ERIC
The
ERISA
Industry
Committee

November 12, 2010

RIN 1212-AB20
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Comments on Proposed Rule Regarding Liability for Termination of Single-Employer Plans; Treatment of Substantial Cessation of Operations (RIN 1212-AB20)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to submit these comments on the proposed regulation under ERISA § 4062(e), regarding the consequences of a substantial cessation of operations at a facility in any location. The proposed regulation was published in the *Federal Register* on August 10, 2010.

ERIC is a nonprofit association committed to the advancement of the employee retirement benefit plans of America's largest employers. ERIC's members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families. ERIC has a strong interest in proposals that would affect its members' ability to provide secure pension benefits in a cost-effective manner.

ERIC is deeply concerned that the proposed regulation is inconsistent with the text and purpose of § 4062(e). The proposed regulation would expand the application of § 4062(e) to routine events that are far less significant than "ceas[ing] operations at a facility in any location." For example, the proposed regulation would reach operational changes within an ongoing facility, and the relocation or sale of an ongoing operation.

Such an expansion would have the effect of overriding the reporting waivers for many events covered by § 4043. In addition, because the § 4062(e) liability is calculated using the PBGC's termination assumptions (rather than ERISA's funding assumptions), expanding the application of § 4062(e) would require many employers to make contributions far in excess of what ERISA generally requires; this undermines ERISA's detailed and highly reticulated funding rules.

The PBGC should withdraw the proposed regulation and issue a new proposed regulation that corrects the following deficiencies in the current proposal:

1. The proposed definitions of "operations," "facility," and "cessation" are inconsistent with the statute. They should be revised to follow the statutory mandate that § 4062(e) does not apply unless a facility closes.

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2. By stating that the relocation or sale of an ongoing operation triggers the application of § 4062(e), the proposed regulation departs from 34 years of consistent administrative practice.

3. The proposed regulation fails to keep within reasonable bounds the circumstances in which an employee's separation from employment would be deemed to occur "as a result" of a cessation of operations at a facility. It allows all employee separations that can be connected by a virtually limitless daisy chain of events to be deemed to result from a cessation of operations at a facility at the beginning of the chain.

4. The proposed regulation fails to address the special but commonplace circumstances of frozen plans.

5. The proposed regulation fails to include a reasonable exemption for well-funded plans.

ERIC reserves the right to supplement these comments.

Discussion

1. Definitions of "Operations," "Facility," and "Cessation"

Section 4062(e) was first introduced as a provision related to "termination of a substantial facility."[1] In the last 36 years, the language of § 4062(e) has not changed: § 4062(e) applies only if "an employer ceases operations at a facility in any location." This simple phrase has been understood to mean that § 4062(e) applies only if operations cease—*i.e.*, the facility is closed.

Rather than define the statute's phrase as a whole, the proposed regulation breaks it down into separate definitions of "operation," "facility," and "cessation." By doing so, the proposed regulation expands the application of § 4062(e) to routine events that do not rise to the level of a "cessation of operations at a facility in any location." ERIC has the following concerns with each proposed definition:

- "***Operation.***" The statute does not authorize the proposal to replace the term "operations" with "an operation." This change could result in § 4062(e) being triggered by routine events that are anything but cessations of operations—*e.g.*, changing the way a space is used or outsourcing an operation within an ongoing facility.

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[1] *See* H.R. 2, 93d Cong. § 462(g) (as passed by the Senate, Mar. 4, 1974); Staff of S. Comm. on Labor and Public Welfare, 93d Cong., Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform 18 (Comm. Print 1974). Although the heading was changed from "Termination of Substantial Facility" to "Treatment of Substantial Cessation of Operations," the language of the provision has not changed since it was first introduced. Moreover, the heading still indicates that a cessation of operations at a facility refers to something "substantial."

- "***Facility.***" The term "facility" should be defined based on its location, rather than an operation. By stating that a single facility may be comprised of more than one building, without any geographic restrictions, the proposed regulation leaves open the possibility that a single facility can be spread across the country. This possibility ignores the statute's phrase "in any location."

- "***Cessation.***" A stoppage of operations should not constitute a cessation unless the facts and circumstances indicate that the stoppage is permanent. The proposed one-week resumption rule (for a voluntary cessation) and 30-day discontinuance rule (for an involuntary cessation) are arbitrary and would sweep in common events that are not intended to be cessations. For example, a disaster like Hurricane Katrina would have been treated like a cessation of operations for many businesses in New Orleans that never intended to close and eventually resumed operations.

In accordance with the statute, "facility" should be defined by reference to its location: a "facility at any location" means a building (or buildings on a campus) at a particular location. "Operations" should be defined as the work performed at the facility; and a cessation of operations at the facility should not be deemed to occur unless all of the facility's operations have ceased—*i.e.*, the facility has closed. Any concern that an employer might try to avoid § 4062(e) liability by continuing only an operation related to basic maintenance of a building (as distinct from changing the operations performed at the facility) should be addressed through an anti-abuse rule.

