ERIC

The
ERISA
Industry
Committee

August 6, 2013

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

RE: RIN 1212-AB06 (Reportable Events and Certain Other Notification Requirements)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to questions posed by the Pension Benefit Guaranty Corporation ("PBGC") at the hearing on the Reportable Events and Certain Other Notification Requirements proposed regulations (the "proposed regulations").[1]

ERIC is a nonprofit association committed to the advancement of the employee benefit plans of America's largest employers. ERIC's members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families. ERIC has a strong interest in proposals that would affect its members' ability to provide secure pension benefits in a cost-effective manner.

Responses to PBGC's Questions

ERIC has previously submitted written comments and testimony on the proposed regulations.[2] At the hearing, the PBGC asked ERIC to provide additional details regarding the following matters.

I. Companies will need to restructure their credit agreements as a result of the proposed regulations.

As ERIC explained in its comment letter and testimony, many companies have credit and lending agreements that include "reportable events" disclosures. Specifically, such agreements include language to provide that the occurrence of a reportable event that is not automatically waived constitutes a default event with respect to the outstanding loans *if* the event could result in financial liability in excess of a certain dollar threshold or could cause a "material adverse effect" on the borrower. The PBGC requested more information about the specific challenges faced by employers related to credit and lending agreements as a result of a reportable event.

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[1] Pension Benefit Guaranty Corporation, *Reportable Events and Certain Other Notification Requirements*, 78 Fed. Reg. 20039 (Apr. 3, 2013).

[2] ERIC Comment Letter to PBGC, *RIN 1212-AB06 (Reportable Events and Certain Other Notification Requirements)* (June 2, 2013), available at http://bit.ly/1dVAos4 ("ERIC Comment Letter"). Testimony of Michael J. Francese on behalf of the ERISA Industry Committee Before the PBGC, "*Reportable Events Proposed Regulations*" (June 18, 2013), available at http://bit.ly/15gcFB9 ("ERIC Testimony").

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As a result of further discussions with our members, we provide the following additional information with respect to this issue. We spoke at length to one of our members who had significant issues regarding reportable events.[3] First, although companies regularly negotiate new credit and lending agreements, many companies have long-standing credit arrangements that carry over from year to year. It is not uncommon for these agreements to involve millions of dollars. As a result, they are, or have been, heavily negotiated by the company and the lender. The lenders will typically start the negotiation process by asking for a provision that any reportable event will be deemed a default under the agreement. The companies then have to try to negotiate to include a "materiality provision" in order to limit the "default" trigger to situations where the company is reasonably likely to incur a material adverse effect as a result of an ERISA event, such as a reportable event.

Large publicly-traded companies then need to closely monitor their business operations across multiple business lines, regions and time periods (as different agreements may apply to different parts of the company) to determine if any activities could trigger a reportable event and therefore cause a default of the agreement. If there are any potential reasons to think that a reportable event may occur, the companies need to rapidly assess whether any exceptions could apply. Because it is often unclear what would constitute a "material adverse effect," companies spend considerable time and money to monitor these issues.

For example, many companies have closed their defined benefit plans to new participants. When there is even a relatively small decline in the number of active participants (who typically represent a small and decreasing portion of the total participants), it could result in a reportable event. For example, if there is a downturn in the economy, the plan's investments are likely to decline in value and a small number of active participants may be terminated. As a result of the combination of these two factors, a company may not be able to rely on the current plan funding safe harbor, and therefore default on the agreement as a result of a small decrease in the number of active participants.

A default would likely have very significant consequences for a company. For large public companies, any disclosure of company activities that trigger special regulatory disclosures can have negative effects on analysts' reports, stock prices and public relations. There are certain times, particularly in a downturned economy when credit is often tight, companies may have difficulty renegotiating the agreement or quickly securing replacement financing at similar rates.

By reducing the instances where automatic waivers apply in the reportable events context, companies must spend additional resources to carefully monitor company activities that could lead to a reportable event. Companies may also need to alter their normal ongoing activities to avoid a reportable event. Company lending and credit agreements often reference reportable events. "Materiality" provisions in lending and credit agreements add uncertainty to the impact of reportable events disclosures on company finances. Companies may need to renegotiate long-standing agreements that are not scheduled to expire if there is a potential default event that could have a potentially material adverse effect.

Accordingly, for the reasons expressed above, ERIC has concerns with the PBGC's approach in the proposed regulations to reduce the number of automatic waivers with respect to reportable events.

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[3] At the request of the PBGC, we offered the member the opportunity to discuss this issue directly with the PBGC. However, the member declined the offer.

