ERIC

The ERISA Industry Committee

January 22, 2010

RIN 1212-AB06
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, DC 20005-4026

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to submit these comments on the proposal by the Pension Benefit Guaranty Corporation ("PBGC"), published in the *Federal Register* on November 23, 2009, to amend its regulations on Reportable Events and Certain Other Notification Requirements (29 C.F.R. part 4043).

As we discuss below, the regulations as proposed on November 23rd are likely to impinge significantly upon plan sponsors' access to credit and other financial resources, while doing little to augment the agency's ability to predict financial distress. In fact, the proposed regulations are likely to hinder rather than enhance the PBGC's efforts to monitor the financial health of defined benefit plans and plan sponsors, while unduly burdening plan administrators and sponsors.

- ERIC urges the PBGC to withdraw the proposed regulations or leave the current regulations in place until the agency engages in a negotiated rulemaking process similar to the process that led to the formulation of the regulations in 1996. The negotiated rulemaking process has already been shown to be an effective means of developing a consensus on the reportable event regulations and is likely to result in a satisfactory balancing of the competing considerations of disclosure, financial security and administrative ease for all parties, including the PBGC.

- If the PBGC does not choose to withdraw the regulations or engage in a negotiated rulemaking process, then the PBGC should delay the effective date of the proposed regulations to allow employers sufficient time to renegotiate lending arrangements that rely upon the current waiver provisions and to establish special compliance units to monitor events that might trigger the reporting requirements.

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. This ability, in turn, depends on ERIC's members—most of

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which are sponsors of defined benefit plans—having ready access to existing lines of credit and other sources of cash.

ERIC believes that the current proposal to amend the reportable events regulations would undermine the financial health of its members and divert employer and plan resources from the business of providing benefits, while at the same time compromising the PBGC's ability to recognize and address early signs of financial distress among sponsors of PBGC-insured plans. The current regulations enumerate seven events that require advanced reporting and 15 events that require post-event reporting to the PBGC. Of these, reporting is waived automatically for 10 events based on the size or funded status of the plan. Reporting is also waived in some cases based on the relationship of the entity that has experienced the reportable event to the plan, and in some cases if the plan administrator or plan sponsor is required to report the same event to the PBGC or another agency under a different statutory requirement.

The proposed regulations would eliminate automatic waivers for most of the reportable events, and would add two new reportable events, neither of which would be subject to an automatic waiver. Thus, even plans that are well-funded, and corporate events involving entities that do not participate in or contribute to the plan, would be subject to the reporting requirements.

In particular, the elimination of the automatic waiver for the existing reportable events, is likely to seriously undermine the financial health of plan sponsors and, therefore, indirectly for plan funding levels. It will also make it less, rather than more, likely, that PBGC will be able to predict financial distress in advance and intervene in a timely fashion. ERIC therefore submits these comments, which are divided into the following three general topics:

- Many Plan Sponsors Have Credit Agreements and Lending Arrangements That Rely Upon the Current Waiver Provisions.—see Part 1 below.

- The Current Waivers Avoid Unnecessary Administrative Burdens on Plan Sponsors and Enhance the PBGC's Efforts to Protect Plan Participants.—see Part 2 below.

- If the PBGC Wishes to Amend the Current Reportable Event Regulations, It Should Use a Negotiated Rulemaking Process.—see Part 3 below.[1]

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[1] In addition, the proposed regulations indicate that PBGC may be revising its enforcement position in two respects that would be of critical importance to plan sponsors in certain situations. First, the proposed regulations would create a new reportable event when an enrolled actuary certifies that a plan's adjusted funding target attainment percentage ("AFTAP") is less than 60 percent. The preamble to the proposed regulations suggests that the PBGC may consider terminating the plan as a result solely of the plan's AFTAP falling below the 60 percent threshold. It would be very helpful for plan sponsors to know in advance if this is the agency's intent. Second, the proposed regulations would eliminate the 30-day grace period for reporting missed contributions under section 303 of ERISA. The PBGC may impose a lien on an employer under § 303(k) of ERISA for the employer's failure to make timely contributions to a plan in certain circumstances. Eliminating

ERIC may supplement this submission to make additional recommendations.

