The
ERISA
Industry
Committee

June 3, 2013

Submitted electronically to regs.comments@pbgc.gov

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, DC 20005-4026

RE: RIN 1212-AB06 (Reportable Events and Certain Other Notification Requirements)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Pension Benefit Guaranty Corporation ("PBGC") for feedback on the proposed regulations regarding "Reportable Events and Certain Other Notification Requirements" (the "proposed regulations").[1]

ERIC'S INTEREST IN RETIREMENT PLANS

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.

SUMMARY OF COMMENTS

ERIC appreciates the efforts of the PBGC in revising the proposed regulations on reportable events that were issued in 2009 (the "2009 proposed regulations") and responding to the concerns of plan sponsors and pension practitioners.[2]

ERIC understands that the PBGC believes that the current regulations should be revised.[3] However, ERIC believes that the current regulations are appropriate and sufficient to protect the interests of the PBGC, and urges the PBGC not to replace these rules with the proposed regulations (or a modified version of the proposed regulations). ERIC therefore submits the following comments:

[1] Pension Benefit Guaranty Corporation, *Reportable Events and Certain Other Notification Requirements*, 78 Fed. Reg. 20039 (Apr. 3, 2013).
[2] *Id.*, 74 Fed. Reg. 61427 (Nov. 23, 2009).
[3] 78 Fed. Reg. 20039.

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- The PBGC already has the appropriate tools to identify at risk plans.
  - The Pension Protection Act of 2006 is protecting the interests of the PBGC.
  - For the plans that pose the most risk to the PBGC (*i.e.,* those that are not adequately funded), the PBGC already receives substantial amounts of information.
- The safe harbors for plans in the proposed regulations are not useful.
  - Few companies regularly calculate their plans' unfunded benefit liabilities on a termination basis.
  - The overwhelming majority of plans will not qualify for the safe harbor for plans that are 120 percent funded on a premium basis.
- The safe harbor for companies in the proposed regulations does not properly identify at risk plans and would cause significant hardships for plan sponsors.
  - The proposed safe harbor is not an appropriate measure of a plan's financial health or the risk that a plan poses to the PBGC.
  - The timing required to comply with the proposed regulation is administratively unworkable and would impose a significant burden on plan sponsors and their service providers.
  - The proposal would require companies to change the way they conduct their core businesses.
  - Even if the financial health of a plan sponsor were an appropriate measure of the financial health of a plan, it is inappropriate to rely on Dun & Bradstreet reports (which are dated and not sufficiently reliable) or a plan sponsor's use of secured debt (which is commonly used by financially healthy companies for items such as receivables and inventory) as measures of the plan sponsor's financial health.
- The proposed regulations could require companies to renegotiate their credit and lending arrangements and for plans to have their investment agreements terminated.
- The proposed regulations impose additional costs and burdens on companies that sponsor defined benefit retirement plans, which may cause even more plan sponsors to freeze or terminate their plans.
- It is not appropriate for the PBGC to regulate through forms and instructions.

Since the Pension Protection Act of 2006 (the "PPA"), plan sponsors have increased the rate at which they have been contributing to their plans in order to improve their plans' ERISA funding levels as required by law; some plan sponsors have also been contributing more than the required minimum amount. Instead of helping to further the goals of the PPA, the proposed regulations would

instead require plan sponsors to divert a portion of those contributions to pay service providers to help comply with burdensome regulatory requirements that do not materially enhance the financial position of the PBGC.

Furthermore, the financial soundness of a company is not an appropriate standard for pension regulatory requirements. The financial soundness approach taken in the proposed regulations continues a larger trend. For example, the Obama Administration requested authority for the PBGC to set its own premiums up to $25 billion based on ***credit risk***.[4] The PBGC also recommended in the ERISA Section 4010 Report to Congress that "Congress create reporting criteria based on the sponsor's ***financial soundness*** using risk measurement tools already widely-employed in business, such as credit scores, rather than relying solely on the plan's funding percentage."[5] PBGC also implemented a 4062(e) enforcement pilot program based on whether it thinks companies are financially sound. The PBGC states that it "is implementing a pilot program under which going forward, PBGC will generally take no action to enforce section 4062(e) liability against ***creditworthy companies***..."[6]

As explained below, this is not a suitable method to use. Plan sponsors have historically been required to maintain their plans' funded status at certain levels, contribute at least the minimum required amounts to their plans (and, through deduction limits and excise taxes on reversions, been *discouraged* from contrtibuting too much to their plans), and invest plan assets prudently -- and they have structured their businesses around satisfying these obligations. It is not appropriate to impose additional requirements on these same sponsors or to change the standards by which they are judged.

