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February 4, 2019

**VIA CERTIFIED MAIL**  
**PERSONAL & CONFIDENTIAL**

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

PBGC/OGC-RECEIVED  
FEB 11 2019 PM 1:02

Re: Comment to Proposed Coverage Determination Request Form

Dear Sir or Madame:

1. Please allow this letter to serve as a comment to the Proposed Pension Benefit Guaranty Corporation (“PBGC”) Coverage Form (the “Form”) which was published in the Federal Register on December 4, 2018 (83 FR 62629). Pursuant to that publication, please note the purpose of this comment is to enhance the quality, utility, and clarity of information to be collected. After a thorough review of the aforementioned publication, the proposed Form, and the instructions to the proposed Form, we seek clarification and propose an additional change to the Form regarding **Part III. Substantial Owners Plans, Required Information** and **Part IV. Small Professional Service Employer Plans, Required Information**. It is our hope this clarification and additional change will enable more relevant information to be submitted with any future Requests for Coverage Determination using this proposed Form, and thus greatly expedite the overall review process.

2. The clarification requested regarding both **Part III. Substantial Owners Plans, Required Information** and **Part IV. Small Professional Service Employer Plans, Required Information** is in relation to the application of both exemptions to floor-offset defined benefit plans. In these types of plans, there are participants with gross benefits that net to zero after the offset provisions are applied. The issue we would like clarification on is whether participants with zero net benefits in a floor-offset defined benefit plan are counted as “participants” for purposes of PBGC coverage. Consequently, this could be determinative in whether either exemption applies, as illustrated in paragraphs 3 and 4, below.

3. To provide an example of the issue using the Substantial Owners Exemption, suppose there is a floor-offset defined benefit plan where, at the inception of the plan, the only participants are “Substantial Owners,” as defined under 29 U.S.C. § 1321(d). In subsequent years, additional participants who are not Substantial Owners are added to the plan. However, all such additional participants added in subsequent years accrue gross benefits, but never attain positive net benefits in the floor-offset defined benefit plan. If only participants with positive net benefits are counted as “participants,” then the Substantial Owners Exemption would apply and the plan would not be covered by the PBGC. On the contrary, if all participants with a gross

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benefit are counted as “participants,” then the Substantial Owners Exemption would not apply and the plan would be covered by the PBGC.

4. To provide an example using the Small Professional Service Employer Exemption, suppose there is a floor-offset defined benefit plan that has 30 participants with gross benefits and otherwise meets the definition of “professional service employer” under 29 U.S.C. § 1321(c)(2)(A). However, at no point during the life of such plan does it have more than 20 participants with positive net benefits in the plan. Therefore, the key issue is whether this plan satisfies the under 25 participant threshold requirement pursuant to 29 U.S.C. § 1321(b)(13). If only participants with positive net benefits are counted as “participants,” then the Small Professional Service Employer Exemption would apply and the plan would not be covered by the PBGC. On the contrary, if all participants with a gross benefit are counted as “participants” then the Small Professional Service Employer Exemption would not apply and the plan would be covered by the PBGC.

5. This paragraph 5 provides a summary of two questions posed and responded to at PBGC Enrolled Actuaries Meetings. These questions and responses are recorded in the accompanying Blue Books, and made public via the PBGC website, *available* at <https://www.pbgc.gov/prac/other-guidance/blue-books>. These questions shed some light on the PBGC’s view regarding this issue, *but only as it relates to PBGC filing premiums*. In the *Blue Book from the 2001 Enrolled Actuaries Meeting, by the Conference of Consulting Actuaries (CCA)*, the following Question 9 was proposed regarding premium payments for floor-offset plans:

Under a floor-offset defined benefit plan, a participant’s benefit is reduced by the benefit attributable to the participant’s account balance in a separate defined contribution plan. Suppose that the benefit attributable to a floor-offset plan participant’s defined contribution plan account balance completely offsets the participant’s benefit under the floor-offset plan as of the premium snapshot date. In view of the change in the definition of “participant” for plan years beginning after 2000 (under which an individual is counted as a participant only if the plan has benefit liabilities with respect to the individual as of the snapshot date), must the plan pay premiums for the participant?

