The
ERISA
Industry
Committee

COMMENTS OF
THE ERISA INDUSTRY COMMITTEE

PROPOSED RULE
REGARDING
SECTION 4010 FILINGS

January 27, 2005

The ERISA Industry Committee ("ERIC")[1] is pleased to submit the following comments on the proposed rule regarding filings under § 4010 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The proposed rule was published in the December 28, 2004, issue of the Federal Register. 69 Fed. Reg. 77,679. The preamble to the proposed rule states that comments on the proposed rule must be submitted by January 27, 2005.

I. Summary of Comments

1. ERIC commends the PBGC for proposing to require the electronic submission of standardized § 4010 reports.

2. The PBGC should delay the effective date of the proposed rule so that it can coordinate the content and effective date of the proposed rule with the content and effective date of any pension funding or disclosure legislation that Congress enacts.

3. In any event, the PBGC should postpone the proposed rule's effective date by *at least* one year so that the rule will not apply to reports for any information year ending before December 31, 2005.

4. The PBGC should extend the comment period on the proposed rule from 30 days to at least 90 days.

[1] ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

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5. The PBGC should amend the proposed rule to allow § 4010 information to be submitted to the PBGC by transmitting the information on an electronic spreadsheet or other commonly-used electronic format, rather than exclusively through the PBGC's Web site.

6. The PBGC should amend the proposed rule to allow a filer to designate a single point of contact for further information about controlled group members and to eliminate the requirement to list the address, telephone number, and EIN information for each controlled group member.

7. The PBGC should amend the proposed rule to eliminate the requirement to identify controlled group members that account for only a de minimis percentage of the controlled group's revenues or assets.

8. The PBGC should revise the proposed rule to make clear how filers should submit actuarial valuation reports and other "hard copy" materials to the PBGC.

II. Comments

1. ERIC commends the PBGC for proposing to require the electronic submission of standardized § 4010 reports. As defined benefit plan sponsors and premium payers, ERIC's members support efforts to strengthen the defined benefit plan system and to carry out the PBGC's mission effectively and efficiently. Because the electronic submission of standardized § 4010 reports is likely to help plan sponsors to submit (and the PBGC to collect) timely, complete, accurate, and useable information in a cost-effective manner, ERIC commends the PBGC's efforts to provide for standardized electronic § 4010 reports.

2. The PBGC should delay the effective date of the proposed rule so that it can coordinate the content and effective date of the proposed rule with the content and effective date of any pension funding or disclosure legislation that Congress enacts. On January 10th of this year, the Administration announced a single-employer pension reform proposal that calls for, among other things, reform of the pension funding rules and improved disclosure of pension funding to workers and regulators (including the PBGC). The issuance of this legislative proposal and the Congressional consideration that will ensue argue strongly for the deferral of any regulatory changes at this time.

It makes little sense to change the disclosure requirements of existing law or to change the assumptions that may be used to calculate the value of vested benefits under § 4010 -- at great expense to plan sponsors and administrators -- when Congress might shortly enact legislation that overhauls the existing

statutory regime governing pension funding and disclosure. Not only might the legislation cause any intervening regulatory changes to be short-lived, but the repeated changes in regulatory and statutory requirements, and the costs and confusion that such changes create, will also provide yet another reason for employers to abandon their defined benefit plans, directly contrary to the PBGC mission mandated by Congress:

> "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants." ERISA § 4002(a)(1).

For example, the proposed rule eliminates the optional assumptions method of calculating the value of vested benefits permitted by the current rule under § 4010. Under the optional assumptions method, unfunded vested benefits are determined using (1) an interest rate equal to 100% of the annual yield for 30-year Treasury constant maturities, (2) the fair market value of plan assets, and (3) mortality tables specified by the PBGC rule. *See* 29 C.F.R. § 4010.4(b)(2).

Repeal of the optional assumptions method will require many companies to redo their § 4010 calculations and, with very little advance notice, will require some companies to make § 4010 filings that would not be required if the optional assumptions method remained in effect. The same companies might be subject to entirely different requirements under any revised funding and disclosure standards that Congress enacts. It is overkill to subject these companies to new regulatory requirements at this time since these companies are -- by definition -- currently at or near the $50 million threshold.

The PBGC should defer action on the proposed rule until Congress has acted on the Administration's legislative proposal. At that time, the PBGC should reconsider whether the proposed changes in the § 4010 disclosure requirements (including the proposed repeal of the optional assumptions method) are necessary and, if so, whether any revisions should be made to the proposed rule to take into account the intervening legislation.

3. <u>In any event, the PBGC should postpone the proposed rule's effective date by *at least* one year so that the rule will not apply to reports for any information year ending before December 31, 2005</u>. As we shall explain, the proposed rule substantially expands the information that must be compiled and submitted under § 4010 and, as explained in Comment #4, below, also expands the class of employers that must make § 4010 filings. The additional information that the proposed rule requires cannot be compiled and submitted overnight -- even by employers that already are § 4010 filers.