DETAILED COMMENTS

For many years, ERIC has been atuned to and had concerns about the PBGC's approach to reportable events and recent use of a company's financial soundness to evaluate the potential risk to its defined benefit plan. While ERIC understands that the PBGC wishes to change its current regulations, we are very concerned that the approach suggested in the proposed regulations will adversely impact plan sponsors without providing any significant additional benefit to the PBGC.

I. The PBGC already has the appropriate tools to identify at risk plans (*i.e.*, those that are not adequately funded).

The purpose of the reportable events rules is to allow the PBGC, when it learns that a plan is at risk, to negotiate funding improvements, intervene as a creditor, minimize funding shortfalls via involuntary plan termination, and take other protective action.[7]

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[4] Office of Management and Budget, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2014*, p. 227 (Apr. 2012), available at http://www.whitehouse.gov/omb/budget/Analytical_Perspectives.
[5] Pension Benefit Guaranty Corporation, *4010 Summary Report*, p.5 (Aug. 21, 2012), available at http://www.pbgc.gov/documents/PBGC-4010-report-harkin.pdf (emphasis added).
[6] Pension Benefit Guaranty Corporation, *Frequently Asked Questions 4062(e) Enforcement Pilot Program*, available at http://www.pbgc.gov/about/faq/pg/frequently-asked-questions-4062.html (emphasis added).
[7] 78 Fed. Reg. at 20039.

A. The Pension Protection Act of 2006 is protecting the interests of the PBGC in addition to the benefits earned by the participants.

The Pension Protection Act of 2006 ("PPA") was designed to strengthen the funding of defined benefit plans and reduce the PBGC's deficit.[8] The CRS Report to Congress explains:

> "The Pension Protection Act is the most comprehensive reform of the nation's pension laws since the enactment of the Employee Retirement Income Security Act of 1974 (ERISA, P.L. 93-406). It establishes new funding requirements for defined benefit pensions…Prompted by the default in recent years of several large defined benefit pension plans and the increasing deficit of Pension Benefit Guaranty Corporation (PBGC), the Bush Administration in January 2005 advanced a proposal for pension funding reform, which was designed to increase the minimum funding requirements for pension plans and strengthen the pension insurance system."[9]

As noted in the last sentence above, the PPA was designed to increase the funding of plans in order to strenghthen PBGC and to decrease the frequency of termination and "take over" actions by the PBGC.

Additionally, the PPA increased the reporting of underfunded plans. Before the PPA, companies were required to file the Form 4010 if the plan's aggregate unfunded vested benefits exceeded $50 million. Beginning in 2008, the PPA requires this filing for any PBGC-insured plan that has a funding percentage of less than 80%.

Reports from the Department of Labor demonstrate that the PPA is working. Contributions to defined benefit plans increased dramatically from $89.8 billion for the 2006 plan year[10] to $131.1 billion for the 2010 plan year.[11] During this time, the number of participants in defined benefit plans *declined* from 42.1 million in 2006 to 41.4 million in 2010.[12] Thus, more money was contributed to defined benefit plans to provide benefits to fewer workers.

As the Department of Labor's data shows, the PPA is protecting the PBGC's interests by increasing the funding and reporting of private-sector defined benefit plans.

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[8] Pub. L. 109–280 (Aug. 17, 2006).
[9] CRS Report for Congress, *Summary of the Pension Protection Act of 2006* (May 1, 2007), available at http://www.aging.senate.gov/crs/pension8.pdf.
[10] U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2006 Form 5500 Annual Reports*, Table A1 (Mar. 2012), available at http://www.dol.gov/ebsa/PDF/2006pensionplanbulletin.PDF.
[11] U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2010 Form 5500 Annual Reports*, Table A1 (Nov. 2012), available at http://www.dol.gov/ebsa/PDF/2006pensionplanbulletin.PDF.
[12] U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2006 Form 5500 Annual Reports*, Table A1 (Mar. 2012); U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2010 Form 5500 Annual Reports*, Table A1 (Nov. 2012).