The response to this question was stated as follows:

For administrative convenience, the PBGC will accept a simplified test for excluding the participant from the participant count in a floor-offset plan. Under the simplified test, the plan administrator would determine whether, under the terms of the floor-offset plan, a benefit would have been payable to the participant from the plan if, on the premium snapshot date, the participant had been fully vested, had terminated employment, and had been eligible for a distribution. If no benefit would have been payable, the participant may be excluded from the count. In the case of a deceased participant with one or more living beneficiaries not in pay status, the plan administrator would apply the same test to each beneficiary, assuming (for purposes of the test) that the beneficiary was eligible for a distribution on the snapshot date.

Whether a participant's benefit must be taken into account in computing unfunded vested benefits *for purposes of the variable-rate premium depends on whether the plan has a current liability for vested benefits of the participant.* A floor-offset plan has no vested current liability for a participant if and only if the offset equals or exceeds the gross vested benefit from the floor-offset plan at every decrement age for every type of decrement the actuary would use to value vested current liability. Similar rules would apply for a deceased participant with a living beneficiary not in pay status. (emphasis added).

As mentioned above, this response addresses the issue as it relates to PBGC premium payments but does not address the issue of whether a floor offset Plan is a covered plan in the first place. The determinative factor for counting "participants" and calculating the PBGC premium payments seems to be "whether the plan has a current liability for vested benefits of the participant." In the *Blue Book from the 2002 Enrolled Actuaries Meeting, by the Conference of Consulting Actuaries (CCA)*, the following Question 17 was proposed: "How does the change in definition of "participant" for premium purposes in the PBGC's regulation on Premium Rates (29 CFR Part 4006) affect coverage determinations under ERISA section 4021(b)(9) and (13)?" To which the response was as follows:

The change in the definition of "participant" for premium purposes has no effect on coverage determinations under ERISA section 4021(b)(9) and (13). As noted in the preamble to the final rule that changed the definition, —

The definition of "participant" in the premium rates regulation applies only for premium purposes. Whether an individual is a participant in a plan for premium purposes has no bearing on whether the individual is a participant in the plan for any other purpose under Title IV of ERISA . . . Similarly, an individual is not considered to be a participant in a plan for premium purposes simply because the individual is a participant in the plan for other purposes.

Clearly, the PBGC intended for this clarification to be applicable only to premium payments. However, this leaves the question stated in paragraph 2, above, open for interpretation. As such, we are requesting clarification on the PBGC's position as it related to coverage for participants in floor offset defined benefit plans who have accrued no net benefits.

6. One important aspect of both Blue Book excerpts is the definition of Participant. As mentioned in Question 17 in the *Blue Book from the 2002 Enrolled Actuaries Meeting, by the Conference of Consulting Actuaries (CCA)* in paragraph 5 above, the definition of Participant used for purposes of PBGC premiums is found in 29 C.F.R. § 4006.6. Specifically, 29 C.F.R. § 4006.6(a) states that "For purposes of this part and part 4007 of this chapter, an individual is considered to be a participant in a plan on any date if the plan has benefit liabilities with respect to the individual on that date." This definition may be compared with the general ERISA definition found in 29 U.S.C. § 1002(7), which defines Participant as ". . . any employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit of any type from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be

eligible to receive any such benefit.” (emphasis added). Given the similarities between these two definitions of Participant, it is reasonable to apply the same rationale regarding the definition of “Participant” the PBGC has applied to premiums to PBGC coverage determinations. However, as requested throughout this comment, we seek clarification as to the definition of “Participant” as applied to PBGC coverage determinations. We propose that “Participant” for purposes of PBGC Coverage determination mirrors the definitions used for purposes of calculating the premium payments.

7. In light of this requested clarification and the proposed definition regarding application of the Substantial Owner Exemption and the Professional Service Exemption to floor-offset defined benefit plans, we propose an additional change to the Form. Specifically, we suggest adding an additional checkbox to both **Part III. Substantial Owners Plans, Required Information** and **Part IV. Small Professional Service Employer Plans, Required Information**. This additional checkbox would be required only for floor-offset defined benefit plans. Use of the checkbox would require submission of the documentation, calculations, and/or benefit statements showing all current participants as of the date of the coverage determination request, and their current net benefit in the floor offset defined benefit plan.

We look forward to your response regarding clarification on the issue provided in paragraph 2 above, and explained further throughout this comment. Moreover, we appreciate your consideration regarding our suggestion to the proposed Form as explained in paragraph 7 above. If you have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,  
INTEGRATED RETIREMENT PLAN SOLUTIONS, LLC



By: Adrienne A. Knauer, Esq.

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