

June 3, 2014

The Honorable Thomas Perez
Chair of the Board of Directors of the PBGC
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Penny Pritzker
Board of Directors of the PBGC
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, DC 20230

The Honorable Jacob J. Lew
Board of Directors of the PBGC
Secretary
U.S. Treasury Department
1500 Pennsylvania Avenue
Washington, DC 20220

Delivered through the office of the Participant and Plan Sponsor Advocate of the PBGC

Dear Secretary Perez, Secretary Pritzker, and Secretary Lew:

The undersigned organizations are writing to express concerns regarding the Pension Benefit Guaranty Corporation's ("PBGC") enforcement actions with respect to ERISA section 4062(e). Very briefly, the PBGC's enforcement of section 4062(e) reflects a policy position that in our view is not consistent with the law and that is adversely affecting critical business transactions needed for companies to recover. While we understand that the PBGC has attempted to address these enforcement concerns, the actions to date have not been sufficient to prevent unnecessary harms to plan sponsors.

This enforcement is costing businesses hundreds of millions of dollars, diverting assets from business investments and jobs. Even worse in some cases, the PBGC's actions are preventing important business transactions from occurring at all, stopping companies from selling unneeded or unprofitable facilities and from achieving efficiencies by consolidating operations. The business transactions being stopped by the PBGC pose no meaningful risk to the PBGC and are essential to a functioning business world where such transactions can facilitate our economic recovery. In fact, by facilitating economic recovery, these transactions not only help the country generally, but also protect PBGC from incurring new liabilities, which can occur when a company fails.

As discussed further below, Congress is also concerned about the negative impact of this enforcement position. Two leading Members have introduced bills to stop PBGC's actions with respect to existing cases, thus addressing what has become a significant problem. Since PBGC operates under the oversight of the Board of Directors, we wanted to make you aware of this issue. It is our hope that we can work with you, the PBGC, and Congress on a more workable approach that protects PBGC without unnecessarily disrupting or stopping important business transactions that do not pose any risk to the PBGC. Moreover, a more workable approach would

help preserve more benefits for participants because the position being taken by PBGC will certainly accelerate the exodus from the pension system, hurting both participants and ultimately the PBGC.

Background. In the summer of 2010, the PBGC issued proposed regulations under section 4062(e). The proposed regulations are not only inconsistent with the statute, but are also inconsistent with published PBGC guidance and many years of historical enforcement practices, demonstrating that the proposed regulations were being driven by policy considerations, not legal interpretations compelled by the statute. Under the statute, liability can be triggered if “an employer ceases operations at a facility in any location”. The statute was clearly intended to apply to situations where all operations at a facility are shut down. Instead, under the proposed regulations, liability can be triggered where just one of multiple operations is shut down with the facility remaining open and operational – or even where *no* operations are shut down, but rather operations are, for example, (1) transferred to another employer, (2) moved to another location, or (3) temporarily suspended for a few weeks to repair or improve a facility.

Moreover, under the PBGC’s current approach, the liability for employers can be vastly out of proportion with the transactions that give rise to the liability. For example, in many cases, a *de minimis* routine business transaction affecting far less than 1% of an employer’s employees can trigger hundreds of millions of dollars of liability, even in situations where a plan poses no meaningful risk to the PBGC.

PBGC’s use of section 4062(e) is also very troubling in another respect. Technically, section 4062(e) requires that employers post security with the PBGC in case the plan terminates in an underfunded status. But to our knowledge, such security is very rarely provided. Instead, PBGC negotiates with employers to increase funding of the pension plans by the large and disproportional amounts that would otherwise be required as security. By diverting assets away from the business, this has very adverse effects on companies, business recovery, and jobs. This also harms plan participants, since it drives companies to exit the pension system. Finally, it is really an end run around the funding rules that were adopted by Congress in the Pension Protection Act of 2006, but an end run that is applied only to those companies that happen to engage in business transactions that are captured by PBGC’s expansive and inappropriate approach to section 4062(e), creating substantial unfairness as compared to their competitors.

Responding to these concerns from the business community, the PBGC announced that the proposed regulations are being reconsidered pursuant to Executive Order 13563 on Improving Regulation and Regulatory Review. However, at the same time, PBGC has as a matter of policy decided to take an enforcement position that is almost identical to the proposed regulations.

Subsequently, the PBGC announced that it was changing its enforcement approach. We appreciate the intentions of the PBGC; however, the , PBGC’s decision to exempt “creditworthy” companies and small plans from its otherwise applicable enforcement position does not adequately address companies’ concerns, regardless of whether they may be currently creditworthy. For example, no company, even a company that is strong today, wants to face a future where if the company confronts financial challenges, it may suddenly have a large PBGC

liability for a previous business transaction, or be severely limited in its ability to engage in helpful future business transactions. And ironically, for companies that fail to satisfy PBGC's creditworthiness test, the application of section 4062(e) and the resulting new liabilities can severely harm the company's recovery, which is in no one's interest, including the PBGC.