B. For the plans that pose the most risk to the PBGC, the PBGC already receives substantial amounts of information.

The PBGC already receives a significant amount of information to help it determine if a plan is at risk. These include:[13]

- *Notice of Intent to Terminate* – Notifies PBGC about proposed termination and provides information about the termination process at least 60 days before the proposed termination date.

- *Form 600 - Distress Termination: Notice of Intent to Terminate* - Notifies PBGC about proposed termination and provides plan and sponsor data at least 60 days before the proposed termination date.

- *Notice of Request to Bankruptcy Court to Approve Termination* - Notifies PBGC at time Bankruptcy Court is notified about company's request to Bankruptcy Court to approve plan termination based upon reorganization test.

- *Form 200 - Notice of Failure to Make Required Contributions* - Requires submission of information relating to plan and controlled group to PBGC no later than 10 days after the plan has aggregate missed contributions of more than $1 million.

- *Reporting of Substantial Cessation of Operation and of Withdrawal of Substantial Employer* - Advises PBGC of certain cessations of operation and of withdrawals of substantial employers and requests determination of liability.

- *Annual Financial and Actuarial Information Reporting* - Requires submission of actuarial and financial information for certain controlled groups with substantial underfunding.

- *Form 10 - Post-Event Notice of Reportable Events* - Requires submission of information relating to event, plan, and controlled group to PBGC within 30 days after a failure to make a required minimum funding payment, active participant reduction, change in contributing sponsor or controlled group, application for funding waiver, liquidation, bankruptcy, and various other events.

- *Form 10-Advance - Advance Notice of Reportable Events* – Requires submission by certain privately-held companies of information relating to event, plan, and controlled group to PBGC at least 30 days before a change in contributing sponsor or controlled group, liquidation, loan default, transfer of benefit liabilities, and various other events.

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[13] U.S. Department of Labor, Employee Benefits Security Administration, *Reporting and Disclosure Guide for Employee Benefit Plans* (Oct. 2008), available on PBGC's website at http://www.pbgc.gov/prac/reporting-and-disclosure/reporting-and-disclosure-overview.html.

The PBGC also has access to information that is available to the public. The PBGC explained in the preamble to the proposed regulations that "a vast quantity of business and financial information has become available through the internet and other means."[14]

Additionally, the PBGC also has an "Early Warning Program"[15] that focuses on companies that have financial difficulties or a significantly underfunded plan. The PBGC has explained:

> "PBGC has developed specialized tools, technology, and financial expertise so that it can meet companies on their own terms. PBGC staff use financial information services and news databases and technology. PBGC also relies on information sharing among the Department of Labor, the Internal Revenue Service and the Securities and Exchange Commission."[16]

The vast amount of information already available to the PBGC should enable it to identify plans for which it will need to negotiate funding improvements, intervene as a creditor, minimize funding shortfalls via involuntary plan termination, and take other protective action. The additional reportable event filings that the proposed regulations would require will not materially enhance the PBGC's ability to identify at risk plans.

C. The current regulations effectively protect the PBGC and reflect a negotiated rulemaking process.

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."[17] 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.[18] 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.[19]

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.[20]

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[14] 78 Fed. Reg. at 20040.
[15] Pension Benefit Guaranty Corporation, *Early Warning Program Fact Sheet*, available at http://www.pbgc.gov/res/factsheets/page/early-warning.html.
[16] *Id.*
[17] 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.
[18] Pub. L. No. 101-648; Pub. L. 104-320.
[19] Pub. L. 101-648 § 2.
[20] *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."[21]

The PBGC convened a negotiated rulemaking committee in 1995 and 1996 to discuss proposed changes to the reportable events regulations.[22] 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.[23] The consensus-based approach worked admirably to create the current regulations; 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.[24]

The PBGC should recognize the value provided by the negotiated rulemaking process and the resulting current regulations. The PBGC should not propose to overhaul the current regulations absent compelling evidence that they are not working.

II. The safe harbors for plans in the proposed regulations are not useful.

The proposed regulations include safe harbors for plans that are either fully funded on a termination basis ("fully funded safe harbor") or that are 120 percent funded on a premium basis ("premium safe harbor").[25]

A. Most companies do not regularly calculate their plans' unfunded benefit liabilities on a plan termination basis.

Under the proposed regulations, a plan will satisfy the fully funded safe harbor if, as of the last day of the prior plan year, the plan had no unfunded benefit liabilities using termination basis assumptions.[26]

Most companies do not regularly calculate their plans' unfunded benefit liabilities on a plan termination basis. As a result, to determine whether this safe harbor is available, companies would have to have their actuaries (or hire actuaries to) perform these additional calculations. Because of the time needed to make the calculations, companies would need to have this calculated *every year* – even though they may not need it during the following year. These calculations take time and cost money -- money that could better be spent funding plans or providing additional benefits. This waste of company assets further contributes to the decision of many employers to reduce or eliminate their commitment to defined benefit pension plans.