1. Many Plan Sponsors Have Credit Agreements and Lending Arrangements That Rely Upon the Current Waiver Provisions.

Many credit agreements between employers and financial lending institutions provide that the occurrence of a reportable event that is not automatically waived is an event of default with respect to the outstanding loans, or precludes the employer from receiving additional financing under the existing credit agreement. Eliminating most of the automatic waivers would therefore dramatically increase the likelihood of employer defaults on outstanding loans and lines of credit.

The PBGC's proposed regulations would thus provide lenders with the opportunity to reopen negotiations of loan terms advantageous to the employer, to deny additional credit under existing lines of credit, and to cancel loans that the lender in retrospect finds disadvantageous, even when the financial condition of the plan sponsor poses little or no risk to the PBGC. This is an unwarranted interference by a government agency in the credit marketplace.

Employers that sponsor defined benefit plans—unlike employers that sponsor only defined contribution plans or do not sponsor any qualified plan—would have more difficulty obtaining loans and retaining access to lines of credit that might otherwise be used to maintain and expand existing operations, finance new ventures, and maintain and improve the employer's financial health. The result would be to diminish, rather than enhance, the ability of defined benefit plan sponsors to adequately fund—as well as to continue to maintain—their pension plans, and to put defined benefit plan sponsors at a serious competitive disadvantage.

The benefit to the PBGC, if any, that would result from the additional disclosure does not justify the potential harm to defined benefit plans and the employers that sponsor such plans. This is particularly true when—as would be the case in many situations in which reporting would be required— the reportable event would not create any meaningful risk that the employer would be unable to meet its plan funding obligations.

- For example, a reportable event occurs under § 4043(b) in the current and proposed regulations when there is an active participant reduction in the plan of 20 percent or more, or a transaction that causes the plan sponsor or another entity in the controlled group to cease being a member of the controlled group. Under the current regulations, however, these reportable events are waived if the plan is at least 80 percent funded, the transaction is *de minimis*, or the entity involved in the transaction is a non-participating foreign entity.

- If these events occur in a situation that is not likely to lead to financial distress for the plan—*i.e.*, in a situation for which there would be a waiver under the current

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the 30-day grace period raises questions as to whether the PBGC intends to start imposing these liens earlier and more frequently.

> regulations—any advantage the PBGC would gain by notification would be outweighed by the serious damage to the plan sponsor that would result from losing, or at the very least having to renegotiate, its current loan agreements and lines of credit. The same is true for the numerous other reportable events for which there is currently an automatic waiver based on the PBGC's previous assessment that the event is not likely to undermine the financial soundness of the plan (for example: the reportable events for distributions to substantial owners, liquidation of a controlled group member, and extraordinary dividends or stock redemptions).

The proposed regulations, particularly in today's tight credit market, would disadvantage employers who sponsor defined benefit plans by (1) increasing the likelihood that such employers would incur a default under outstanding loans and lines of credit, (2) giving lenders more leverage in renegotiating existing credit agreements with such employers, and (3) making it appear as though sponsors of defined benefit plans do not enjoy the same financial health as employers who sponsor only defined contribution plans (or do not sponsor any qualified plans). Accordingly, employers that do not sponsor defined benefit plans would, by virtue of this proposed government action, have a clear advantage over defined benefit plan sponsors, thus threatening the ability (or even willingness) of employers to continue to sponsor defined benefit plans.

In short, the proposal to eliminate the existing waivers would seriously undermine the financial strength and future growth of plan sponsors and, accordingly, for the fiscal health of defined benefit plans of many employers. These potential problems, which are not immediately obvious, demonstrate the necessity of proceeding with extreme caution and taking action only after attaining a thorough understanding of the potential implications of the proposal through negotiated rulemaking or a similar process.

2. The Current Waivers Avoid Unnecessary Administrative Burdens on Plan Sponsors and Enhance the PBGC's Efforts to Protect Plan Participants.

In addition to compromising existing loan agreements and lines of credit, elimination of the automatic waivers for the vast majority of reportable events would add unnecessary and burdensome information-gathering and recordkeeping requirements for sponsors and administrators of defined benefit plans. These administrative burdens would drain plan sponsors of valuable capital resources and add to the competitive disadvantage already inuring to defined benefit plan sponsors. Many such employers would have to establish special compliance units and add to their work force employees whose primary responsibilities would include monitoring corporate transactions and other events worldwide that might trigger the reporting requirements.

Elimination of the automatic waivers would also threaten to inundate the PBGC with information that will be of little or no use to the agency and undermine its ability to perform its most important functions.