II. Many financially sound companies secure their receivables to reduce financing costs.

Among other requirements, the proposed regulations' safe harbor for companies would apply only if, on the determination date, a company has no secured debt, other than leases or debt incurred to acquire or improve property and secured only by that property (the "company safe harbor"). The PBGC requested more information with respect to secured debt.

While secured debt had historically been used primarily by companies with lower credit ratings, more and more financially sound companies are using this method of financing. Research indicates that the use of asset-based lending has been steadily rising. The Commercial Finance Association reported that asset-based lending grew by over 6.7% last year.[4] The Secured Lender reported that there is a "growing Main Street acceptance of asset-based loans as a product not just for the company on the downturn, but also for the financially sound and stable enterprise, as well."[5]

Large companies, particularly those that are publically traded, need to be able to use all available methods to keep shareholders satisfied by increasing profits whenever possible. Management is responsible for finding as much savings for the company as possible in order to maximize the company's profits. This includes not only new approaches to utilizing secured debt, but any other methods that may evolve in the future. As noted by the PBGC, the gap between the interest rates charged to healthy companies for secured debt as compared to unsecured debt may not be as great as the gap between interest rates charged to unhealthy companies for secured compared to unsecured debt. Nonetheless, the savings for healthy companies is still enough to make using secured debt worthwhile.

ERIC urges the PBGC to reconsider basing a safe harbor on a plan sponsor's financial health. We believe that the proposed regulations do not support the goals of Executive Order 12866 "Regulatory Planning and Review" and Executive Order 13563 "Improving Regulation and Regulatory Review." These Executive Orders direct agencies to balance additional costs of regulations on companies with a corresponding benefit to the system. Executive Orders 12866 and 13563 direct agencies to maximize *net* benefits, promote flexibility and reduce regulatory burdens on companies. These proposed regulations will require companies to make significant changes to their compliance procedures for reportable events filings. The increased costs associated with these compliance changes do not, in our view, produce corresponding benefits to companies, the PBGC, or participants. As a result, we recommend that the PBGC continue to use the current regulations for reportable events filings.

III. Complying with the proposed regulations would be costly for companies.

As ERIC discussed in its comment letter, the analysis involved with determining whether the proposed regulations' safe harbors are available to the employer will require significant additional resources. The PBGC requested additional information regarding the resources that would be needed.

Companies will need to spend considerable amounts of time having their employees monitor transactions to determine whether they might give rise to a reportable event. They would need to gather and identify relevant data and then work with attorneys and actuaries to make a decision as to

[4] Commercial Finance Association, *Asset-Based Lending Index Shows Lenders Further Increasing Credit Commitments to U.S. Businesses* (Mar. 11, 2013), available at http://bit.ly/17FQu7R.
[5] Myra A. Thomas, *Asset-Based Lending Goes Mainstream*, The Secured Lender (Nov/Dec 2008).

whether a reportable event has occurred and if any safe harbors apply. The information they need is not centrally located, but likely spread throughout the company. The exercise also requires coordination with multiple internal company departments as well as with outside consultants (in many instances). Companies must ensure that the multiple corporate departments and outside consultants review their records carefully to ensure that they have accurate information on which to base their decisions. Furthermore, analyzing such data is time-consuming and expensive both in terms of the diverted use of workers' time as well as hiring outside experts to assist in this process. One ERIC member estimated that the process of monitoring and reporting several reportable events has cost them over $200,000.

Those funds could be better spent on funding the plan. Thus, the proposed regulations result in an additional expense for companies without a significant corresponding benefit for the PBGC or for the security of participants. For the large publicly-traded plans that pose the most risk to the PBGC (*i.e.*, those that are not adequately funded), the PBGC can readily obtain substantial amounts of relevant and publicly available financial information.

IV. Ninety-eight percent of the largest U.S. defined benefit plans will not qualify for the safe harbor for plans that are 120 percent funded on a premium basis.

The proposed regulations include a safe harbor for plans that are 120 percent funded on a premium basis ("premium safe harbor").[6] A recent study indicates that the premium safe harbor would only be available for defined benefit plans where the value of the plan's assets as determined for premium purposes is not less than 120% of the plan's premium funding target for the prior plan year.[7] The PBGC inquired about the details of the study during the hearing.

The study examined the top one hundred U.S. pension plans (the "largest plans") and found that only approximately 2% of these plans had a funded status of more than 120 percent in 2012.[8] Furthermore, only an additional 2% of the largest plans had a funded status of 105% - 120% in 2012. Thus, only 2% of the largest plans would have qualified for the premium safe harbor. Even if PBGC lowered the threshold to 90%, only around 15% of the largest plans would have qualified in 2012.

