

June 24, 2011

Honorable Joshua Gotbaum  
Director  
Pension Benefit Guaranty Corporation  
1200 K St., NW  
Washington, DC 20005

Dear Director Gotbaum:

We are concerned about a pattern that seems to be developing with respect to the PBGC's review of premium filings. We are receiving repeated reports from our members that filings are being rejected and penalties are being imposed for reasons that seem unnecessarily rigid. We wanted to bring this to your attention, so that together we could explore means to address the issue.

In our view, the relationship between the PBGC and defined benefit plan sponsors should be a cooperative one that furthers the mission of the PBGC. The PBGC's mission includes "encourag[ing] the continuation and maintenance of voluntary private pension plans for the benefit of their participants." In that context, requiring excess premium payments and imposing penalties seems inappropriate in the case of conscientious sponsors that are trying to comply with the rules.

This letter addresses two issues. The first part of the letter discusses needed changes to Technical Update 10-2. The second part of the letter very briefly highlights deep concerns regarding the PBGC's penalty system, and recommends needed changes to that system.

The changes we are urging PBGC to make are fully consistent with the principles stated in the President's Executive Order 13563 on Improving Regulation and Regulatory Review, including, for example, the need to "use . . . the least burdensome tools for achieving regulatory ends." We hope that you will consider our recommended changes in light of the PBGC's efforts to act in a manner consistent with these important principles.

**Technical Update 10-2.** In Technical Update 10-2, PBGC provided relief to certain "plans that intended to elect to use the alternative premium funding target to calculate the variable rate premium (VRP)" —*i.e.*, those whose only error was not checking box 5 for the 2008 plan year or for certain 2009 plan years—by treating them as "deemed to have made a valid election to use the APFT." We greatly appreciate that relief.

Unfortunately, in a number of cases, the same confusion that led to a failure to check box 5 also led to other errors. Thus, the "one error" approach really does not provide an equitable solution. We urge you to provide the same relief, *i.e.*, "deeming" the plan to have made a valid APFT election, to a broader class of plans. In particular, we believe this relief is warranted where: (1) there is clear evidence (*e.g.*, correspondence with the actuary, corporate records, etc.) that, on or before the premium filing deadline, the plan administrator intended to elect the APFT, (2) the plan administrator made a bona fide, good faith effort to comply with the PBGC's premium filing requirements, and (3) there is no evidence of any "gaming" of the system (*e.g.*, making an election decision based on hindsight as to the direction of interest rates) in connection with the APFT election.

Difficulties with election issues were especially pronounced in 2009 because, as you know, the Treasury did not issue its guidance on what interest rate could be used under the alternative method until shortly before the due date for calendar year filings. Employers and actuaries in many cases had to quickly determine the premiums under the new option and get forms filled out for the first time, or in many cases amended. Because the PBGC software did not have cross checks, as has been discussed in the context of the box 5 mistake, many parties did not realize that the change had to be made in more than one place.

We understand that actuaries and employers must use reasonable business care in filling out these forms. However, employers should not have to pay hundreds of thousands of dollars in additional premiums simply because of a mistake in filling out the form. Unlike election failures in the minimum funding context where the money is going into the plan and reducing future employer contributions, additional premiums because of an election mistake go to the PBGC and thus clearly constitute a penalty from the employer's perspective.

We have numerous examples of sponsors facing up to hundreds of thousands of dollars in increased premiums because their formal actions did not technically match their intent. For example, we know of one case where, in addition to not checking box 5, box 7 was also mistakenly checked as if it were a standard filing. However, in that case as in many others it is unquestionable that the premium calculation (and payment) was based on the alternative method. The confusion is understandable, as most filers focus on funding issues, and what is designated the "standard" method for premium filing purposes is an alternative to what is done for funding; and what is designated the "alternative" method for premium filing purposes is the standard method for funding.

In other cases, members attempted to file timely and with the right elections but mistakenly failed to press the "submit" button and may have had another mistake. Most of these members did not even know they had not properly filed until contacted by the PBGC. If there is independent evidence of their intent and good faith, the PBGC should not be charging them additional premiums.

**Penalty System.** A recent case has also raised very serious concerns about the PBGC's penalty system. In this case, the premium was paid on October 14<sup>th</sup>, the day before the deadline. The plan sponsor contacted the PBGC on October 15<sup>th</sup> to ensure that the payment had been received; a PBGC representative confirmed orally that the payment had been made. Then on October 19<sup>th</sup>, the PBGC contacted the plan sponsor and said that the payment had been returned. Apparently, the plan sponsor had made a clerical error with respect to the account number. On the same day – October 19<sup>th</sup> – the plan sponsor made the full premium payment.

This plan sponsor was assessed a large penalty and all of its requests for reconsideration have been denied. The PBGC stated in its second denial: "the payment failure was the result of a clerical error by the Plan and therefore does not meet reasonable cause. An oversight is not in keeping with ordinary business care and prudence."

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It is very disturbing that the PBGC's current position is that any oversight affecting timely payment is a cause for penalties. Regardless of the care used by the plan sponsor, any error apparently triggers penalties. We agree that there need to be incentives for plan sponsors to be conscientious and careful. But in order to be true to its mission, PBGC needs to balance that objective with the need not to act in a punitive way with respect to plan sponsors that make inadvertent errors despite clear evidence of an intent to comply.

If a plan sponsor makes any mistake affecting timely payment, penalties apply under PBGC's current system. This is not the right answer. We ask PBGC to announce that inadvertent errors, such as clerical errors, that are made despite a clear intent to comply will not give rise to penalties. Any other position would be punitive and inconsistent with the PBGC's mission.

**Summary.** In summary, with respect to Technical Update 10-2, whether the filing contains one error or more than one error, most of these situations arise from essentially the same overarching facts. That is, the companies clearly intended to elect the APFT, made bona fide, good faith attempts to comply (often within a short turn-around time frame that resulted from rule changes), and had no intent of "gaming" the system. We hope on reflection you see the merits of expanding the relief in Technical Update 10-2.

With respect to the penalty system, we are very concerned about the standards being applied. To apply penalties whenever any mistake affects timely payment is not appropriate and we believe that a revised approach to penalties, as discussed above, is necessary.

We urge you to implement these changes on a retroactive basis, subject only to applicable statutory limitations periods. We believe it is important to provide this relief to as many affected filers as possible, regardless of whether any PBGC reconsideration process has been initiated or completed, and regardless of whether any premium or penalty amount at issue has been paid.

Thank you for your consideration of our views. We appreciate the opportunity to weigh in and look forward to working with you to resolve these issues.

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ASPPA College of Pension Actuaries  
Committee on Investment of Employee Benefit Assets  
The ERISA Industry Committee  
Financial Services Roundtable  
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