluctant to make a coverage determination request if that determination is to be applied retroactively at some point after a plan has been fully established. **ARA recommends** that coverage determinations not be automatically applied on a fully retroactive basis, as facts and participant coverage under the plan established earlier may have changed, but that a fully retroactive determination could be requested at the option of the plan sponsor filing for the coverage determination.

We also think it would be helpful for the PBGC to indicate in the instructions whether the form is required to be used when the plan sponsor wants to request a coverage determination. If so, **ARA recommends** that the instructions indicate that the plan sponsor should not request a coverage determination using a method other than the proposed form, such as an email request.

It is also is not clear whether the PBGC coverage determinations are intended to be made available to the public. One advantage to doing so would be for the public to have available the reasons that a plan is (or is not) subject to PBGC coverage. **ARA recommends** that the PBGC make its coverage determinations public, either on an individual plan basis or through periodic reporting. Because the redaction process is lengthy and complex, **ARA recommends** that the PBGC issue a periodic report summarizing their findings on coverage determinations, perhaps on a quarterly or semiannual basis. Also, **ARA recommends** that the PBGC clarify what the format of the coverage determination will be, e.g., a letter from the PBGC, an emailed response, or other method. Because facts and circumstances can change, **ARA recommends** that the PBGC consider allowing a streamlined form to be submitted for coverage determinations before a plan is established or when a second determination is being requested. Finally, **ARA recommends** that the PBGC clarify in the instructions that previous coverage determinations made by the PBGC (e.g., in 2017) do not need to be re-submitted by the plan sponsor to the PBGC using the new form.

The following are specific comments relating to the proposed form and instructions:

General comments, not specific to any section:

1. **ARA recommends** numbering the questions within each part of the form. Using numbers for each line makes referencing the information easier, decreases the chances of incorrect boxes being checked in communications with plan sponsors, and therefore will make the forms more accurate during PBGC's review.
2. The requirements of the form impact the number of applications the PBGC will receive. PBGC estimates the proposed form is expected to generate 425 requests. ARA believes that the simpler the form, the more requests that would be submitted, while the more complex and onerous the form, the less requests that would be submitted. **ARA recommends** leaning toward a simpler, less complex form with adequate, but minimal, information necessary to complete a proper coverage determination.

3. At various points, the form refers to “documents” or “copies of documents”. **ARA recommends** differentiating between legal documents that the PBGC needs to see, and information that can be submitted in a spreadsheet or other form of document (these references are generally in Parts III and IV).

Specific comments, related to various parts of the proposed form:

4. **Part I, identifying the filer.** **ARA recommends** including boxes for “Enrolled actuary for the plan”, “Plan attorney”, and “Third party administrator”, to ease the coverage determination filing process. Also, the instructions do not make it clear who can be the “authorized contact person” for the filer. Can this be anyone, or it is limited to certain categories of authorized representative such as on IRS Form 2848? Is a power of attorney from the plan sponsor required for a person to be an authorized contact person? **ARA recommends** that the PBGC clarify who can be an authorized contact.
5. **Part II, 3rd section.** This line asks whether all relevant information has been provided to the PBGC. The instructions for this line indicate that an answer of “no” means that the filer is knowingly not providing all relevant information. This question appears to be focused on whether any material omissions have been made by the filer. If that is the thrust of the question, **ARA recommends** instead asking directly if there are any knowing material omissions, as there is no way for the plan sponsor to positively attest that “all relevant information” has been provided. **ARA recommends** also that this question be shifted to Part IX.
6. **Part III, 4th section, 1st box.** We are not sure if the names of the participants include all active, retired and terminated vested participants. We also have privacy concerns about listing all names, and we are unsure why such a listing is necessary. **ARA recommends** that PBGC reconsider whether this information is necessary, perhaps listing Participant A, B, C, etc., rather than listing by name.
7. **Part III, 4th section.** The instructions summarize the substantial ownership rules, and reference the corporate constructive ownership rules, including the spousal attribution rules. There are some community property states where spouses have real ownership, and the rules are particularly unclear where non-corporate plan sponsors operate in community property states. **ARA recommends** that PBGC clarify what information is required where non-corporate plan sponsors are operating in community property states. **ARA recommends** also that PBGC state in the instructions that spousal ownership be determined in accordance with relevant state law.
8. **Part III, 4th section.** **ARA recommends** that because partnership agreements themselves may be burdensome for the filer to provide, a simple listing of the partners be instead provided (this could be the intent of the question, but it is not clear).

9. **Part IV, 2nd section, 7th box.** This box asks for documents showing dates and amounts paid to participants within the last six years. As referred to above, **ARA recommends** PBGC clarify that this information may be provided in a spreadsheet listing.

If you have any questions regarding the matters discussed herein, please contact Martin Pippins, ACOPA Executive Director and Director of Regulatory Policy at (703) 516-9300 ext. 146. Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/

Martin L. Pippins, MSPA
Executive Director
ACOPA