



AMERICAN BENEFITS
COUNCIL

April 15, 2011

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

Re: Reducing Regulatory Burdens: Review Under Executive Order 13563

Dear Sir or Madam:

I am writing on behalf of the American Benefits Council (the "Council") in response to the Pension Benefit Guaranty Corporation's (the "PBGC") recent request under Executive Order 13563 for suggestions on how it can streamline its guidance and eliminate unnecessary regulatory burdens. The Council is a public policy organization representing principally 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 appreciates that the PBGC needs information about the financial strength of plan sponsors and their pension plans. We believe, however, that the PBGC can reduce the administrative burden on plan sponsors while still obtaining the information necessary for the PBGC to satisfy its mission. The right balance is important because the burdens associated with reporting make plans more costly and elevate plan sponsors' frustration levels. The PBGC is charged with encouraging the continuation and maintenance of voluntary pension plans and excessive information reporting obligations are at odds with this charge. Thus, as an overarching comment, the Council urges the PBGC to carefully review its reporting and disclosure rules to ensure that they are appropriately tailored to the PBGC's needs. Our specific suggestions are discussed below.

REPORTABLE EVENTS

Section 4043 of the Employee Retirement Income Security Act of 1974 (“ERISA”) provides that a plan sponsor must notify the PBGC of certain “reportable events.” Broadly speaking, the reportable events are intended to be events that signal that the plan or its sponsoring employer are in distress. The notice is meant to allow the PBGC to act appropriately before the situation deteriorates.

The Council appreciates the PBGC’s desire to have advance notice of the potential need to terminate a plan. We are concerned, however, that the existing reportable event requirements are too expansive and we are troubled by the PBGC’s proposal to eliminate most of the automatic waivers and filing extensions under the current regulations and create two new reportable events.¹ If finalized as proposed, these regulations would represent a massive expansion of the reportable event rules. We applaud the PBGC’s decision to repropose the regulation. We strongly recommend that the PBGC reverse direction and carefully review the existing web of reportable events, extensions and waivers with an eye to striking the right balance between the costs and benefits of an expansive reporting regime.

There are any number of simplifications to the existing regulation that would be appropriate. Consider, for example, required reporting if an installment or payment under the required minimum funding rules is not made by the due date.² Notice is waived if the required contribution is made by the 30th day after its due date but this time period is often too short to be of much utility.³ Thus, reporting is often necessary if a required contribution is missed even if, for example, the missed contribution is very modest in size. The PBGC has substantial discretion to provide relief from the reportable event requirements and has provided relief from reporting for missed quarterly contributions for small plans.⁴ We believe that it would be appropriate to provide additional relief for missed contributions that are de minimis relative to the plan’s assets and/or liabilities.

Another example involves reporting in connection with active participant reductions. The existing regulation treats a reduction in the number of active participants to less than 80 percent of the number at the beginning of the plan year, or to less than 75 percent of the number at the beginning of the previous plan year as a reportable event.⁵ It is not uncommon for a plan that has a reportable active participant reduction to have another reportable active participant reduction shortly thereafter, for example, at the beginning of the next plan year. This reporting is almost invariably duplicative since the PBGC will be aware of the situation as a result of the first reportable event. Relief

¹ 74 Fed. Reg. 61,248 (Nov. 24, 2009).

² Reg. § 4043.25(a).

³ Id.

⁴ See, e.g., Technical Update 10-4 (Dec. 3, 2010).

⁵ Reg. § 4043.23.

should be provided in circumstances where an active participant reduction notice was filed in the preceding 12 month period.⁶

By way of another example, the current regulations appropriately provide an exception from reporting for active participant reductions by plans with fewer than 100 total participants.⁷ The notion in the regulations is that a modest reduction in active participants in a small plan may be a large percentage reduction triggering the generally applicable thresholds but nonetheless is an event that does not suggest the plan sponsor is in financial distress. We believe that the PBGC should consider applying this exception more broadly. The mere fact that a plan has a substantial number of participants who are inactive does not make a modest reduction in active participants probative of financial distress. Under current rules, a plan that has 100 or more total participants but, for example, only 10 active participants would have to report if it lost 3 active participants. There should be an appropriate de minimis threshold that is based on the number of individuals who depart from active participation. We also note that such a modest reduction should not be considered an event triggering section 4062(e). Such a reduction is not within the Congressional intent underlying section 4062(e).