The fully funded safe harbor, even if retained, is unworkable in its current form.

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[21] 142 Cong. Rec. S6155, S6158 (June 12, 1996).
[22] See 60 Fed. Reg. 41033 (Aug. 11, 1995).
[23] 61 Fed. Reg. 63988 (Dec. 2, 1996).
[24] *Id*. at 63988; Pension Benefit Guaranty 1996 Annual Report available at http://www.pbgc.gov/docs/1996_annual_report.pdf.
[25] 78 Fed. Reg. at 20061.
[26] *Id.*

First, plans that are not fully funded on a termination basis as of the last day of the prior plan year may be fully funded at the time the reportable event filing is made due to contributions made after the calculation is made and/or investment earnings.

Also, it takes many months to calculate a plan's funded status (whether on a termination basis or for funding purposes): participant census data needs to be updated; non-publicly traded asset classes might need to be valued, and the value of certain asset classes can be subject to a lag in reporting. Thus, even companies that are in a position to calculate their plans' funded status on a termination basis will likely not know whether their plans are fully funded "as of the last day of the prior plan year" until some time during the middle of the current plan year. This effectively means that this safe harbor, even if calculated by an employer, is not useable during a large portion of a given reporting year.

If the PBGC is inclined to retain the fully funded safe harbor, it should base the availability of that safe harbor on the plans' funded status determined either as of the last day of the prior plan year or the first day of the prior plan year. In this way, employers interested in using the fully funded safe harbor who decide to routinely calculate their plans' funded status on a termination basis will be able to know (using the funded status on first day of the prior plan year) whether the safe harbor will be available to them during a calendar year. Employers that choose not to regularly calculate their plans' funded status on a termination basis and who decide, upon the occurrence of a potential reportable event, to calculate their plans funded status on a termination basis, could alternatively use the last day of a plan year using more recent information, if available.

Finally, the termination basis safe harbor is not truly useful for the PBGC. Most employer plans do not terminate. For plans that are at risk of termination, the PBGC has appropriate tools available to it under current law to monitor and manage this risk. Indeed, the current reporting waivers for financially sound plans—e.g., no variable rate premium being due, less than $1 million in unfunded vested benefits, and fair market value of plan assets of at least 80% of vested benefits (for public companies)—are adequate to bring to the PBGC's attention circumstances that might affect plans that present a risk to the PBGC.

The PBGC should recognize that the termination basis safe harbor, in its present form, is not useful for either companies or the PBGC.

B. The overwhelming majority of plans will not qualify for the premium safe harbor.

The premium safe harbor is only available to defined benefit plans where the value of the plan's assets as determined for premium purposes is not less than 120% of the plan's premium funding target for the prior plan year.[27]

A study of the top one hundred U.S. pension plans (the "largest plans") indicates that only approximately 2% of these plans had a funded status of more than 120 percent in 2012.[28] Furthermore, only an additional 2% of the largest plans had a funded status of 105% - 120% in 2012.

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[27] *Id.*

Thus, only 2% of the largest plans would have qualified for the premium safe harbor. Even if PBGC lowered the threshhold to 90%, only around 15% of the largest plans would have qualified in 2012.

The PBGC should maintain the existing threshhold at 80% of the plan's premium funding target for the prior plan year in order for it to remain meaningful.

III. The safe harbor for companies in the proposed regulations does not properly identify at risk plans and would cause significant hardships for plan sponsors.

The proposed regulations' safe harbor for companies (the "company safe harbor") would apply only if, on the determination date, a company met the following criteria:

- The score for the company by a commercial credit reporting company indicates a low likelihood that the entity will default on its obligations.
- The company has no secured debt, other than leases or debt incurred to acquire or improve property and secured only by that property.
- For the most recent two fiscal years, the company has positive net income under generally accepted accounting principles ("GAAP") or International Financial Reporting Standards ("IFRS").
- For the two-year period ending on the determination date, the company has not defaulted on loans with an outstanding balance of $10 million or more.
- For the two-year period ending on the determination date, the company has not failed to make required contributions.

