ERIC

The ERISA Industry Committee

May 19, 2010

Vincent Snowbarger
Acting Executive Director
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, D.C. 20005-4026

RE: Alternative Premium Funding Target Election

Dear Mr. Snowbarger:

The ERISA Industry Committee (ERIC) is writing in regard to concerns recently raised by many of our members relating to public comments made by you and other Pension Benefit Guaranty Corporation (PBGC) officials regarding the election of the "alternative premium funding target." We believe that, in rejecting plan administrators' reasonable requests to honor their clear intent to elect the alternative funding target, the PBGC is needlessly penalizing plans for what is at worst a clerical error. Moreover, the error, if there is one, appears to result not only from a form and instructions that many found confusing, but also from software that should have but did not detect the alleged error at the time of filing. ERIC strongly encourages you to reconsider your stated position on this matter in the interest of sound government and customer service and to permit plan administrators to seek dismissal of any premium deficiencies assessed against them by providing evidence of the administrator's intent to elect the alternative premium funding target.

We understand that PBGC has recently informed hundreds of plan administrators that they failed to correctly elect the alternative premium funding target in their 2009 PBGC comprehensive premium filing. In addition, plan administrators who believed they had correctly elected the alternative premium funding target for 2008 are only now being informed of the same alleged error in the filing for that year. In many cases this belated notification led to what the PBGC views as errors in 2009 filings that could have been avoided had those affected been timely informed of the 2008 errors.

The PBGC appears to have taken what we believe is an incorrect position that there is no means for affected plan administrators to establish that they made an effective election of the alternative premium funding target, and that the plan must instead use the standard premium funding target. Requiring plan administrators who believed they had correctly elected the alternative target to use the standard target would result in substantial additional premiums, penalties, and interest. The large number of plan administrators affected demonstrates that this issue is neither one of individualized carelessness nor a disguised effort to rewrite a prior election. In fact, the intent to elect the alternative premium funding target at the time of filing was abundantly clear in these cases. That so many plan administrators failed to check both Boxes 5 and 7 indicates honest confusion about a form, instructions, and software that could have been clearer.

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

A series of factors appear to have tripped up plan administrators into believing they had made an effective election of the alternative target. These factors include: (1) PBGC's form, instructions, and software for completing the filing, which left many plan administrators unaware that the alternative target must be elected in two places on the comprehensive premium filing, and (2) last minute changes by the Internal Revenue Service that required filers to re-evaluate how to complete the form.

While we strongly believe that many of what the PBGC views as erroneous filings could have been avoided with a more clearly designed form or more robust software, we also believe a reasonable solution is available that is consistent with both the Department of Labor's and the Internal Revenue Service's correction programs. Plan administrators who did not check Box 5 but indicated their election of the alternative target by checking Box 7, should be permitted to amend their comprehensive premium filing by checking Box 5 as well. It is well within the PBGC's authority to provide these plan administrators with the ability to amend their filings. Doing so would indicate a commitment on the PBGC's part to working with those in the pension community. A reasonable correction program that would permit plan administrators to submit an amended comprehensive premium filing after the filing deadline serves the interest of the PBGC while providing a workable solution for plan administrators.

ERIC proposes that plan administrators who did not check Box 5 be permitted to amend their filings by checking that box if the original filing indicates that the alternative premium funding target was used to determine premiums in Box 7. Because we recognize the PBGC's concern regarding the timing of the election, we would propose that along with the amended filing, the PBGC accept any of the following additional evidence to establish the administrator's intent at the time of filing:

1. Any written communication or notation, dated no later than the comprehensive premium filing deadline, from the plan administrator to the plan actuary electing or otherwise instructing the actuary to use the alternative premium funding target. Such communication may be in the form of a letter, memorandum, email, or any other written communication or notation, or

2. Any written communication or notation, dated no later than the comprehensive premium filing deadline, from the plan actuary to the plan administrator or from the plan administrator to the actuary confirming, verifying, or otherwise reflecting an oral communication between the administrator and the actuary whereby the administrator instructed the election of the alternative premium funding target. Such communication may be in the form of any written communication or notation, or

3. Affidavits from each the plan administrator and the plan actuary, confirming that (a) to the best of their knowledge, no written communication electing to use the alternative premium funding target exists or can be located; (b) the plan administrator, intending to be bound for five years, irrevocably elected to use the alternative premium funding target no later than the comprehensive premium filing deadline; and (c) the plan actuary completed Box 7 of the comprehensive premium filing in accordance with the plan administrator's election by no later than the filing deadline.

We believe that requiring the plan administrator to submit any of these items of evidence should alleviate the PBGC's concerns regarding the failure of the original comprehensive premium filing to indicate the use of the alternative premium funding target in Box 5. A plan administrator who has been notified of an incorrect election in Box 5 should be permitted to file an amended comprehensive premium filing together with the supporting evidence as part of a request for reconsideration. If the premiums, calculated using the alternative premium funding target, were correctly determined and paid at the time of the initial filing, no additional premiums, interest, or penalties should be due.

ERIC members have also raised concerns regarding the PBGC's position that the alternative premium funding target may not be elected by a plan administrator who submits the comprehensive premium filing after the deadline. We believe this represents a change from PBGC's earlier policy, at least as expressed by PBGC call center representatives, who informed plan administrators that the only effect of a late filing would be a small amount of penalties and interest. PBGC's new position would subject many plans that submitted their filings as little as one day late, to potentially large additional premiums, penalties, and interest. Such a harsh result is neither necessary nor proper.
In addition, the same applies to plan administrators who believed they submitted filings on a timely basis, only to find out later that the software had not accepted the filing as being submitted on a final basis. Plan administrators that would have completed the filing on a timely basis but for the failure to make a final keystroke or "signature" and timely paid any premiums due according to such intended filing should be allowed to amend their filings.

ERIC recognizes that the PBGC is concerned that plan administrators might try to "game" the system by making a late election based on conditions or information concerning the interest rate environment that became known only after the filing deadline has passed. This concern, however, is substantially diminished for two reasons: (1) while a plan administrator may gain some short-term knowledge that makes one premium funding target more beneficial, the five-year binding election encompasses future years well outside any plan administrator's knowledge, and (2) for filings made shortly after the deadline, a decision as to which premium funding target to use was likely made before the deadline.

We propose that PBGC either relax the deadline or adopt an administrative grace period so that plan administrators that submitted a comprehensive premium filing within a reasonable period of time after the due date (we would recommend 15 days), would be permitted to elect the alternative premium funding target. The late filing would be subject to additional interest and penalties based on the date of actual submission and calculated using the elected premium funding target. A plan administrator who submits a comprehensive premium filing that elects the alternative premium funding target during the administrative grace period would be required to submit one of the three items necessary for filing an amended return under the correction program outlined above. The submission of an affidavit or a written communication verifying the plan administrator's intention to elect the alternative premium funding target prior to the comprehensive premium filing deadline should satisfy PBGC's concerns.

ERIC strongly believes that the amended filing rule and administrative grace period proposed are consistent with the PBGC's customer service philosophy that aims to set standards so that plan administrators can know what to expect. We encourage the PBGC to adopt these reasonable proposals that balance plan administrators' legitimate need for relief with PBGC's need for consistency and clear elections.

We would be happy to discuss our concerns with you further.

Sincerely,

Mark J. Ugoretz
President & CEO