SECTION 4010 REPORTING

Another example of potentially overly expansive reporting involves section 4010 reporting. Section 4010 imposes costly reporting requirements on certain sponsoring employers, most notably those with plans that have a funding target attainment percentage for the preceding year of less than 80 percent. Reporting is waived for an information year if, for the plan year ending within the information year, the aggregate funding shortfall for all plans of the controlled group does not exceed \$15 million.⁸ The Council greatly appreciates the \$15 million waiver but believes it would be appropriate to consider less expansive reporting for employers with plans whose aggregate funding shortfall is relatively modest albeit in excess of \$15 million. It would, for example, be very helpful if employers with plans with aggregate funding shortfalls in excess of \$15 million but less than some threshold, for example, \$50 million, could provide simplified funding data, rather than the precise data required under the existing regulations. This would greatly mitigate the cost associated with section 4010 but would not deprive the PBGC of important information. Under this approach, the initial filing could provide simplified funding data but the PBGC could retain the power to affirmatively request more detailed information.

By way of another example, we believe that simplified reporting would be appropriate if a sponsoring employer knows it will not be subject to section 4010 filing for the

⁶ The proposed reportable event regulations, discussed below, would make a similar change.

⁷ Reg. § 4043.23(c).

⁸ Reg. § 4010.11.

subsequent year at the time it would otherwise have to provide the section 4010 information for the current year. This may arise, for example, if the employer has made (or is scheduled to make) contributions that will bring all of its plans' funding target attainment percentages for the current year above the 80 percent threshold. This approach would also accommodate circumstances, for example, in which a controlled group acquires an employer with a small plan that is below the 80 percent threshold after the contribution due date and therefore has not had an opportunity to bring the plan above the threshold.

More generally, we recognize the PBGC's interest in the section 4010 information, but believe that the PBGC should explore whether there are ways to reduce the administrative burden associated with section 4010 reporting. Section 4010 was added to ERISA pursuant to GATT 1994.⁹ The PBGC's monitoring efforts, the timing of the availability of the Form 5500 Schedule B (now Schedule SB), and internet information has greatly changed since then. While section 4010 may simplify data collection for the PBGC, there are other readily available avenues for the PBGC to gather much of the applicable information and we urge the PBGC to explore these possibilities.

PREMIUM FILING

The PBGC has made many changes in the premium process over time to improve the system with an emphasis on electronic filing. We commend the PBGC for these efforts. Unfortunately, the one thing that is difficult to remove is human error. Human error should not be ignored, but it should not be overly penalized. Most plan sponsors are trying their best to comply. Even so, errors occur. We appreciate that the PBGC allows for good cause exceptions. However, even in circumstances where a good cause exception is unavailable, the penalty should not be a huge increase in the premium. The box 5 situation of the last few years is a perfect example of how the PBGC is over-penalizing errors.

Premium information must be submitted electronically in accordance with the electronic forms available on the PBGC's web site.¹⁰ The Council is aware, however, of plans that have struggled with the process. Most notably, for 2009, many plans that intended to elect to use the alternative premium funding target (the "alternative method") to calculate variable rate premiums did not check the required box 5 because of confusion over the website instructions. The PBGC issued relief for many of the plans that failed to check box 5, which we greatly appreciate.¹¹ However, we believe that there is a more fundamental point, namely that the consequences associated with an error or delay in completing the premium filing are disproportionate to the error.

⁹ Uruguay Round Agreements Act ("GATT"), P.L. 103-465, § 772(a).

¹⁰ Reg. § 4007.3.

¹¹ Technical Update 10-2: Variable Rate Premiums; Alternative Premium Funding Target Elections; Box 5 Relief.

If a plan fails to complete the website instructions in the precise manner necessary to elect the alternative method, then the plan is required to use the standard premium funding target (the “standard method”).¹² Similarly, a plan that files late is foreclosed from the alternative method.¹³ The election requirements for the alternative premium funding target are designed to prevent plans from switching between smoothed and spot interest rates in computing liabilities based on hindsight.¹⁴ The rules are not meant to create a trap for the unwary and severely punish clerical or administrative errors.