A. The safe harbor for companies is ill-suited for large employers.

For the reasons described above, it is not appropriate for the PBGC to adopt a safe harbor related to the plan sponsor's financial health. However, if the PBGC is inclined to adopt such a safe harbor, it cannot use the one included in the proposed regulations.

1. Commerical credit reporting companies are not sufficiently reliable.

The proposed regulations provide that, in order to qualify for the company safe harbor, the business must receive a score by a commercial credit reporting company that indicates a "low likelihood" that the company will default on its obligations. The preamble to the proposed regulations provides Dun & Bradstreet as an example of a commercial credit reporting company.[29] It also states that the score necessary to qualify for the safe harbor will change over time and that the PBGC will

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[28] Milliman, *2013 Corporate Pension Funding Status*, available at http://www.milliman.com/expertise/employee-benefits/products-tools/pension-funding-study/.
[29] 78 Fed. Reg. at 20044.

notify the public as to what score it has selected.[30] The preamble also states that the Dodd-Frank Wall Street Reform and Consumer Protection Act prevents them from relying on credit ratings in regulations.[31]

Dun & Bradstreet explains that its credit score includes payment trends and public filings to evaluate companies. Their website states that "The credit score uses statistical probabilities to classify risk based on the full spectrum of D&B's business information, including payment trends, company financials, industry position, company size and age and public filings."[32]

The PBGC's proposal to use credit reporting companies, like Dun & Bradstreet, is problematic for a number of reasons.

First, the information received by credit reporting companies is likely to be dated -- in many cases as of the end of the prior fiscal year. The credit reporting company's score is based on the same public financial disclosures, which are issued some time after the events reported in them have occurred. The credit reporting company must then analyze the information provided in the public financials. They do not have timely information from management and do not look at the forecast for the company. If the transaction occurs before the year-end results, the information used by the credit reporting company will be even further out of date.

In addition, credit reporting companies may rely on inaccurate information. Credit reporting companies use payment trends, which may not accurately reflect the company's relationship with its suppliers. For example, a company may have contractually agreed to pay a supplier within 45 days. A report from a supplier that the company paid within 40 days may give the impression that the payment was late (e.g., if the industry average is 30 days), while in fact, the company paid 5 days early.

Finally, large companies do not generally use commercial credit reporting companies. Instead, large companies use credit agencies. They have established relationships with credit agencies and provide them with forecasts and access to management. This enables the credit agencies to perform a more thorough analysis. Because large companies typically do not obtain credit reports, they generally do not monitor them for accuracy as part of their business practices. As a result, if this standard were applied, companies would be required to devote resources to ensuring that the credit reports were accurate and working through the lengthy process to correct any inaccuracies. Because the credit report is evaluated as of the determination date (which is unknown in advance), companies would need to constantly monitor their reports and there would not be sufficient time to correct any inaccuracies if they had a reportable event.

2. Financially healthy companies have secured debt.

The proposed regulations provide that, in order to qualify for the company safe harbor, the business must not have any secured debt other than leases or debt incurred to acquire or improve property. A safe harbor that examines whether a company has secured debt is not appropriate.

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[30] 78 Fed. Reg. at 20044.
[31] 78 Fed. Reg. at 20043.
[32] Dun & Bradstreet, *Using D&B's Recommended Credit Limits*, available at https://www.dnb.com/credit_limit/help/creditline.htm#risk.

Financially healthy companies often take on significant levels of secured debt in order to obtain the most favorable financing rates that they can. For example, healthy companies often use their inventories or receivables to secure debt. Securing debt in this way is not a sign that a company is in financial distress, but rather a sound business practice used to secure favorable rates, particularly in light of the current interest rate market and federal reserve policy.

In addition, it is not appropriate simply to add "receivables" and "inventory" to the list of exclusions in the safe harbor. Financially sound companies might secure other assets for legitimate business purposes. If the PBGC is going to use secured debt as a marker of a company's financial soundness, the only appropriate way to do so would be based on the percentage of a company's assets that are used as collateral for debt. For example, a company that has "substantially all of its assets" pledged as collateral for debt might not be financially sound.

