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VIA E-MAIL: REG.COMMENTS@PBGC.GOV

Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW.
Washington, DC 20005-4026

**Re: Comment Letter Regarding Proposed Rule Under ERISA Section 4010 -
Annual Financial and Actuarial Information Reporting; Changes to Waivers (RIN
1212-AB30)**

Dear Sir or Madam:

I am writing to comment on the proposed regulations amending your Annual Financial and Actuarial Information Reporting regulations under ERISA Section 4010 published in the Federal Register on July 27, 2015 (“Proposed 4010 Regulations”) to change the conditions for the availability of the \$15 million aggregate underfunding waiver.

While the PBGC’s need for reporting of information in connection with single-employer pension plans that have significant funding problems is well recognized, the PBGC’s approach in the Proposed 4010 Regulations does not strike the right balance between the costs and burdens of reporting and the benefits that reporting would produce.

Cumulative, overlapping or duplicative reporting requirements impose real burdens on plan sponsors, making the maintenance of pension plans more costly and vexing. The PBGC’s regulatory approaches should not discourage the maintenance of pension plans. Unfortunately, the Proposed 4010 Regulations would do just that by imposing overly broad and expensive reporting obligations on plan sponsors.

The PBGC should either not adopt the changes to the conditions for the availability of the \$15 million aggregate underfunding waiver in the Proposed 4010 Regulations or consider alternatives described below that would be more appropriately tailored to the PBGC’s concerns and the greatest risks to the pension insurance system and that would also involve the least burdensome tools for achieving those regulatory ends as contemplated by Executive Order 13563.



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My specific comments on the Proposed 4010 Regulations follow below.

NO CHANGES TO THE \$15 MILLION AGGREGATE UNDERFUNDING WAIVER ARE NEEDED

Congress intended that the PBGC would waive the onerous reporting requirements under ERISA Section 4010 in appropriate circumstances such as in the case of small plans. There are different metrics for measuring whether a pension plan is small or large, including the level of assets, liabilities and funding shortfall of the pension plan, the number of participants, or a combination of these metrics or other metrics.

The risk and exposure to the PBGC and the pension insurance system is more correctly viewed through the lens of a pension plan's funding shortfall, not the number of participants or a combination of the funding shortfall and the number of participants. The risks to the PBGC for two pension plans with an equal funding shortfall on plan termination are exactly the same, regardless of the number of participants each plan has. It is unfair to add a fewer than 500 participant count threshold under 29 CFR Section 4010.11 and deny a plan sponsor a reporting waiver in circumstances in which its pension plan has 500 or more participants but grant a waiver to another plan sponsor for its pension plan simply because the other plan sponsor has its funding shortfall risks concentrated in the benefits of fewer than 500 participants when both have the exact same amount of a funding shortfall.

The PBGC has expressed concern that the use of stabilized rates under MAP-21 and HATFA in the application of the Section 4010.11 \$15 million aggregate underfunding waiver has depressed the number of plans with respect to which ERISA Section 4010 filings are being made and that the absence of filings is problematic, mainly asserting the risks to the PBGC and the pension insurance system are not adequately quantified and the ability of the PBGC to intervene for troubled plans is impaired by a lack of information. The solution in the Proposed 4010 Regulations dramatically curtailing the availability of the \$15 million aggregate underfunding waiver is an over-reaction and unnecessary.

The addition of a fewer than 500 participant count cap to the Section 4010.11 waiver rules as proposed by the PBGC is a permanent change that addresses a transitory concern. The corridor for the stabilized rates under MAP-21 and HATFA are scheduled to widen considerably by plan years beginning after 2020 (and incrementally before then). The impact of the stabilized rates under MAP-21 and HATFA upon ERISA Section 4010 filings will greatly diminish over time. As the impact of the stabilized rates under MAP-21 and HATFA diminishes, the number of plan



sponsors submitting ERISA Section 4010 filings should naturally increase regardless of how many participants are in the pension plan(s) sponsored by an employer.

The PBGC believes that the vast majority of plans for which ERISA Section 4010 reporting would be required but for the impact of the MAP-21 and HATFA on the \$15 million aggregate underfunding waiver have large unfunded benefit liabilities measured on a plan termination basis. Even if the PBGC's assessment is correct, the PBGC already has access to sufficient information with respect any pension plan for which it is not receiving an ERISA Section 4010 filing due to the \$15 million aggregate underfunding waiver. Under ERISA Section 101(f), the plan administrator of a pension plan is required to provide an annual funding notice (AFN) to the PBGC that includes detailed information about the pension plan's funding status. Under ERISA Section 101(f) and DOL Field Assistance Bulletin 2009-01, the plan administrator of a pension plan must provide the AFN to the PBGC:

- Within 120 days after the end of the plan year to which the notice relates if plan liabilities exceed plan assets by more than \$50 million; and,
- Within 30 days of receiving a written request from the PBGC, if plan liabilities do not exceed plan assets by more than \$50 million.