Because the proposed rule applies to reports for information years ending on or after December 31, 2004, the proposed rule will become effective for reports due on April 15, 2005. Even if the PBGC issues a final rule on February 14th (which is hardly a certainty, given that comments can be filed as late as January 27th), this will leave calendar-year § 4010 filers with only two months to compile and submit the required information.

The proposed rule will not give many § 4010 filers the time they need to compile and submit the information required by the proposed rule. The proposed rule requires a voluminous amount of information to be entered manually at a single entrance point on the PBGC's Web site. Some of this information is likely to be completely unavailable to the individuals responsible for making the § 4010 filing; but even to the extent that the information can be obtained, a protracted period of time will be required to collect the information and to enter it manually on the PBGC's Web site.

For example, under the proposed rule, the filer must identify all members of its controlled group, including "exempt entities" (small entities that are not contributing sponsors). The PBGC originally excluded "exempt entities" from the § 4010 rule because of the burden that a reporting requirement would create. The proposed rule repeals that exemption and requires the filer to provide identifying information for every exempt entity in the controlled group.

The proposed rule requires the § 4010 report to identify all of the entities in the controlled group -- regardless of the assets or revenues of the member -- and to identify the address and telephone number of each entity in the group, together with the legal relationships with other members of the controlled group. The proposed rule also requires a listing of each entity's employer identification number or "EIN" (or an explanation for the absence of an EIN) and, in any case where the entity became a member of the controlled group during the information year, the date it became a member. In addition, the proposed rule requires a listing of the entities that *ceased* to be members of the controlled group, together with the date on which this occurred and identifying information regarding the former member.

These requirements will impose enormous burdens on major employers, including both employers that are current § 4010 filers and employers from whom the proposed rule (but not the current rule) will require § 4010 filings. Many major employers have hundreds of controlled group members; some have thousands. Many of these controlled group members are foreign entities, and many have little or no assets. Moreover, major employers regularly engage in mergers,

acquisitions, and reorganizations. All of this makes it extremely difficult to identify all the members of the controlled group -- let alone to obtain the required information about each member of the controlled group and to do so by April 15, 2005, for calendar-year filers. At the very least, therefore, the PBGC should defer the effective date of the proposed rule by at least one year so that the rule will not apply to reports for any information year ending before December 31, 2005.

4. The PBGC should extend the comment period on the proposed rule from 30 days to at least 90 days. The truncated 30-day comment period does not give the public sufficient time to digest, analyze, and comment on the proposed rule. A 30-day comment period is inadequate under any circumstances, but the particular 30-day period that applies here is especially inadequate because it began during the Holiday season (when many employers were closed and many employees were on vacation) and included *three* federal holidays (New Years Day, Martin Luther King Day, and (in the District of Columbia) Inauguration Day).

Moreover, the notice of proposed rulemaking does not adequately alert the public that one effect of the proposed rule is to expand the class of companies required to file § 4010 reports. Although the preamble mentions that the proposed rule eliminates the use of the optional assumptions method in connection with the $50 million § 4010 gateway test,[2] the preamble does not give prominence to this change nor does it alert the public to the effect of the change. As a result, and particularly in light of the truncated 30-day comment period, many companies are not even aware that they are (or could be) affected by the proposed rule.

5. The PBGC should amend the proposed rule to allow § 4010 information to be submitted to the PBGC by transmitting the information on an electronic spreadsheet or other commonly-used electronic format, rather than exclusively through the PBGC's Web site. Under the proposed rule, § 4010 information must be submitted to the PBGC web site from a single source. It is a great mistake to rely on a single source within a large controlled group to provide all of the information that the proposed rule requires. Within a large controlled group, information is often widely dispersed within the group and is not readily available to a single source. Requiring information to be submitted by a single

[2] Although the $50 million test is mandated by § 4010 itself rather than by PBGC rule, ERIC continues to believe that the obligation to submit information under § 4010 should be based on the *percentage* of the plan's vested benefits that are unfunded rather than on the *absolute dollar amount* of the plan's unfunded vested benefits. $50 million of unfunded vested benefits represents a de minimis percentage of a large plan's total vested benefits.

source is likely to create a bottleneck at many companies, slowing down (and making more difficult) the submission of all of the information that § 4010 requires.

The PBGC should revise the proposed rule to allow § 4010 information to be transmitted on an electronic spreadsheet or other commonly-used electronic format that can be uploaded by the PBGC. This approach allows a number of people at a controlled group to assemble, enter, and review the § 4010 information simultaneously, thereby avoiding the bottleneck created by the proposed rule, and providing information that is more accurate and timely than the information that the PBGC will collect under the proposed rule.