3. Using net income punishes healthy companies in cyclical indusries.

The proposed regulations unfairly impact financially healthy companies in cyclical industries and those with rare or extraordinary events. For example, some companies are more responsive to the economy and as a result, have more volatile financials. These companies may be well-managed financially, but fail to have positive net income in some years due to this volatility. Additionally, a company may normally have positive net income, but experience a loss due to an infrequent, unusual and significant event. For example, a company may have a loss due to a natural disaster that does not normally occur in its part of the country or an unexpected seizure of property by a foreign government.

For the foregoing reasons, the PBGC should recognize that the proposed safe harbor for companies—which relies on commercial credit reporting agencies, the absence of secured debt, and net income—is ill-suited for large companies. It will force companies to expend resources and adjust their business practices relating to debt, is too unpredictable and is not a useful proxy for the financial soundness of the company as it relates to the risk to the PBGC.

B. The safe harbor for companies is administratively unworkable and would impose a significant burden on plan sponsors and their service providers.

Like the fully funded safe harbor, described above, the usefulness of the safe harbor for companies depends on companies devoting substantial resources to tracking and measuring criteria that they do not currently monitor in connection with their pension plans. Moreover, without the investment of such resources, it would be extremely difficult for a company to be able to predict with any reasonable certainty whether they would be eligible for the company safe harbor until they need to use it. Because the commercial credit reporting companies are relying on payment trends and industry positions, the scores provided by commercial credit reporting companies can be volatile. This is particularly problematic for companies that have cyclical businesses. Additionally, companies will not know in advance what threshhold score the PBGC will select and also might be forced to turn down favorable financing arrangements in order to avoid taking on secured debt.

In order to use the company safe harbor, the person at the company responsible for notifying the PBGC about a reportable event would need to know at any given time: (1) whether there was a reportable event; (2) the company's credit score from a commercial credit reporting company;

(3) what threshhold credit score the PBGC had most recently selected; (4) what secured debt the company has and how that debt is secured; (5) the company's net income for the past two years; (6) whether in the past two years the company has defaulted on any loans and the outstanding balance of those loans; and (7) whether the company has failed to make any required contributions to the plan in the past two years.

The person at the company responsible for notifying the PBGC would be required to get all of this information in sufficient time in advance of making a determination of whether the company was eligible for the company safe harbor – and if not, to prepare the notification to the PBGC. As noted above, there would likely be insufficient time to challenge any inaccuracies related to a credit score. Additionally, they may need to review volumes of agreements (which companies execute on a continual basis) to determine how their debt is secured. The responsible person would also need to work with the employees who handle the company's loans to determine whether there have been any defaults in the past two years and the pension people to determine if there have been any missed required contributions.

The purpose of a safe harbor is to provide a company with an expedited and clear method to comply with a regulation. In this case, the analysis involved with determining whether the safe harbor is available to the employer will require significant additional resources. In the alternative, companies will have to embark on the expensive and time-consuming process of preparing a reportable event filing. The PBGC's proposed approach to a safe harbor for reportable events does not appear to provide a streamlined and efficient alternative to filing a reportable event (which companies may execute in an effort to ensure 100% compliance with the rules). The approach taken by the PBGC in the proposed regulations is burdensome on the company's resources and would require plan sponsors to spend significant resources complying with the requirements rather than funding and prudently managing their plans.

Thus, ERIC urges the PBGC to recognize that the timing it has proposed is administratively unworkable and would impose a significant burden on plan sponsors and their service providers.

C. The safe harbor for companies, as currently structured, is inconsistent with Executive Order 13563 and would interfere with the way companies conduct their businesses.

The approach taken in the proposed regulations with respect to companies is inconsistent with the Executive Order 13563 which requires regulations to promote predictability, reduce uncertainty, and use the least burdensome approach available to accomplish its objectives.[33] The Executive Order states that:

> "[E]ach agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); [and] (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into

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[33] The White House, *Executive Order 13563 -- Improving Regulation and Regulatory Review,* §1(a) (Jan. 18, 2011), available at http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.

account, among other things, and to the extent practicable, the costs of cumulative regulations…"[34]

The proposed regulations would interject pension administration issues into basic and unrelated core business decisions, including loan agreements, capital investments, accounting decisions, and debt securitization. Companies that want to avail themselves of the ability to use the company safe harbor would be forced to make various business decisions with the reportable events safe harbor in mind.