The study, *2013 Corporate Pension Funding Status*, is available at http://www.milliman.com/expertise/employee-benefits/products-tools/pension-funding-study/.

ERIC urges the PBGC to maintain the existing threshold at 80% of the plan's premium funding target for the prior plan year in order for it to remain meaningful.

V. The PBGC should not create a new approach whereby it uses a limited number of factors in the company safe harbor.

At the hearing, the PBGC inquired whether the proposed regulations' safe harbor for companies would be improved if they provided businesses with the ability to comply with only a limited number of the factors, such as 3 out of 5.

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[6] 78 Fed. Reg. at 20061.
[7] *Id.*
[8] Milliman, *2013 Corporate Pension Funding Status*, available at http://bit.ly/JrSQdM. *See also*, ERIC Comment Letter at 9 and ERIC Testimony at 5-6.

However, even using only a limited amount of the company safe harbor factors would not properly identify at risk plans and would cause significant hardships for plan sponsors who would, nonetheless, be required to monitor all of the factors to ensure that they satisfied the minimum number required to meet the exception. As ERIC discussed in our comment letter, the factors proposed by the PBGC are particularly problematic for large companies. For example, commercial credit reporting companies are not sufficiently reliable and companies would need to constantly monitor their reports. The timing required to comply with the proposed regulations is administratively unworkable and would impose a significant burden on plan sponsors and their service providers.

The proposal would also require companies to change the way they conduct their core businesses. The proposed regulations could require companies to change their agreements and the way they operate their businesses. Companies could need to renegotiate their credit and lending arrangements and plans could have to terminate some of their investment agreements. It would also discourage companies from using secured debt and entering into innovative practices going forward. Therefore, we do not recommend that the PBGC modify its proposed regulations to require companies to comply with a subset of the factors included in the revised proposed regulations. Because we find a majority of the factors to be either misleading or inefficient (meaning that they create additional compliance effort without proportional or correlating benefit), we do not believe that requiring companies to comply with only a subset of the factors would be an improvement to the approach taken in the proposed regulations.

Finally, the proposed regulations reference Executive Orders 12866 and 13563, which emphasize the need to streamline regulations and reduce the economic burden on companies. The PBGC's analysis regarding these Executive Orders appears to be inadequate.[9] First, the PBGC concludes that it has greater risk where the company is not financially sound, however, the PBGC provides scant data to support this conclusion. Second, the PBGC only appears to focus on the impact of the company safe harbor. The PBGC's analysis focuses on 2011 filings. Plans which satisfy existing safe harbors for 2011, such as those based on plan funding, would not be included in the 2011 filings. As a result, the PBGC is only evaluating the impact of the company safe harbor on plans that do not satisfy current safe harbors. Third, the analysis also does not appear to include the amount of work a company must perform to determine if a filing is necessary. A more helpful analysis would: (1) compare the total number of filings under the current rules and the proposed rules; (2) compare the total amount of work performed by a company under the current rules and the proposed rules; and (3) include an explanation and justification of the benefit of any additional filings, if applicable. ERIC believes that the proposed regulations will reduce the availability of safe harbors based on the plan's funded status. We also believe the proposed regulations will result in additional and unnecessary compliance procedures related to reportable event filings, including additional monitoring of corporate activities, ensuring that credit reports are accurate, and making determinations if the company can satisfy the new safe harbors.

Conclusion

In ERIC's view, the proposed regulations would not provide the PBGC with better and more useful information with respect to underfunded plans. We agree with the observation that Deborah

[9] Although the PBGC includes an analysis of 2011 filings, we found this analysis to be confusing. We also believe that it fails to provide adequate justification for the proposed regulations.

Forbes of the Committee on the Investment of Employee Benefit Assets (CIEBA) made in her testimony at the hearing – the PBGC already has the information it needs to identify problematic plans.

Furthermore, a one-size fits all approach does not work for evaluating plan sponsors. While insurers such as the Federal Deposit Insurance Corporation (FDIC) only regulate one industry (i.e., financial institutions), PBGC regulates the plans of companies of every size and in every industry. ERIC encourages the PBGC to recognize that because of the diversity of its stakeholders in both size and industry, there are significant challenges to having a "one-size fits all" approach to reportable events in terms of triggers, disclosures and factors.

ERIC urges the PBGC not to finalize the proposed regulations in their current form. The approach in the proposed regulations is likely to lead to even more companies freezing their defined benefit plans or ceasing to sponsor plans. Instead, the PBGC should recognize that the current regulations are more than adequate to protect the needs of the PBGC and balance its needs with those of its stakeholders.

ERIC appreciates the opportunity to provide additional comments on the proposed regulations. If you have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

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