



October 12, 2010

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

RE: RIN 1212-AB20

Dear Sir or Madam:

I am writing today on behalf of the American Benefits Council (the "Council") with respect to the proposed regulations under ERISA section 4062(e). The Council is a public policy organization principally representing Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The Council recognizes the difficult mission of the Pension Benefit Guaranty Corporation (the "PBGC"). The PBGC is charged with:

- Encouraging the continuation and maintenance of voluntary private pension plans for the benefit of their participants;
- Providing for the timely payment of benefits under covered plans; and
- Maintaining premiums at the lowest level needed to carry out its responsibilities.

In these economic times, balancing those missions is quite difficult. The Council has worked with PBGC in the past on this delicate balancing process and we look forward to future work together. It is in that spirit that we deliver this message. We believe that the proposed regulations under section 4062(e) should be withdrawn. The proposed regulations would:

- **Go beyond the Congressional intent underlying the enactment of section 4062(e), as evidenced in part by the fact that the proposed regulations are not consistent with longstanding written positions of the PBGC.**
- **Give the PBGC the power to rewrite the carefully crafted funding rules that Congress has enacted.**
 - **As discussed below, as frozen plans age, it will be difficult in many cases to avoid triggering section 4062(e) liability through insignificant transactions. The proposed regulations explicitly state that PBGC may well use these occasions to require (1) funding beyond the amounts required by law, and (2) credit balance waivers. This result is very concerning. Congress' carefully crafted rules should only be modified in extreme circumstances, not as a result of de minimis normal transactions.**
- **Interfere with normal business operations and transactions.**
 - **In effect, the proposed regulations would be placing a severe toll charge on normal business transactions. Companies with healthy plans that want to engage in a normal business transaction may have to pay hundreds of millions—or billions—of dollars extra, either into escrow or in addition to the otherwise applicable funding requirements. *This would do great harm to the economy and would have a severely negative effect on businesses' efforts to retain jobs and compete in the global market. In short, this regulation is in direct conflict with the efforts of the Administration and Congress to stimulate the economy.***
- **Apply sanctions on plan sponsors maintaining well-funded plans that do not pose a threat to the PBGC.**
- **Have an extremely adverse effect on companies' willingness to maintain defined benefit plans. Companies without defined benefit plans would be able to freely enter into normal business transactions; companies with such plans would be severely restricted with respect to such transactions. Accordingly, the movement to freeze and even terminate defined benefit plans would greatly intensify, which is in conflict with PBGC's statutory mission.**

Following the withdrawal of the proposed regulations, we urge PBGC to propose new regulations that are clear, administrable, and consistent with Congressional intent. These new regulations should address all of the specific problems identified in this letter and should focus section 4062(e) on plans and transactions that pose real risks for the PBGC. Such new regulations should include clear safe harbors that exempt plans and transactions that do not pose such a risk, and should recognize that financial backing for a plan comes from the entire controlled group maintaining the plan—not just discrete operations within a controlled group.

Section 4062(e)

Section 4062(e) provides as follows:

If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 4063, 4064, and 4065 shall apply.

The statute is clearly aimed at employers that shut down all operations at a single facility. Section 4062(e) gives the PBGC the power, in such cases, to require the employer to provide the PBGC with short-term security in the form of a bond or escrow amount based on the plan's unfunded termination liability.

In fact, as discussed below, PBGC itself has followed this approach in all formal guidance issued prior to the proposed regulations. The proposed regulations actually formalize a complete reversal of PBGC's prior position.

Proposed regulations

The proposed regulations expand the scope of section 4062(e) beyond the Congressional intent. Examples illustrate this expansion. For purposes of these examples, please assume that the plan has a funding target of \$5 billion and assets valued for funding purposes at \$5 billion, so that the plan is 100% funded under the funding rules. Assume, however, that under the assumptions used by PBGC, the plan has a termination liability of \$6 billion, so that the plan has \$1 billion of unfunded termination liability.

Example 1. A profitable plan sponsor sells a business unit that includes 25% of the active employees who are participants of the plan. All employees of the business unit become employed by the buyer, so no one loses his or her job, there is no shutdown of a facility, and there is no signal of any weakness on behalf of the plan sponsor. Yet the plan sponsor has a liability under section 4062(e) of \$250 million (i.e., 25% of the \$1 billion unfunded termination liability).¹ Thus, the plan

¹ The proposed regulations state that if the buyer assumes the part of the plan covering the transferred employees, the PBGC "may permit" the section 4062(e) liability to be deemed to be satisfied. Since the PBGC has the discretion to settle the liability under section 4062(e) in all cases, we view this part of the

sponsors must either place \$250 million in escrow for the PBGC, post a bond for \$375 million, or agree to other terms prescribed by the PBGC.²

The proposed regulations' application of section 4062(e) to this situation is a reversal of PBGC's consistent written position, dating back many years. See PBGC Opinion Letters 86-13, 85-8, 82-29, 78-29, 77-147, 76-52, and 76-89.