For example, some companies use secured debt for receivables that are not paid within 90 days and for inventory. These business decisions are unrelated to the company's financial health. However, if a company wanted to ensure that they were eligible for the company safe harbor, they would not be able to use this approach and would be forced to incur additional financing costs in order to be able to fall within the safe harbr. Additionally, there may be business decisions that arise in the future which could be impacted (unintentionally) by the proposed regulations.

The proposed regulations would effectively impose new business standards on companies. The PBGC states in the preamble that it is not trying to "reinvent the wheel" and "can and should rely on procedures, documents, and performance standards that are already established and accepted" to the extent possible.[35] While the PBGC claims that it "would not itself evaluate the creditworthiness of plans sponsors", it will do just that. If the PBGC does not think that a company has properly used the company safe harbor, it will evaulate: (1) whether a company has reached the threshold that the PBGC sets for the credit score, (2) the type of secured debt a company has, (3) whether the company had positive net income and used GAAP or IFRS, (4) whether the company defaulted on any loans with an outstanding balance of $10 million or more, and (5) whether the company failed to make required contributions. The requirements to satisfy the company safe harbor would effectively invent new business standards for companies. The methods for complying with the company safe harbor are not normally used by companies and would impose significant burdens on them in order to use the company safe harbor.

A company's compliance with pension regulations should not directly impact unrelated decisions a company makes with its ongoing business concerns. Although we support the mission of the PBGC to ensure compliance with its regulations, under a true "cost-benefit" analysis, this proposed safe harbor will not meet the standards set in Executive Order 13563. These proposed regulations will necessitate a domino of decision-making normally related to pure business endeavors in order to satisfy compliance with a regulatory safe harbor for pension plan administration. Under the PBGC proposal, these business decisions – wholly unrelated to the administration of the pension plan – become intertwined with the ongoing maintenance and compliance requirements of the pension plan.

[34] *Id*. at § 1(b).
[35] 78 Fed. Reg. at 20040.

IV. The proposed regulations could cause companies to have to renegotiate their arrangements and for plans to have their agreements terminated.

A. Companies may have to renegotiate their credit and lending agreements due to the proposed regulations.

In January 2010, ERIC explained to the PBGC that many credit and lending 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.[36]

Since then, many companies have renegotiated their agreements to provide that the occurrence of a reportable event that is not automatically waived is an event of default with respect to the outstanding loans only if the event could result in financial liability in excess of a certain dollar threshold or could cause "a material adverse effect" on the borrower. For example, credit and lending agreements often state:

> "SECTION X. Events of Default. If any of the following events ("Events of Default") shall occur and be continuing:….. The Company or any of its ERISA Affiliates shall incur a Material Adverse Effect, or in the case of clause (i) below, shall be reasonably likely to incur a Material Adverse Effect, as a result of one or more of the following: (i) the occurrence of any ERISA Event [defined to include a Reportable Event]…."

However, given the uncertainty that can arise in the case of a reportable event, lenders may use this opportunity to re-enter into negotiations under the guise of claiming that the reportable event resulted (or at least could result) in a material adverse effect on theborrower. This is particularly true for companies that have well-funded plans but who are going through temporary financial difficulties. In their weakened state, they will be less able to negotiate with lenders or otherwise find alternative sources of credit.

Additionally, if a company believes it qualifies for one of the safe harbors, but is inadvertently incorrect, the PBGC could impose a lien, which would be problematic under the lending agreement. For example, the employee who handles secured debt may inadvertently overlook an item which would disqualify the business for the company safe harbor.

The PBGC should continue to use the current regulations, which companies have considered when entering into their credit and lending agreements.

B. Plans may have certain of their investment agreements terminated as a result of the proposed regulations.

Some complex investment contracts—used by pension plan fiduciaries to manage investment risk—provide that the contract may be terminated in the event of a reportable event that has not been

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[36] ERISA Industry Committee, *Comment Letter to PBGC* (Jan. 22, 2010), available at http://www.eric.org/forms/uploadFiles/1E6C90000000F.filename.ERIC_CommentLetter_PBGC_ReportableEvents_PropRegs012210-final.pdf.

waived. Notably, this provision typically does not provide for any materiality threshold or qualifier. For example, some investment agreements state:

> "In the event that Party B is an ERISA Plan (as defined in Part 4 of this Schedule), whether or not identified as an ERISA Plan on Appendix I hereto (as periodically amended), the following Additional Termination Events shall apply:…Reportable Events. An event occurs in respect of Party B that is a "reportable event" as defined under ERISA Section 4043 ("Reportable Event") and the regulations thereunder, and is not an event for which the reporting requirements of ERISA Section 4043(a) have been waived by the PBGC."