Most recently, the PBGC has reached out to the business community to discuss section 4062(e). That was followed up by a meeting with PBGC regarding the policy issues raised by the PBGC's enforcement position on section 4062(e). While we view this as a positive sign and welcome further dialogue, we are troubled that this outreach coincides very closely in time with (1) a dramatic expansion in enforcement through the use of liens (as discussed below) and (2) PBGC efforts on the Hill and with participant groups seeking support for its current enforcement approach.

Legislative actions. Earlier this year, Senator Tom Harkin (D-IA), Chairman of the Senate Health, Education, Labor and Pensions Committee, introduced S. 1979 under which the PBGC would be prohibited from bringing any actions under ERISA section 4062(e) for two years, while GAO studies the issue. This is an unmistakable signal from the Chairman of the Senate Committee with jurisdiction over this issue that the PBGC's enforcement position needs to be modified.

Just last year, Congressman Richard Neal (D-MA), Ranking Member of the Select Revenue Measures Subcommittee of the House Ways and Means Committee, introduced H.R. 2117. This bill would clarify Congress' original intent by stating explicitly that in order for there to be liability under ERISA section 4062(e), there must be an actual shutdown of a facility, not just, for example, a transfer of ownership of the facility or a movement of the operations of the facility to another location. The bill makes these clarifications effectively retroactive for all open cases, since the bill is only clarifying what has always been the law.

These bills raise important issues regarding current and future application of section 4062(e). In this regard, there is an opportunity here for a constructive discussion among the Board, Congress, and retirement plan stakeholders about how section 4062(e) should be applied to protect the PBGC without causing unnecessary disruption of business transactions. Such disruptions would harm not only the businesses, but their employees, plan participants, and ultimately the PBGC.

Our request. The undersigned organizations strongly believe that PBGC's enforcement activities are not only inconsistent with the law, but they are also causing serious harm to businesses planning for the future and, therefore, to their current and future employees. Leading Members of Congress agree on both points.

Companies are facing immediate demands from PBGC to satisfy large asserted liabilities. Moreover, PBGC has taken the position that it can file Federal tax liens -- liens that, by statute, apply only once a pension plan has been terminated -- against companies that have ongoing pension plans if they do not agree with PBGC's position with respect to their liability. In addition, PBGC's enforcement activities regarding section 4062(e) can trigger loan defaults and accelerated repayment obligations, which adversely affect everyone involved -- the company, the

plan, the participants, the company's employees, and certainly the PBGC by making it more likely that the company will fail and turn over liabilities to the PBGC.

An issue of this magnitude – where the PBGC is taking action despite contrary policy views and proposed legislative clarifications and where PBGC's actions are doing great damage – is a most appropriate issue for Board oversight. It is our hope that we can work with the Board, the PBGC, and Congress to fashion a solution that protects PBGC without doing unnecessary damage to American businesses.

Thank you for your consideration of our views.

American Benefits Council
ASPPA College of Pension Actuaries
Committee on Benefits Finance, Financial Executives International
The Committee on Investment of Employee Benefit Assets

cc:

The Honorable Tom Harkin, Chairman, Senate Health, Education, Labor and Pensions Committee
The Honorable Ron Wyden, Chairman, Senate Finance Committee
The Honorable John Kline, Chairman, House Education and the Workforce Committee
The Honorable Dave Camp, Chairman, House Ways and Means Committee
The Honorable Lamar Alexander, Ranking Minority Member, Senate Health, Education, Labor and Pensions Committee
The Honorable Orrin Hatch, Ranking Minority Member, Senate Finance Committee
The Honorable George Miller, Ranking Minority Member, House Education and the Workforce Committee
The Honorable Sander Levin, Ranking Minority Member, House Ways and Means Committee
The Honorable Jason Furman, Chair, Council of Economic Advisers
The Honorable Jeffrey Zients, Director, United States National Economic Council
The Honorable Sylvia Burwell, Director, Office of Management and Budget
The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget
The Honorable Phyllis Borzi, Assistant Secretary, Employee Benefits Security Administration, Department of Labor
The Honorable Mary Miller, Under Secretary for Domestic Finance, Department of the Treasury
The Honorable Mark Doms, Under Secretary for Economic Affairs, Department of Commerce
The Honorable Winslow Sargeant, Chief Counsel for Advocacy, Small Business Administration
The Honorable Joshua Gotbaum, Director, Pension Benefit Guaranty Corporation

The Honorable David Strauss, Chairman, Advisory Committee to the Pension Benefit Guaranty Corporation

The Honorable Cheryl Alston, Member, Advisory Committee to the Pension Benefit Guaranty Corporation

The Honorable David Blitzstein, Member, Advisory Committee to the Pension Benefit Guaranty Corporation

The Honorable Robin Diamonte, Member, Advisory Committee to the Pension Benefit Guaranty Corporation

The Honorable Joyce Mader, Member, Advisory Committee to the Pension Benefit Guaranty Corporation

The Honorable Dallas Salisbury, Member, Advisory Committee to the Pension Benefit Guaranty Corporation