The Council believes that there are more reasonable and appropriate ways to prevent plans from inappropriately switching between liability measurement methodologies. The PBGC could, for example, allow plans to use the alternative method but reserve authority to reject such use if it determines that the plan did not intend at the applicable deadline to use such method. Alternatively, the PBGC could permit plans to utilize the alternative method if they can show that the plan intended as of the filing due date to use the alternative method. A plan could establish that it intended at the applicable deadline to use the alternative method, for example, through communications between the plan and its actuary showing that a decision had been made on or before the premium due date to use the alternative method. Either approach would provide the PBGC with greater flexibility to ensure that plans are not disproportionately penalized for clerical or administrative mistakes.

It is important that the PBGC adopt changes to allow plans to cure defective elections that occurred prior the effective date of the new rules, including elections for 2009. There are more than a few plans that previously did not make an effective alternative method election notwithstanding an intent to do so. It is inappropriate to force a plan into the standard method simply because a plan administrator filed late, for example, because the plan administrator had a computer problem. Similarly, it is inappropriate to require a plan to use the standard method where it failed to appropriately fill out the website instructions. The rules should be fixed in a manner that allows plans that previously had a misstep in the filing process to cure that defect easily. The controversy over box 5 aptly illustrates the need for a more flexible and fair approach. While the box 5 relief provided by the PBGC was welcome, it was incomplete relief and there are plans that are being treated unfairly. Thus, we urge the PBGC to adopt rules that allow plans to elect the alternative method retroactively if the plan can establish by clear evidence that it intended as of the relevant filing due date to use the alternative method.

We note that our concern is not limited to the alternative premium funding target. The PBGC should, for example, provide relief where differences between the correct asset values and the asset values used to determine variable rate premiums are de minimis.

¹² Reg. § 4006.5(g).

¹³ Id.

¹⁴ 73 Fed. Reg. 15,068 (March 21, 2008) (preamble to final regulations on variable rate premiums).

Current regulations provide that large and mid-size plans, which are subject to an earlier premium due date than small plans, may file based on an estimate of the premium funding target if the target is not known as of the filing due date.¹⁵ The plan then makes a reconciliation filing later in the year. This rule is very helpful but it is too narrow because it requires a precise asset value. It is not uncommon for a plan to have subsequent changes in the asset values used to determine the variable rate premium, for example, if the plan is invested in hard-to-value assets. The current rules, however, impose potential penalties if the asset valuation as of the filing due date is not precisely correct. We believe that a reconciliation filing should also be permitted for asset valuations. There is no reason to impose such a high threshold for accuracy.

PROPOSED SECTION 4062(E) REGULATIONS

The Council previously filed a comment letter on the PBGC's proposed regulations under section 4062(e).¹⁶ We continue to strongly believe that the proposed regulations are overly broad and should be withdrawn. Risk-averse sponsors may well choose to report even if there is little likelihood that a section 4062(e) event has occurred. Further, the proposed regulations do not provide safe harbors from reporting and liability. We urge the PBGC to consider identifying situations in advance where reporting would not be necessary. The proposed regulations now inappropriately apply severe sanctions to plan sponsors maintaining well-funded plans that pose no threat to the PBGC and materially interfere with normal business operations. These regulations are a prime example of the sort of rules that fail to strike the appropriate balance between costs and benefits. Thus, we continue to urge the PBGC to withdraw the proposed regulations.

FAILURE TO PROPOSE PPA REGULATIONS

The Pension Protection Act of 2006 (the "PPA") includes two important statutory changes that we understand were included at the PBGC's request. One allows the PBGC to pay interest on premium overpayments.¹⁷ The other would establish a missing participant program for terminating defined contribution plans.¹⁸ Five years after the PPA was passed implementing regulations have yet to be proposed. We urge the PBGC to prioritize these regulations which benefit plan sponsors and plans, for example, by creating parity between premium underpayments (which are subject to interest) and overpayments (which should also be subject to interest adjustments).

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¹⁵ Reg. § 4007.11.

¹⁶ 75 Fed. Reg. 48,283 (Aug. 10, 2010).

¹⁷ ERISA § 4007(b), added by P.L. 109-280, § 406(a).

¹⁸ ERISA § 4050, added by P.L. 109-280, § 410(a).

We appreciate the opportunity to comment on the need for regulatory simplification, and we look forward to working with you on these important changes.

Sincerely,

Jan Jacobson

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Senior Counsel, Retirement Policy