The impact on a plan could be substantial if an investment were terminated pursuant to this provision. For example, the party to the investment agreement may utilize this provision to terminate the agreement at a time that is lucrative to the party and detrimental to the plan.

The PBGC should continue to use the current regulations in order to avoid the disruption of plans' investment agreements.

V. The proposed changes to the rules for controlled groups will result in additional burdens without corresponding gains.

Under the current rules, a reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons ceasing to be members of the plan's controlled group.[37] The current regulations provide for several useful automatic waivers, including waivers if:

- *De Minimis Waiver* - The person or persons that will cease to be members of the plan's controlled group represent a de minimis 10-percent segment of the plan's old controlled group.
- *Foreign Entity Waiver* - Each person that will cease to be a member of the plan's controlled group is a foreign entity other than a foreign parent.
- *Funding Waiver* –
  - There is no variable rate premium is required to be paid for the plan for the year;
  - The plan has less than $1 million in unfunded vested benefits; or
  - As of the testing date for the event year, the plan would have no unfunded vested benefits if unfunded vested benefits.
- *Public Company Waiver* - The plan sponsor is a public company and the fair market value of the plan's assets is at least 80 percent of the plan's vested benefits amount.

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[37] 29 CFR § 4043.29(a).

The proposed regulations would eliminate the Funding Waiver and the Public Company Waiver. Instead, companies would have to satisfy the company safe harbor, the fully funded safe harbor, or the premium safe harbor. As discussed above, these safe harbors are not useful for plans and their sponsors. Thus, the elimination of the Funding Waiver and the Public Company Waiver would negatively impact companies that experienced corporate transactions and will not improve the information already available to the PBGC that it uses to monitor and manage its risks.

As we explained to the PBGC in our January 2010 comment letter, large public companies may enter into dozens of transactions that result in numerous acquisitions, spinoffs, mergers or other corporate restructurings every year.[38] 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. By eliminating the existing waivers, the PBGC would be adding significant administrative burdens without a corresponding increase in the security of the pension plan system.

Elimination of these automatic waivers 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 whether:

- It is a "transaction that results, or will result, in one or more persons ceasing to be members of the plan's controlled group" within the meaning of § 4043.29(a);
- 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
- 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 date the reportable event occurs" within the meaning of § 4043.29(b).

Under the proposed regulations, the reporting requirement is triggered by the entering into 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.

VI. The proposed regulations impose yet another risk for companies, which may cause even more plan sponsors to freeze or terminate their plans.

The proposed regulations create significant uncertainty for companies. As discussed above, companies will frequently be unable to determine whether they qualify for the company safe harbor or the fully funded safe harbor and the overwhelming majority of plans do not qualify for the premium basis safe harbor.

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[38] ERISA Industry Committee, *Comment Letter to PBGC* (Jan. 22, 2010), available at http://www.eric.org/forms/uploadFiles/1E6C90000000F.filename.ERIC_CommentLetter_PBGC_ReportableEvents_PropRegs012210-final.pdf.

As a result, company officers will need to evaluate whether they want to take the risk of having to file future reportable events, the costs that are involved to do so, and the risks to their lending and investment agreements. Given the other uncertainties that already exist for defined benefit plans, more company officers may decide to freeze or no longer have the company sponsor a defined benefit plan.

ERIC urges the PBGC not to finalize the proposed regulations which are likely to lead to even more companies freezing their defined benefit plans or ceasing to sponsor plans. Instead ERIC believes that the current regulations are more effective at protecting the needs of the PBGC and should therefore be maintained in their current state.

VII. The PBGC should not regulate through forms and instructions.

The preamble to the proposed regulations states that the PBGC plans to replace the current regulatory process by regulating through forms. It states "PBGC also proposes…to make use of prescribed reportable events forms mandatory and to eliminate from the regulation the lists of information items that must be reported."[39]

This process proposed by the PBGC would allow it to change the information that it requests without engaging in the regulatory process. ERIC urges the PBGC to recognize the value provided by the regulated community in the rulemaking process and not seek to eliminate public input when it seeks to change the information that it collects.

ERIC appreciates the opportunity to submit these comments on the proposed regulations. If you have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

Kathryn Ricard
Senior Vice President, Retirement Policy

[39] 78 Fed. Reg. at 20051.