



AMERICAN BENEFITS  
COUNCIL

June 3, 2013

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

**Re: RIN 1212-AB06**

Dear Sir or Madam:

On behalf of the American Benefits Council (the "Council"), I am writing to express great concern regarding an element of the proposed regulations regarding "Reportable Events and Certain Other Notification Requirements."

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.

There are a number of issues raised by the proposed regulations, but we respectfully focus our attention here on one issue that we see as having by far the broadest effect: the use of the financial soundness of the plan sponsor as a factor in PBGC's exercise of its enforcement and interpretive authority.

The negative impact of the growing use of plan sponsor financial soundness as a factor, such as in this proposed regulation, is easily seen in the PBGC's enforcement policy under ERISA section 4062(e) and in the Administration's recent premium proposals. However, while the financial soundness test could decrease the reporting burden on some "stronger" companies, the proposal has the effect of increasing the burden on "less strong" companies (by imposing more burdensome requirements than would be imposed if the reporting requirements applied equally to all companies). For example, the proposal dramatically increases the amount of information required to be

submitted with an initial reportable events notice and tightens reporting waivers based on plan funding status. It also eliminates the extensions tied to actual notice of an event and of the controlled group relationship where the event involves a “foreign-linked entity” or foreign parent. In addition, the Council is concerned that once the precedent of evaluating company health is established in the reportable events area, the government could use a similar test for other purposes, such as the calculation of premium payments. We see this trend as constituting a serious threat to the strength of the defined benefit plan system and to the PBGC.

**The financial soundness test is pro-cyclical in nature.** There are two main reasons for the long decline of the private defined benefit plan system. First, the increasing volatility of plan funding and accounting obligations makes business planning and capital planning exceedingly difficult, especially for public firms. Second, the funding and accounting rules have a “pro-cyclical” effect, so that when economic challenges are the greatest, the burdens are the highest. Companies concerned about making inevitable future down cycles far worse may need to consider exiting the system. Use of a financial soundness test would exacerbate the second problem.

**The financial soundness test is a threat to PBGC.** One very clear fact is often overlooked in analyses of threats to the PBGC. No healthy company has ever turned over liabilities to the PBGC. Only unhealthy companies pose a risk to the PBGC. So logically, PBGC’s primary interest should be to help financially challenged companies recover so they do not have to turn over their obligations to the PBGC. While we appreciate that use of financial soundness as a trigger for additional burdens may appear logical on the surface, if applied in practice, it makes it more difficult for plan sponsors to recover and thus (1) increases the likelihood of liabilities being turned over to the PBGC and (2) is not in the best interests of plans or participants.

**Financially strong companies oppose the use of financial soundness tests.** Many financially strong companies have expressed grave concerns to the Council about PBGC’s use of financial soundness as a trigger for increased burdens.

First, such companies know that they could face business challenges in the future. Currently strong companies do not want burdens imposed in the future when they are least able to afford such burdens. Further, a company may have a very strong plan and experience short term business challenges.

Second, strong companies that want to stay in the system know that the pro-cyclical effects of the financial soundness tests will cause many more plan sponsors to exit the system. That would mean that far fewer companies would be responsible for paying for PBGC liabilities, thus dramatically increasing the burden for those companies.

The reasons that both strong and less strong companies have expressed opposition to the PBGC assessing the financial soundness of private companies are discussed further below.

**Financial soundness tests led to de-risking and will lead to more de-risking.** For the reasons described above, the imposition of financial soundness tests is a contributing factor to the trend toward plan shrinkage by offering lump sums or providing annuity contracts – generally referred to as “de-risking.” In fact, it was the Administration’s PBGC premium proposal – based on a financial soundness test – that provided the catalyst for de-risking. The driving force behind the de-risking trend is funding and accounting volatility, but it was the premium proposal that provided the spark. Additional rules that include financial soundness increase risk for sponsors maintaining pension plans, and the economic environment will push companies to further de-risking.

**A financial soundness test is similar to charging people higher health insurance premiums after they get sick.** There is an initial appeal to the argument that a financial soundness test is needed to focus burdens on the companies creating risk to the PBGC, but that argument falls apart upon scrutiny. As discussed above, by focusing burdens on those least able to afford the burdens, a financial soundness test has the adverse effects of hindering companies’ recovery, and severely hurting the plan system and PBGC. The best analogy would be to a system that increases premiums for individuals who get sick. Financial soundness tests make it much harder for a company to recover and therefore increase the likelihood of the obligations being turned over to the PBGC.

**It is inappropriate for PBGC to assess the financial soundness of businesses.** It is inappropriate for PBGC, on behalf of the Federal government, to judge the financial soundness of companies. There has been some suggestion that the proposed test is simply based on existing commercial measurements but the PBGC is proposing much different criteria.

- The PBGC will decide what credit score is sufficient.
- The PBGC will have to make up its own credit score for the employers with no credit score.
- The “no-secured debt” rule is created by PBGC.
- The “two years of positive net income” test is created by PBGC. And it does not make sense. For example, very profitable companies can have one-time events that result in a misleading loss year. And the application of this rule to non-profits is simply inconsistent with the nature of non-profit organizations.
- The “no loan default rule” is created by PBGC and does not take into account meaningless technical defaults that are waived by the lender and are not indicative of any business issue.

While the Council is in favor of reducing unnecessary reporting, a flawed test that could serve as a precedent for other areas (such as premiums) is worse than extra reporting.

While we do not comment today on whether indeed the use of credit scores is consistent with the requirements of Dodd-Frank, we do note that there are a variety of commercial measurements that are used for a wide variety of specific purposes, none of which are necessarily consistent with or appropriate for the use proposed by the PBGC. But this is certainly an issue meriting a very careful legal review.

**The tests for plan “soundness” do not make sense.** In this interest rate environment, the plan soundness tests are not realistic. Any plan that is at the proposed funded levels today would be close to 200% funded on a funding basis when interest rates return to historically average levels. In effect, thus, there would be no plan soundness test today under the proposed regulations.

## CONCLUSION

In order to avoid accelerating the decline of the defined benefit plan system, PBGC needs to signal its commitment to supporting the system by abandoning its use of a financial soundness test. In addition, the use of a financial soundness test would, by reason of this acceleration, severely hurt the PBGC by eroding PBGC’s premium base.

The proposed reportable events regulations need to be withdrawn. While some companies would see reduced reporting, currently the proposal is based on a flawed premise that will hurt the plan system and the PBGC for the reasons outlined above. We respectfully request the opportunity to testify at the PBGC’s June 18 hearing on this issue.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive, flowing style.

Lynn D. Dudley

Senior Vice President, Retirement  
and International Benefits Policy