September 26, 2011

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

Dear Director Gotbaum:

We very much appreciated the opportunity to meet with you to discuss the ongoing issues regarding elections of the alternative premium funding target ("APFT")—the "Box 5/Box 7 issue."

As you know, Technical Update 10-2 provided relief to certain "plans that intended to use the alternative premium funding target to calculate the variable rate premium ("VRP")", but this relief was generally limited to plans whose only error was not checking box 5 for the 2008 plan year or for certain 2009 plan years. As we discussed in our prior letter and at our meeting, there are numerous situations where plans made a second or different error, despite a clear intent to comply in good faith. Addressing these other situations is especially important in light of the significant number of employers that are facing large and entirely unexpected liabilities if adequate relief is not provided.

In our June 24, 2011, letter to you, we emphasized the importance of a supportive relationship between the PBGC and defined benefit plan sponsors—a relationship that can further the PBGC's mission to "encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants." Given that context, we urge you to provide relief so that filers who may have made an inadvertent error, while acting in good faith, are not exposed to what amounts to an enormous penalty in the form of hundreds of thousands—or more—of dollars of additional premiums.

In addition, the PBGC has recently announced a plan for regulatory review. In that announcement, PBGC identified its objectives as being to "[m]inimize administrative burdens on plans and participants[, to] [s]implify filing[, and to] [p]rovide relief for small businesses and plans, and assist plans with applicable requirements". In the context of the Box 5/Box 7 issue, the PBGC is presented with a great opportunity to implement its objectives without the need to amend a regulation. It would send a very positive signal to the plan community if the PBGC were to quickly act on those laudable objectives in a very concrete and helpful manner by adopting our recommended solution to the APFT issue, as set forth below.

More recently, PBGC published a Federal Register notice providing relief from certain premium penalties and in certain situations involving APFT elections. While we appreciate the relief provided in this notice, it does not address the core concern we raised in our June 24 letter—the need, *in particular for the 2009 plan year*, to "deem" plans to have made a valid APFT election in broader circumstances than those outlined in Technical Update 10-2.

The relief PBGC provided for *post*-2009 plan years addresses many of our concerns, although we believe (as discussed below) that there will continue to be a need for PBGC to make

case-by-case judgments in cases where the mechanical criteria for relief are not met. More importantly, we believe that the need for relief is even greater for pre-2010 plan years than it is for post-2009 plan years, yet the only relief provided for pre-2010 plan years is the waiver of penalties on the late payment of additional premiums that, in many cases, should not have to be paid at all.

As discussed in our June 24 letter, "[d]ifficulties with election issues were especially pronounced in 2009." And as noted in your recent Federal Register notice, PBGC has taken various "steps to reduce box 5 errors *for 2010 and later plan years*," (emphasis added). Given (1) the challenges faced by filers in 2009 (which was, as you know, the critical year for APFT elections), (2) the steps that have been taken to ameliorate the problem for later years, and (3) PBGC's recognition that relief is needed for those later years,, we believe that similar relief should be provided for pre-2010 plan years.

Our Proposal

At our meeting and in our prior letter, we suggested that the PBGC apply a rule under which a plan that meets all three of the following criteria would be treated as having made its intended election:

- *Clear intent to elect APFT:* There must be 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;
- *Good faith compliance effort:* The plan administrator must have made a bona fide, good faith effort to comply with the PBGC's premium filing requirements; and
- *Absence of "gaming" evidence:* There must not be any evidence of "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.

You expressed the following concern with respect to our proposed rule. Because of resource pressures, PBGC has a strong preference for mechanical, objective rules that do not involve the use of judgment and discretion. Accordingly, you asked us to consider whether there is a way to address our concerns through the use of mechanical rules.

We believe that the mechanical rules PBGC recently announced for post-2009 plan years would help significantly, provided that they are revised both to apply to pre-2010 plan years and to build in the flexibility for PBGC to grant relief on a case-by-case basis where appropriate in situations that do not qualify for relief under the mechanical rules. Because many plans would qualify for relief under these mechanical rules, PBGC would need to conduct a case-by-case analysis for a relatively small number of plans.