We have described several examples of the potential administrative burdens to employers and plan sponsors below.

a. The Proposed Regulations Would Significantly Increase Administrative Burdens on Employers and Plan Administrators.

1. Controlled Group Restructurings

A reportable event occurs when a member of the employer's controlled group ceases to be a member of the controlled group by reason of a transaction or liquidation. Under the current regulation, reporting is waived if the plan has less than $1 million in unfunded vested benefits or the employer is a public company and the plan is at least 80 percent funded. The proposed regulations would eliminate this waiver and provide a waiver only if the entity that will cease to be a member of the employer's controlled group during the fiscal year represents a *de minimis* 10-percent segment of the controlled group.

Large public companies may enter into dozens of transactions that result in numerous acquisitions, spinoffs, mergers or other corporate restructurings every year. When the plan of a large public company is funded at the 80 percent level or higher, the likelihood of one of these events causing irreparable damage to the plan is minimal, even if the entity involved represents more than a 10 percent segment of the controlled group.[2] By eliminating the existing waivers, the PBGC would be adding significant administrative burdens without a corresponding increase in retirement plan security:

- Elimination of the automatic waiver would mean that plan administrators of even well-funded plans would have to monitor every transaction in which every controlled group member engages throughout the year and analyze each such transaction to determine:

  (a) whether it is a "transaction that results, or will result, in one or more persons ceasing to be member's of the plan's controlled group" within the meaning of § 4043.29(a);

  (b) whether it constitutes a transaction that results "solely in a reorganization involving a mere change in identity, form or place of organization" within the meaning of § 4043(a); and

  (c) whether the entity that will cease to be a member of the controlled group represents a "*de minimis* 10-percent segment of the plan's old controlled group for the most recent fiscal year(s) ending on or before the reportable event occurs" within the meaning of § 4043.29(b).

- The proposed regulations would not change the rule that employers are not required to report an event if it will result solely in a reorganization involving a mere change in identity, form, or place of organization. However, this exemption does not, at least on

[2] The only evidence for eliminating the waivers cited in the preamble to the proposed regulations pertains to small plans that were terminated in 2007. See 74 Fed. Reg. 61247, 61251. The PBGC's experience with small plans should not be the basis for regulations affecting large public companies, where there is generally a greater funding cushion and more resources for the plan sponsor to call upon.

its face, apply to reorganizations within an employer's controlled group in which a member ceases to exist because its ownership is transferred to another member or because it is merged into another member. Therefore, the proposed regulations would:

(a) require plan administrators of well-funded plans to monitor all of these internal reorganizations;[3] and

(b) effectively introduce the PBGC into virtually every external and internal corporate transaction representing more than a 10-percent segment of the plan's controlled group, regardless of how well-funded the plan is.

- Under the regulations, the reporting requirement is triggered by the execution of a legally binding agreement, whether or not written, to engage in a transaction described in the regulation. Thus, the report will in many cases have to be filed with the PBGC well before the event occurs, and must be reported even if the transaction is never consummated.

2. Reductions in the Number of Active Participants

The proposed regulations would eliminate the automatic waivers that apply in the event of an active participant reduction (*i.e.*, no variable premium due, less than $1 million in unfunded benefits, plan is 80 percent funded and reduction does not result from a facility closing, small plan). Instead, an employer would be exempt from providing notice under PBGC Reg. § 4043.23 only if the active participant reduction is attributable to a substantial cessation of operations under § 4062(e) of ERISA or the withdrawal of a substantial employer under § 4063(a) of ERISA and is timely reported to the PBGC under § 4063(a) of ERISA.

In addition to adding significant administrative burdens and costs without a sound basis for doing so, this change would also raise several compliance concerns for employers whose plans have historically met the requirements for the automatic waivers for this event, including:

- Without the automatic waivers, the regulations appear to require all employers to monitor, on a daily basis, whether the number of active participants has been reduced to less than 80 percent of the number of active participants at the beginning of the plan year or to less than 75 percent of the number of active participants at the beginning of the previous plan year. The proposed regulations would require employers to provide notice to the PBGC every time the number of active participants dips below this threshold during the plan year. (If employers are not required to monitor the number of active participants on a daily basis under PBGC Reg. § 4043.23, the PBGC should clarify the regulations accordingly.)

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[3] At the very least, if the PBGC does not intend for employers to report these events, it should clarify the regulations accordingly.