In addition, stopping operations should not result in a "cessation" unless the facts and circumstances indicate that the stoppage is permanent. The determination of whether a stoppage is permanent should not be based on a fixed time period. If the PBGC nevertheless determines that a time period is necessary, (a) the time period should be no less than 90 days; (b) the time period should not apply in the case of a labor disruption; and (c) the standard should be rebuttable.

2. Relocation and Sale of Ongoing Operations

PBGC Opinion Letters from the last 34 years have consistently indicated that relocating or selling an ongoing business generally does not trigger a § 4062(e) inquiry. Absent a change to the statute, the new regulation should preserve this history. Accordingly:

- When ongoing operations are relocated, § 4062(e) should not apply if the operations are continued—regardless of how many employees make the move. *See, e.g.*, Op. Ltr. 77-134.

- When ongoing are sold (whether in an asset sale or a stock sale), § 4062(e) should not apply if the operations are continued. At the very least, § 4062(e) should not apply if (a) the facility's employee population does not shrink by more than 20% and (b) the buyer continues the plan or a similar plan without substantial changes. *See, e.g.,* Op. Ltrs. 86-13, 82-29, 78-29, 76-52.

The proposed regulation appropriately allows an employee's separation to be ignored if a replacement is hired before the cessation is complete. This rule should be expanded to apply when replacement employees are hired within a reasonable period after the cessation. For example, if ongoing operations are relocated from City A to City B and the employer intends to replace the employees who do not make the move, the employer should not be penalized merely because some positions are not filled for a reasonable period after the move. Also, replacement employees should be taken into account from their date of hire, without regard to whether they are eligible to participate in the plan.

ERIC appreciates that the PBGC may waive the § 4062(e) liability in appropriate circumstances. However, in order to ensure reasonably consistent results and to ease the burden on employers and the PBGC in cases involving insignificant events, the regulation should include safe harbor standards under which waiver or reduced liability is automatic. At a minimum, the regulation should provide for an automatic waiver of the § 4062(e) liability (including the reporting requirement) in the circumstances described above.

3. "As a Result"

The proposed rule that a separation from employment at one facility can be "as a result" of a cessation of operations at another facility is overly broad and vague. It allows all employee separations that can be connected by a virtually limitless daisy chain of events to be deemed to result from a cessation of operations at a facility at the beginning of the chain.

Although there might be cases where a cessation of operations at one facility affects employment at other facilities, linking causation across facilities should be the exception rather than the rule. The regulation should include a rebuttable presumption that separations at one facility do not result from a cessation of operations at another facility. In other words, the proposed standard for a plan administrator to decide whether a § 4062(e) event has occurred, when to file a notice of an event, and how many affected participants to report should end the inquiry unless there are unusual circumstances.

To the extent that linking causation across facilities is permitted, the regulation should limit the time period over which a chain reaction may occur to 30 days or less. No separation occurring after this period should be linked to a cessation of operations that occurred before the period started.

4. Plans Frozen to New Entrants

When a plan is frozen to new entrants, the percentage of active employees who participate in the Plan declines steadily over time—especially if the plan sponsor's business is successful. By ignoring this fact, the proposed regulation would sweep in many insignificant events.

For example, suppose a plan was frozen to new entrants in the 1990's. At the time of the freeze, the plan sponsor had 20,000 employees in the U.S. and all of them participated in the plan. Since the freeze, attrition has resulted in the number of active employees participating in the plan falling to 1,000, but the size of the business has remained steady or grown. Under the proposed regulation, a cessation that results in only 200 participating employees losing their jobs—1% or less of the total U.S.-based employee population—would be a § 4062(e) event.

As another example, suppose that when a plan was frozen, the employer had 5,000 employees and they all participated in the plan. Since that time, the employer's business has grown and it now employs 20,000 employees. Under the proposed regulation, a cessation that results in 1,000 participating employees losing their jobs—only 5% of the total employee population—would be a § 4062(e) event.

In order to avoid these absurd results, the regulation should include an exemption for frozen plans that meet minimum funding requirements. Alternatively, the regulation should allow the active participant base to include employees who would have been active participants if not for the freeze.

5. Exemption for Well-Funded Plans

ERIC appreciates that the PBGC intends to continue its practice of negotiating with affected employers in appropriate cases. However, in order to ensure reasonably consistent results and to aleviate the burden of a reporting requirement in cases where the risk to the PBGC is not significant, the regulation should specify criteria under which no action will be required.

Many plans that are not fully funded on a termination basis nevertheless do not pose a significant risk to the PBGC. For example, a plan with an Adjusted Funding Target Attainment Percentage ("AFTAP") of 90% or more does not pose a significant risk to the PBGC. The regulation should relieve the sponsors of plans in this category from worrying about § 4062(e).

Adding a reasonable exemption for plans that do not pose a significant risk to the PBGC would not only ease the burden on plan sponsors, allowing them to deliver benefits more efficiently: it would enable the PBGC to allocate its limited resources to the cases that warrant attention.

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ERIC appreciates the opportunity to submit these comments. We look forward to working with you to create workable rules that enable the PBGC to protect itself against the cost of terminating underfunded plans without imposing unnecessary burdens on employers. If we can be of further assistance, please let us know.

Sincerely,

Mark J. Ugoretz
President & CEO