Need for Exercise of Judgment and Discretion

In our view, the determination of whether a plan administrator should be treated as having made a valid APFT election cannot be determined based purely on mechanical rules. In

this regard, we have carefully considered a number of possible mechanical rules that could ease the administrative burden on PBGC. For example:

- *Timely payment of APFT-based premium.* A possible mechanical rule would be one that makes it a condition of relief that the plan administrator made a timely premium payment in an amount that exactly matched what was owed using the APFT. At first blush, such a mechanical rule has some appeal, as it requires that the intended election be backed up with a concrete action, *i.e.*, a matching premium payment. However, the facts and circumstances of particular cases will inevitably make such a wooden rule inappropriate. First, there will be cases where no variable-rate premium payment, timely or otherwise, is made because, *e.g.*, the APFT that was relied on leads to a determination that the plan has no unfunded vested benefits and therefore owes no variable-rate premium or a credit from the prior plan year exceeds what would otherwise be required. More importantly, the relief should not automatically be denied simply because of a delay in payment, where there is clear evidence that the delay was entirely unrelated to the APFT election (*e.g.*, where there is a simple administrative error that caused the delay).

- *Prompt correction after PBGC notice.* Another possible mechanical rule would require that the error (*e.g.*, a failure to check "box 5" in a case where Technical Update 10-2 would not otherwise provide relief, or a failure to push "submit" because of a belief that the filing had been completed once the plan administrator e-signed the filing) be corrected promptly after PBGC gave notice of the error. Again, there is surface appeal to such a rule, as it could serve to weed out cases (which we believe are exceedingly rare, if indeed there are any) where a filer attempts to keep open the option of electing, or not electing, the APFT based on the future direction of interest rates. However, there will be cases where it is not at all clear that the filer had actual notice of the error, and this will require some case-by-case evaluation of the facts and circumstances. If, for example, the filer believed that communications from the PBGC about a filing problem related to a late payment already made rather than, *e.g.*, to a failure to check "box 5" or to a failure to push "submit," the promptness of the correction should be measured only from the point in time when it is clear that the filer understood that there was an error that needed to be corrected.

- *Grace period for late APFT elections.* A mechanical rule treating a late APFT election as valid if it is filed within a prescribed period of time after the deadline, such as the recently-announced PBGC rule, can be very helpful in providing appropriate relief. However, there will clearly be cases in which further relief is needed. For example, assume that a filer timely makes an APFT election (*i.e.*, checks Box 5 and e-signs the completed filing reflecting use of the APFT under penalty of perjury), but did not recognize the need to push the "submit" button, and that PBGC does not clearly notify the filer of the need to push the submit button until more than 90 days after the deadline. In such circumstances, so long as the filer promptly pushes the "submit" button after being clearly informed by PBGC of the need to do so, relief is clearly warranted.

- *Electronic evidence of attempted timely filing.* Yet another possible mechanical rule would require the availability of electronic evidence to support a claim that the filer

encountered technological difficulty in attempting to make a timely filing that was to include an APFT election. Certainly, where such evidence happens to be available, it should be considered and would weigh heavily in favor of providing relief. However, there will be cases where such evidence is simply not available. In such cases, we believe that PBGC should consider other evidence of the technological and related problems the filer encountered, including, for example, an affidavit from the filer. Particularly given that PBGC has—understandably—made e-filing of premium returns mandatory for all filers primarily to make premium return processing more efficient, relief should be broadly provided where there is reasonable evidence that a technological problem was the reason for a delay in making an APFT election. This is particularly so when the delay is relatively short, where there accordingly is no reasonable concern that the filer was attempting to keep open the APFT election option.

We hope that these examples of possible mechanical rules—and we recognize that there may be others one could develop—make clear that there is a need for PBGC to consider the facts and circumstances of individual cases where the application of purely mechanical rules, such as those PBGC recently announced, do not result in relief. Although we recognize and fully appreciate PBGC's desire for mechanical rules, when the determinations have as dramatic an effect on sponsors as these do, the additional work associated with making case-by-case fact-specific judgments in appropriate cases is, we believe, fully warranted. Moreover, there should be no concern that a flexible, fact-specific approach to enforcement will result in future non-compliance, as filers are extremely unlikely to take the risks associated with intentionally *not* making their elections in full accordance with all PBGC requirements and thus rely on the hope that PBGC will provide fact-specific relief.

In determining what criteria to use, and in deciding whether to grant relief in a particular case, we urge PBGC to consider the following overall test: would an independent third party who is aware of all the facts and circumstances conclude that the denial of the ability to use the APFT is unduly harsh or otherwise inappropriate?

Prevailing Use of Judgment and Discretion by the ERISA Agencies

In this context, we would urge you to reconsider our original proposal in connection with situations where mechanical rules to not result in relief. Such reconsideration is especially appropriate in light of the fact that the use of judgment and discretion is a critical element of the plan-related enforcement systems of the Department of Labor, Department of Treasury and IRS, and the PBGC, as described below. Employers are willing to offer retirement plans voluntarily in part because they expect that their regulators will treat them fairly when inevitable problems arise.