6. The PBGC should amend the proposed rule to allow a filer to designate a single point of contact for further information about controlled group members and to eliminate the requirement to list the address, telephone number, and EIN information for each controlled group member. The proposed rule requires a § 4010 filer to list the address, telephone number, and EIN of each member of the controlled group. Because this information frequently changes (due to mergers, acquisitions, reorganizations, and changes in business location) and because this information is typically widely dispersed within a large controlled group (and often pertains to entities outside the U.S.), a requirement to provide this information will make it far more difficult to make timely, accurate, and complete submissions to the PBGC.

Moreover, it is far from evident that the PBGC needs all of this information. Only a tiny percentage of the plans sponsored by § 4010 filers will be terminated in an underfunded condition. And in any event, many of the members of a large controlled group are quite small and account for a de minimis percentage of the group's revenue and assets. As a result, submitting information about these companies is unlikely to strengthen the PBGC's financial position significantly. It is far more efficient and useful to require only that the filer designate one or more individuals at the controlled group whom the PBGC may contact to obtain additional information about particular members of the group.

7. The PBGC should amend the proposed rule to eliminate the requirement to identify controlled group members that account for only a de minimis percentage of the controlled group's revenues or assets. The proposed rule requires each filer to provide for each member of the controlled group (*including exempt members*):

- the name, address, telephone number of the member,

- the legal relationship of the member to the other members of the group,
- either the member's EIN or an explanation of why there is no EIN, and
- if the member joined the controlled group during the information year, the date on which it became a member. *See* Prop. Reg. § 4010.7(a)(1).

In addition, for any entity that ceased to be a member of the controlled group during the information year, the filer must identify the date the entity ceased to be a member of the group and the identifying information listed above as of the date immediately before the entity's departure from the controlled group. *See* Prop. Reg. § 4010.7(a)(2).

These requirements are both unduly burdensome and unnecessary. As we have explained, the information regarding each of the members of a controlled group frequently changes (due to mergers, acquisitions, reorganizations, and changes in business location), is typically widely dispersed within a large controlled group, and often pertains to entities outside the U.S. Moreover, it is far from evident that the PBGC needs all of the information that the proposed rule requires. Many of the members of a large controlled group are quite small and account for a de minimis percentage of the group's revenue and assets.

We recommend that the PBGC retain the exclusion for exempt entities that appears in its current rule. *See* 29 C.F.R. § 4010.7(a). The exclusion for exempt entities appropriately balances the PBGC's need for significant information against the burden imposed by an indiscriminate request for every bit of information.

Alternatively, the PBGC could expand the information required by the current rule without imposing undue burdens on filers by requiring a list of only the information required to be listed in Exhibit 21 to Form 10-K. The SEC regulation regarding Form 10-K allows the names of individual subsidiaries to be omitted from the list if the unnamed subsidiaries, considered in the aggregate, do not constitute a "significant subsidiary." *See* 17 C.F.R. § 229.601(b)(21). In general, the SEC's regulations define "significant subsidiary" as a subsidiary (including its subsidiaries) that meets any of the following conditions:

- the registrant's and its other subsidiaries' investments in and advances to the subsidiary exceed 10% of the total assets of the

registrant and its subsidiary consolidated as of the end of the most recent fiscal year;

- the registrant's and its other subsidiaries' proportionate share of the total assets of the subsidiary exceeds 10% of the total assets of the registrant and its subsidiary consolidated as of the end of the most recent fiscal year; or

- the registrant's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items, and cumulative effect of a change in accounting principle of the subsidiary exceeds 10% of such consolidated income of the registrant and its subsidiaries. *See* 17 C.F.R. § 210.1-02(w).

Unlike the information required by the proposed rule, the information required by the SEC's regulations is readily accessible to major public companies and excludes immaterial information that is likely to be of little or no value to the PBGC.[3]

8. The PBGC should revise the proposed rule to make clear how filers should submit actuarial valuation reports and other "hard copy" materials to the PBGC. Although the proposed rule requires most § 4010 information to be submitted electronically, it appears to require "hard copies" of some materials, such as actuarial valuation reports and actuarial certifications. The proposed rule does not specify how such material is to be submitted, and states only that the material is to be provided "in accordance with the instructions on the PBGC's Web site." *See* Prop. Reg. § 4010.8(a).

Neither the proposed rule nor the PBGC's Web site appears to give filers the guidance they need regarding the submission of non-electronic documents. The proposed rule refers to the Web site and, although the Web site provides instructions regarding § 4010 filings, the instructions (if any) on how to submit non-electronic documents are not prominently displayed. The PBGC should remedy this deficiency.

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[3] The PBGC should establish a similar rule for companies that are not regulated by the SEC. Although such companies are not required to file Forms 10-K, a rule similar to the SEC rule will avoid requiring such companies to compile and submit information that is not likely to be useful to the PBGC.

We appreciate the opportunity to submit these comments. We reserve the right to supplement these comments as our members gain more time to study the proposed rule.

If the PBGC has any questions about our comments, or if we can otherwise be of assistance, please let us know.

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