AMERICAN ACADEMY *of* ACTUARIES

June 3, 2013

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

Re: Regulation Identifier Number (RIN) 1212-AB06

To Whom It May Concern:

The American Academy of Actuaries[1] Pension Committee is pleased to present the following comments to the Pension Benefit Guaranty Corporation (PBGC) regarding recent proposed regulations on Reportable Events under ERISA Section 4043. The committee believes PBGC's revamped proposal eliminates many concerns within the pension benefit community about the 2009 proposed regulations. The previous proposal would have eliminated many existing waivers for certain events. The committee commented at the time on the need to avoid unnecessarily increasing the administrative burden on defined benefit plans. Regarding the current proposal, the committee applauds PBGC on its common sense, risk-based approach to reporting, and supports its goal of reducing reporting for events that pose little risk to the pension insurance system.

PBGC has asked for public comment on the proposed rule. The committee has several suggestions, which we respectfully submit for consideration. While PBGC specifically asked for comments related to the appropriateness of the criteria for plan sponsor financial soundness, we are not commenting on those areas as they are outside of the scope of our actuarial expertise.

Combinations of plan sponsor and plan financial soundness

Although the committee is not commenting upon the criteria for the plan sponsor financial soundness safe harbor, we would like to see a proper balance between company soundness and plan soundness. A sponsor that only marginally falls short of both the company and plan financial soundness criteria might pose little risk to PBGC. Perhaps various combinations of a plan sponsor's creditworthiness and a plan's funded status could be made available to satisfy the financial soundness waiver.

[1] The American Academy of Actuaries is a 17,000-member professional association whose mission is to serve the public and the U.S. actuarial profession. The Academy assists public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

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Thresholds for plan financial soundness

Under the proposed regulations, in order for a plan to be considered financially sound, it must be 100% funded on a termination liability basis or 120% funded on a premium liability basis. PBGC views a plan below those funding levels with a reportable event as posing a risk. Although it is true that PBGC's risk generally increases as funding levels decrease, we believe the proposed thresholds are too high. Very few sponsors would fund to these levels because if the plan sponsor later opted to undergo a standard termination – with no cost to PBGC – any surplus could only be retrieved after paying an onerous excise tax. The proposal would subject to reporting many plans that have higher than average funding levels and as such pose low risk to PBGC. Thus, in the spirit of balancing regulatory benefits with burdens on the public per Executive Order 13563, we urge PBGC to consider reducing the proposed thresholds.

Waivers that require information as of the last day of the prior year

The following waivers in the proposed regulations are based on information that may not be available for reportable events that occur during the early part of a plan year.

- Plan sponsor financial soundness – In order to qualify for this waiver, the plan sponsor (or the sponsor’s highest level controlled group parent that is a US entity) must have positive net income for the two most recent fiscal years.
- Plan financial soundness – A plan can qualify for this waiver if the plan had no unfunded plan termination liabilities as of the last day of the prior plan year.

To allow the plan sponsor to determine whether the waivers apply, the waivers should be modified to allow determination of the information as of a prior date. For example, in assessing plan sponsor financial soundness, instead of testing net income for the two most recent fiscal years, net income might be tested for the two most recent fiscal years for which net income has been determined. Similarly, in assessing plan financial soundness, the plan sponsor might be permitted to determine the unfunded plan termination liabilities as of a date earlier than the end of the prior year, such as up to three months prior to the end of the prior year.

Plan financial soundness based on premium liability for the current plan year

The new waivers will permit many plan sponsors to avoid unnecessary reporting based on information already available to them at the start of the event year. But the plan’s status may be based on information that is well over a year old, particularly for events occurring late in a plan year. For instance, a plan experiencing a reportable event in November, 2013 will determine its eligibility for the waiver based on its 2012 variable rate premium filing – which is based on assets and liabilities as of January 1, 2012.

We suggest that the plan financial soundness waiver be expanded to also cover plans that could meet the test based on current year premium information, if available, by the event date. This option can be made available regardless of whether the current year’s PBGC premium has been filed (similar to termination liability, which need not be based on any filing), as long as the assets do not reflect any contributions past the date of the reportable event.

Failure to make timely funding balance elections

The proposed regulations maintain the existing waiver for missed minimum funding requirements that are corrected within 30 days of the payment due date, and expand the small plan waivers that had previously been provided in technical updates. We suggest that an additional waiver be provided for contributions that are considered to be late solely because of the plan sponsor's failure to timely make a funding balance election.