A consistent theme throughout the DOL, Treasury, IRS, and PBGC regimes described below is the use of a reasonable cause exception to penalties otherwise applicable. As you know, the application of a general reasonable cause exception by definition involves the use of discretion, rather than the application of mechanical rules. In addition, although the "reasonable cause" test is not the right test for providing relief in the context of the APFT issues, the need for

the same kind of discretion can be far greater in that context, in light of the much higher dollar amounts often in issue.

DOL

Title I of ERISA contains numerous penalties that can be triggered even where there is no bad faith or intent, and DOL has established a series of procedures to waive or reduce these penalties. For example, it is not uncommon for plans to file their Form 5500 late, and DOL waives the substantial penalty upon a showing of "mitigating circumstances regarding the degree or willfulness of the noncompliance." See DOL Reg. § 2560.502c-2(d). Substantially similar language allowing for a reduction or waiver of penalties via a showing of reasonable cause can be found in other DOL regulations implementing the penalty rules in ERISA section 502. See DOL Reg. §§ 2560.502c-5; 2560.502c-6; 2560.502c -7; 2560.502c -8; 2560.502i-1.

DOL even has discretion to waive or reduce the penalty under ERISA section 502(l) for a breach of fiduciary duty. See DOL Reg. § 2570.85. DOL's rules provide that waiver may be granted when the fiduciary "acted reasonably and in good faith" *Id. at* § 2570.85(a)(1). DOL provides all applicants with at least one conference, and may exercise discretion to hold additional conferences.

IRS

The tax code, Treasury regulations, and IRS procedures contain too many examples of the use of discretion in enforcement to list here—including many involving a "reasonable cause' exception -- so a few examples must suffice. IRS routinely exercises its discretion to enter into closing agreements with taxpayers in accordance with Code section 7121 and Treas. Reg. § 301.7121-(a). Code section 9707(d), which sets limits on the amount of a penalty that may be imposed for the failure to pay any premium required under Code section 9704, states that, in the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved. In fact, the Tax Court can rule on whether or not Treasury's failure to abate interest for taxpayers who meet certain requirements was "abuse of discretion." See Code section 6404(h)(1).

IRS has an entire compliance resolution system for qualified plans that have document or operation errors that would otherwise disqualify the plan. See Rev. Proc. 2008-50. This program allows for self-correction, voluntary correction with an IRS filing for errors discovered by the plan itself, and correction upon audit for errors discovered by the IRS. Among the principles underlying the program is that "[s]anctions for plan failures identified on audit should be reasonable in light of the nature, extent, and severity of the violation." *Id.* § 1.02.

PBGC

Just as DOL and IRS routinely retain and exercises their enforcement discretion, so, too, does PBGC. For example, PBGC retains the discretion to waive any requirement relating to the

methods that may be used when a regulation calls for the filing of any notice, information or payment with the PBGC or calls for the issuance of any notice, information or payment to someone other than the PBGC. See PBGC Reg. §§ 4000.5; 4000.15. PBGC retains also the discretion to waive any requirement pertaining to when a submission is deemed filed or issued and whether a submission shall be treated as timely or untimely. See PBGC Reg. § 4000.32.

Under PBGC Reg. § 4007.8(c), PBGC may waive all or part of a late payment penalty charge if PBGC determines that there is reasonable cause for the late payment, also known as a reasonable cause waiver. PBGC may look at a number of factors to determine whether there is reasonable cause. See Appendix, §§ 22-25. However, the list is non-exhaustive and is comprised entirely of examples that would inevitably require PBGC's judgment and discretion precisely because enforcement is not one-size-fits-all and discretion is necessary to advance the PBGC mission effectively.

PBGC also routinely exercises case-by-case discretion, relying on the facts and circumstances of particular cases, in many other contexts, including in its determinations as to whether to grant an extension or waiver of an annual employer reporting requirement under ERISA section 4010 or of a reportable event filing requirement under ERISA section 4043, in its assessment and waiver of penalties under ERISA section 4071, in its dealings with employers under the Early Warning Program, in its pursuit of downsizing liability under ERISA section 4062(e), in its evaluation of whether particular pension plans meet the criteria for a distress or involuntary termination, and in its dealings with debtors and other parties in bankruptcy cases.

Conclusion

In light of the examples of discretionary authority and the inherent judgments related to that discretion,, we believe that our proposal for the PBGC to apply the aforementioned three-prong rule where mechanical rules do not provide relief would be consistent with the already-existing discretionary authority mentioned above.

We look forward to discussing these issues with you. Again, thank you very much for meeting with us and for the opportunity to share our views.

Sincerely,

American Benefits Council
ASPPA College of Pension Actuaries
Committee on Investment of Employee Benefit Assets
The ERISA Industry Committee
Financial Services Roundtable
U.S. Chamber of Commerce