- A 4063(a) notice must be filed with the PBGC within 60 days after a substantial cessation of operations under § 4062(e) of ERISA occurs. The PBGC has stated that plan sponsors must determine whether and when a substantial cessations of operations has occurred under § 4062(e) based on the facts and circumstances. *See* American Bar Association Joint Committee on Employee Benefits Q&A Session with PBGC, Q&A-17 (May 9, 2007). *See also* 71 Federal Register 34819, 34820 (June 16, 2006). Thus, there is a significant risk that the PBGC would find that an employer that provided what it thought was timely notice under § 4063(a) under ERISA in fact failed to do so, resulting in violations under not only § 4063(a) of ERISA but also § 4043 of ERISA.

3. Transactions Involving Non-Participating Foreign Entities

The proposed regulations eliminate the automatic waiver for reportable events that occur when any foreign entity that is a member of an employer's controlled group ceases to be a member of the controlled group by reason of a transaction or liquidation. The proposed regulations also eliminate the automatic waiver for certain activities of foreign entities that might trigger a reportable event, such as dividend declarations or stock redemptions, loan defaults and bankruptcies. These waivers are eliminated even when the foreign entity is not a parent of the contributing sponsor and is not itself a contributing employer.

Elimination of this waiver will require constant monitoring of foreign controlled group members. Because the foreign entities (to whom the existing waivers apply) rarely, if ever, contribute to the plan or have employees who are covered by the plan, it is unlikely that plan administrators who are responsible for monitoring compliance with the reportable events requirements would become aware that a reportable event has occurred with respect to these foreign entities. Nor is there evidence indicating that the financial health of plans maintained by the domestic members of the controlled group would be endangered by events that only involve non-parent, non-contributing foreign members. The additional administrative burden to the employer and the plan administrator would not be justified by the marginal advantage, at best, that would inure to the PBGC if this automatic waiver were eliminated.

4. Transfers of Benefit Liabilities

An employer is required to file a Form 5310-A with the Internal Revenue Service if (a) a plan within the employer's controlled group transfers benefit liabilities to a person or entity who is not a member of the employer's controlled group and (b) the value of assets transferred during the plan year in which the transfer occurs is 3 percent or more of the assets of the plan before the transfer as of at least one day in that plan's plan year.

Without the current automatic waivers, employers would also have to report such an event to the PBGC under § 4043.32 of the proposed regulations. The PBGC should coordinate with the Service to receive notice of this event through the Form 5310-A instead of imposing additional, unnecessary reporting costs on employers.

b. The Proposed Regulations Would Undermine Rather Than Enhance PBGC's Efforts to Monitor Troubled Plans and Protect Participants.

If the waivers set forth in the current regulations are eliminated, the PBGC is likely to be inundated with notices that (i) report events that have no notable bearing on the funding status of employers' plans and (ii) provide no indication of the financial condition of the employer. Many of the waivers that would be eliminated under the proposed regulations were proposed by the PBGC for this very reason. For example, in 1983, the PBGC determined that "the reporting of active participant reductions is critical only when the plan's unfunded vested liabilities are large, exposing the insurance system to large potential losses." 48 Fed. Reg. 37230 (Aug. 17, 1983).

The PBGC also waived notice requirements for failures to meet minimum funding standards if a plan's unfunded vested benefits would still exceed a certain amount even after the failure. The PBGC adopted this waiver because it had received "a substantial number of notices involving failure to meet minimum funding standards where the amount of unfunded vested liabilities in the plan is relatively insignificant * * * and the exposure for the insurance system * * * is relatively small." *Id.* at 37231.

The amount of insignificant information that the PBGC would receive if it were to eliminate most of the automatic waivers would only overwhelm and frustrate the PBGC's efforts to identify "early warnings that would enable it to mitigate distress situations." 74 Fed. Reg. 61247, 61251 (Nov. 23, 2009). We understand that the PBGC plans to monitor reportable events filings without the waivers to determine whether some automatic waivers and extensions should be restored. However, the costs that would be imposed on employers for the PBGC to engage in this experiment are simply too high, and in some cases, ignore well-documented lessons that the PBGC has already learned from its early years of implementing these notice requirements without these waivers.

Instead, at the very least, we recommend that the PBGC consider restoring the negotiated rulemaking process, such as the one used in 1996 to craft the current regulations, which will permit plan sponsors and other interested parties to share their views on possible ways to provide the PBGC with the information that it seeks without flooding the PBGC with unnecessary information, at extraordinary expense to defined benefit plan sponsors.