Under PPA, a plan sponsor needs to notify the enrolled actuary and plan administrator in writing of an election to apply the funding balance to minimum funding requirements. If the election is not made by the contribution due date, the IRS deems it to be a late contribution. As such, a late funding balance use election is subject to reporting under §4043.25 relating to missed contributions (and possibly under §4043.81 relating to missed contributions with outstanding amounts exceeding $1 million, as well).

Failure to make a required cash contribution may indicate that the sponsor is suffering financial difficulty. But PBGC has nonetheless waived reporting if the contribution is made within 30 days; in such cases, the late payment was likely due to administrative oversight. PBGC has noted in the preamble to the proposed regulations that it is persuaded "that missed contributions that are made up within 30 days do not generally pose excessive risk to the pension insurance system." The preamble also notes that IRS Form 5500 filings and PBGC Form 200 both provide other, independent sources of reporting for late contributions.

Similarly, a failure to make a contribution solely due to a late funding balance election should pose no risk to the PBGC or plan participants. The money to cover the minimum required contribution is already in the plan – it just has not been subtracted from the funding balance. In substance, this is simply a bookkeeping entry that has not yet been made. On its own, it does not signal a plan sponsor's financial distress nor a plan's imminent termination. As such, reporting of such an event should provide no value to PBGC.

Since there is no benefit to PBGC for requiring reporting in these cases, and the information will in any event be available through other means, we urge the PBGC to explicitly waive reporting for late funding balance elections, even for large plans and even if not corrected within 30 days. However, the waiver should only apply as long as the missed contribution is still correctable with a current funding balance election.

Failure to make required contributions

When a plan sponsor's unpaid balance of contributions to a plan (including interest) exceeds $1,000,000, the statute requires notification to PBGC within ten days following the due date of the unpaid contribution. We are not aware of any provision for the PBGC to waive this notification requirement. However, while missing contributions may signal financial strain on a plan sponsor, there may be circumstances where the due date was missed due to simple administrative error, or situations beyond the plan sponsor's control (such as an error by the bank). To reduce onerous filings when there is no real risk to PBGC, we suggest that PBGC allow a simplified Form 200 filing under limited circumstances – such as when the missed contribution has been made by the due date of the Form 200 filing. This simplified Form 200 filing could also be limited to plan sponsors who have not missed any other contributions within a certain period of time. Of course, PBGC retains the right to ask for additional information if warranted.

Multiple active participant reductions
Current regulations sometimes require multiple reports to PBGC when active participant reductions occur in close succession. The 2009 proposed regulations provided a waiver if an active participant reduction had been reported in the previous year. In the preamble to that proposal, PBGC acknowledged that additional reporting was unnecessary because monitoring continues for an extended period after a report is filed. The 2013 proposed regulations eliminate that waiver because the new rules supposedly make it unnecessary. However, we believe the waiver for multiple reports should be reinstated because:

- Q&A 12 of the 2006 Blue Book posits a situation where the active participant count is reduced from 100 in one year to 50 the next, and remains at 50. The Q&A confirms that two separate reportable events have occurred – the first when the active count was reduced from 100 to 50 (more than a 20% reduction over one year), and the second one a year later (more than a 25% reduction over two years). We believe there should be a specific exemption in the newly proposed regulations that would preclude the need for multiple reports in this case.

- The new proposal includes three types of events: a single-cause event, a short-period event, and an attrition event. It is possible that two or more different types of events could occur in a year and require multiple reports. Here too a waiver might be appropriate because PBGC monitoring continues for an extended period after a report is filed. We also note that under the regulations as currently drafted, a reduction that requires a report as a single-cause event or a short-period event could require a second report as an attrition event; this duplicative reporting does not seem to provide any useful information to PBGC. At a minimum, we recommend the regulations clarify that in determining whether a second report is required, any reductions already reported should be disregarded.

As an alternative to reinstating the 2009 proposed waiver, PBGC could clarify how multiple events are to be handled.

The Pension Committee appreciates the opportunity to comment on these proposed regulations and would be happy to discuss any of these items with you at your convenience. Please contact David Goldfarb, the Academy's pension policy analyst (202-785-7868, goldfarb@actuary.org) if you have any questions or would like to discuss these items further.

Sincerely,

Michael F. Pollack, FSA, MAAA, EA, FCA
Chairperson, Pension Committee
American Academy of Actuaries