MAP-21 and HATFA require extensive additional information to be included in AFN disclosures. In particular, information about the effect that the MAP-21 and HATFA stabilization rules have on a single-employer pension plan's funding position and its funding shortfalls must be disclosed. See DOL Field Assistance Bulletins 2015-01 and 2013-01. These enhanced disclosures are required through applicable plan years beginning before January 1, 2020, which period corresponds to when the corridor for the stabilized rates under MAP-21 and HATFA are anticipated to have the most material impact on ERISA Section 4010 filings and the application of the \$15 million aggregate underfunding waiver.

PBGC is already provided automatically or able to request an AFN for any pension plan sponsored by an employer that qualifies for the current \$15 million aggregate underfunding waiver. While the actuarial information in an AFN does not represent exactly the same amount of unfunded benefit liabilities measured on a plan termination basis that would be included in an ERISA Section 4010 filing, an AFN provides information that is an adequate proxy for that amount and other relevant information. It is an expensive, time consuming, wasteful, and intrusive task to require plan sponsors that qualify for the current \$15 million aggregate underfunding waiver to go through the exercise of preparing and submitting ERISA Section 4010 filings to the PBGC simply because they have more than 500 participants in their pension



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plan(s). For example, the actuary for one of our clients estimates the incremental actuarial costs for the first ERISA Section 4010 filing to be approximately \$10,000 - \$15,000 for a plan with 1,000 - 2,000 participants.

To identify plans which pose the greatest risk to the pension insurance system, instead of simply requiring more ERISA Section 4010 filings, the PBGC should:

- Focus its resources on review of the AFNs it currently receives (as those plans pose potentially greater risks to the pension insurance system due to larger amounts of underfunding);
- Identify plans with liabilities that do not exceed plan assets by more than \$50 million for which it should request AFNs and then review those AFNs; and,
- Evaluate which single-employer pension plans and which plan sponsors the PBGC should monitor and investigate further based on the AFNs and the review described above.

Because the Proposed 4010 Regulations change to the \$15 million aggregate underfunding waiver to add a fewer than 500 participant count threshold is not carefully tailored to meet the regulatory objectives, would be unnecessarily intrusive, and would impose undue burdens on plan sponsors, this change should not be adopted.

IF CHANGES TO THE \$15 MILLION AGGREGATE UNDERFUNDING WAIVER ARE ADOPTED, THE CURRENT PROPOSAL SHOULD BE MODIFIED

- *Higher Participant Count Threshold for \$15 Million Aggregate Underfunding Waiver*

If the Proposed 4010 Regulations are finalized and adopted, the participant count threshold added to Section 4010.11 should be considerably higher than 500 (e.g. 3,000). While it would reduce but not eliminate the unfairness described above, a much higher participant count threshold would impose the burden of the additional reporting on much larger plan sponsors for which the incremental cost of this additional reporting may be viewed as a marginal cost of providing a pension plan to their employees.



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- *Simplified Reporting*

If a plan sponsor would qualify for the \$15 million aggregate underfunding waiver under Section 4010.11 but for a newly imposed participant count threshold being exceeded, the PBGC should only require simplified reporting initially.

A simplified reporting alternative should require the submission of initial disclosures and information that is less intrusive and burdensome than that which is required under a full ERISA Section 4010 filing. For example, the Section 4010 Regulations could be amended to provide that a plan sponsor with not in excess of \$15 million in aggregate underfunding and more than the applicable participant count threshold (e.g. 500 or some higher number of participants) would be required to initially submit only the identifying information in Section 4010.7 and a copy of a pension plan's latest available AFN and, after the initial submission, submit in response to any PBGC request any information that would be required under a full ERISA Section 4010 filing. Such a simplified reporting alternative would represent a more appropriate balance between the costs and burdens of reporting and the benefits that reporting would produce.

Thank you for the opportunity to comment on the Proposed 4010 Regulations and your consideration of these comments. If your staff has any questions about my comments, please contact me.

Sincerely,

Stoel Rives LLP

Jeffrey M. Krueger