Example 2. Same as example 1, but with more detail. The plan was completely frozen in 1995, so that it only has 500 active employees who are plan participants. The company itself has 35,000 employees. So in this example, a \$250 million liability is triggered by the transfer of 125 employees—.36% of the employer's employees—to another business.

The plan is 100% funded, the company is doing well and poses no threat to the PBGC, and the company engages in a de minimis and normal transaction that has almost no effect on its business operations. Yet the proposed regulations would create a \$250 million liability.

Example 2 is a scenario that will in the near future be confronted by countless plans. Plans across the country have been frozen, so that over time the number of active employees who are plan participants will dwindle to very small numbers. Accordingly, tiny business transactions of no real significance will trigger enormous liabilities under section 4062(e).

Example 3. The plan is maintained for a business unit that is very profitable and expanding rapidly. Due to the unit's growth, and its marketing success in another area, the unit needs to move to a bigger site in a different part of the country. Twenty-five percent of the work force chooses not to move; all of these employees are replaced by new employees. And many more employees are hired due to the business expansion. None of the new employees become plan participants (either because the plan has a one-year waiting period or the plan is frozen to new hires). This rapidly growing profitable company maintaining a fully funded plan would have a \$250 million liability under the proposed regulations, a result inconsistent with PBGC's prior written position. See PBGC Opinion Letter 77-134.

Please note that under the proposed regulations, this result would occur even if the business unit only occupied part of a facility, so that the facility is not shut down, a result clearly not covered by the statutory language quoted above.

regulation as having no real significance. The PBGC still has the power to impose an enormous penalty on the employer for a normal business transaction.

² A sale of business assets would clearly trigger section 4062(e) under the proposed regulations, and a sale of the stock of a subsidiary may also.

Example 4. A bad storm causes damage to a company facility where 25% of a company's workers covered by the plan are employed. It takes five weeks to repair the facility, during which time the company's other facilities are able to absorb the extra work. All workers employed at the damaged facility are paid for the five-week period and resume their duties at the end of the period. The proposed regulations would impose a liability of \$250 million on the plan sponsor, again a result clearly inconsistent with the statute, since the facility was never shut down and no one lost their job.

Example 5. The plan and the employees covered by the plan are transferred from one government contractor to another government contractor pursuant to the transferee contractor being awarded the government contract. In this situation, the section 4062(e) liability is \$1 billion. Since the plan is 100% funded, no one lost his or her job, and the new employer was chosen by the federal government, this result does not seem justified. Under the rationale underlying all of the PBGC Opinion Letters listed above, this transaction would not be subject to section 4062(e) under current law, but would be under the proposed regulations.

Example 6. The plan is maintained by the AB joint venture, which is owned 80% by Company A and 20% by Company B. A and B decide to modify the ownership arrangement slightly, so that A owns 70% of the joint venture and B owns 30%; the change has no effect on the employees or the operations of the joint venture. Because an 80% ownership stake makes AB part of A's controlled group, but a 70% ownership makes AB a separate company, this minor adjustment in ownership on its own triggers a \$1 billion liability under the proposed regulations with respect to a plan that is 100% funded.

Other adverse effects of the proposed regulations.

The enormous expansion of section 4062(e) would have extremely adverse effects even without the actual imposition of a dollar sanction or increased funding obligations. First, the specter of PBGC intervening in almost any routine business transaction would have a chilling effect on normal business activity, as companies will recognize that PBGC negotiations could be long and difficult. Second, because of the enormous scope of the proposed regulations and the penalties for noncompliance with the notice rules, companies would be effectively forced to provide PBGC with notices almost routinely. This will exacerbate the involvement of the PBGC in business transactions and will impose a real burden in terms of dollars and time in providing the notices. (Such a burden would actually be enormous if all notice information must be current as of the date of the section 4062(e) event.)

Third, and extremely importantly, under loan covenants now in effect, a section 4062(e) event with respect to a company can trigger a loan default. If these

proposed regulations are finalized in their current form, such provisions would be expected to be more common and could also prevent companies from obtaining additional financing under existing loan agreements. Such provisions could also be included in stock or asset purchase agreements. Thus, if the extremely broad definition of a section 4062(e) event in the proposed regulations is retained, the effect on companies could be devastating—bankruptcy in some cases—in an already tight credit market.

We urge the PBGC to withdraw its proposed regulations under section 4062(e) and propose new regulations. We would like to work with you to craft those new regulations in a way that protects PBGC but also is consistent with Congressional intent and does not interfere with normal business transactions that pose no threat to the PBGC.

Sincerely,

A handwritten signature in cursive script that reads "Lynn D. Dudley". The signature is written in black ink and is positioned above the printed name.

Lynn D. Dudley
Senior Vice President, Policy