3. If the PBGC Wishes to Amend the Current Reportable Event Regulations, It Should Use a Negotiated Rulemaking Process.

a. The Current Regulations Were the Result of Negotiated Rulemaking in 1996

The current reportable event regulations were originally adopted on September 17, 1980. 45 Fed. Reg. 61615 (September 17, 1980). In 1984, the PBGC revised the regulations to delete reporting requirements for multiemployer plans, and to waive the notice requirement for one reportable event and narrow the reporting requirements for two other reportable events with respect to single employer plans. 49 Fed. Reg. 22472 (May 30, 1984).

After 1984, very few changes were made to the regulations until they were reorganized and substantially revised in 1996 pursuant to the consensus of a negotiated rulemaking committee consisting of representatives of employers, participants, pension practitioners, and the PBGC. 61 Fed. Reg. 63988 (Dec. 2, 1996). The negotiated rulemaking process reflected the benefits of shared information, knowledge, and expertise possessed by all the affected parties.

b. The Results of Successful Negotiated Rulemaking Should Not Be Overturned Without Further Negotiated Rulemaking

Negotiated rulemaking is a "means by which representatives of the interests that would be substantially affected by a rule, including the agency responsible for issuing the rule, negotiate in good faith to reach consensus on a proposed rule."[4] Negotiated rulemaking has been twice endorsed by Congress, first in the Negotiated Rulemaking Act of 1990 and subsequently in 1996, when Congress permanently reauthorized the Act. Pub. L. No. 101-648; Pub. L. 104-320. Negotiated rulemaking is considered more effective than adversarial rulemaking because it (1) increases the acceptability and improves the substance of rules, making it less likely that the rules will be challenged in court; and (2) shortens the amount of time needed to issue final rules. Pub. L. 101-648 § 2.

Negotiated rulemaking has met, if not exceeded these expectations. The results of a major study on the effectiveness of negotiated rulemaking conducted by Laura Langbein and Cornelius Kerwin, professors at American University, showed that, in 13 different categories, participants in the negotiated rulemaking process preferred it by wide margins over traditional adversarial rulemaking. *See* Laura Langbein & Cornelius Kerwin, "Regulatory Negotiation versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence," 10 *J. Pub. Admin. Res. and Theory* 599, 603-604 (July 2000). Since the Negotiated Rulemaking Act was enacted "agencies across the government have tried and liked it." 142 Cong. Rec. S6155, S6158 (June 12, 1996).

The PBGC convened a negotiated rulemaking committee in 1995 and 1996 to discuss proposed changes to the reportable events regulations. *See* 60 Fed. Reg. 41033 (Aug. 11, 1995) The negotiated rulemaking committee proposed substantial changes to the regulations, including new reportable events, while also providing extensions of time and waivers for certain filings. 61 Fed. Reg. 63988 (Dec. 2, 1996). The consensus-based approach worked admirably; the "PBGC received only one written comment on the proposed rule" and the rule received the Hammer Award from former Vice President Al Gore's National Performance Review. *Id.* at 63988; Pension Benefit Guaranty 1996 Annual Report available at *http://www.pbgc.gov/docs/1996_annual_report.pdf.*

If the PBGC wishes to overhaul the reportable event regulations, it should do so using the same negotiated rulemaking process that led to satisfactory results in 1996. In addition to the historical precedent for promulgating the regulations through a negotiated rulemaking

[4] Harter. "Assessing the Assessors: The Actual Performance of Negotiated Rulemaking," 9 N.Y.U. Envtl. L. J. 35. (2000). For more details on how Negotiated Rulemaking is intended to function, *see* 5 U.S.C. § 561

process, the reportable event regulations are particularly well-suited for this process, given the far-reaching implications of the regulations on aspects of employers' businesses about which the PBGC may not be aware.

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ERIC appreciates the opportunity to submit these comments. We will continue to solicit member analysis of these and other proposed regulations to assist the PBGC in fashioning reporting and notification requirements for reportable events under § 4043 of ERISA that would help the PBGC achieve its aims to receive earlier warnings that a pension plan is in distress without imposing significant or unnecessary burdens on employers or diminishing their access to existing lines of credit. If we can be of any further assistance, please let us know.

Sincerely,

Mark J. Ugoretz
President