Re: RIN 1212–AB20

Via e-mail to regcomments@pbgc.gov

These are comments on Regulation Identifier Number 1212-AB20. They are made by Tom Schryer A.S.A. They do not necessarily reflect the opinions of his employer, Findley Davies, Inc.

“The employer would have a week in which to resume activity”

This is not generally practical. Please consider “The employer would have a week in which to begin taking the necessary steps (including planning) to resume activity but undue hesitation in actually resuming activities will result in a cessation being triggered at the point of undue hesitation.”

“Reasonably certain” and “Hope or Expectation”

These two concepts are several paragraphs apart but should be connected. See –

> “any hope or expectation the employer may have that the discontinued work will be resumed would be irrelevant to whether the discontinuance is a cessation” and
>
> “unless, when the discontinuance occurs, it is reasonably certain that the employee will resume such active work within 30 days—for example, after a two-week holiday shutdown. This standard would allow a plan administrator to decide immediately whether a separation occurred when an employee discontinued active work. If, however, the 30 days pass without the employee’s having returned, the employee would be considered to have separated from employment when active work stopped.”

Participation

See “the rehired or replacement employee was a participant in the plan.” Most plans have service requirements before “covered employees” become participants. Please change this to “the rehired or replacement employee was in employment that is – or would have been if the plan had not been frozen to new participants - covered by the plan and the employee has a reasonably customary likelihood of remaining in such employment until meeting the plan’s age and service requirements for participation.”

The first presumption (applicable to a voluntary cessation)

The first presumption relates to an ***involuntary*** cessation so a correction is needed. This then affects the second since it should not include the word “also” after this change.

Cessation Process

“For a voluntary cessation, carried out pursuant to an employer decision, that decision marks the beginning of the cessation process, and the active participant base would be measured immediately before that decision.” Think about the classic business transition: Buggy Whip Company of Detroit has just announced that – even though sales remain steady and prospects are decent – they will begin making steering wheel covers and upholstery for cars. The company's termination rate ticks up 10% (from 4% annually to 4.4% annually) as some employees leave to join Henry Ford's crew. That appears to start the process according to the proposed rules. Eight years go by before they decide to give up the factory making buggy whips. I suggest a new phrase: "For a voluntary cessation, carried out pursuant to an employer decision, that decision (or, if later, when a downsizing rate of what appears to be at least 20% per year begins) marks the beginning of the cessation process, and the active participant base would be measured immediately before such time."

<u>Penalties</u>

If true, the rules should at least allude to the fact that some penalty rates are ***per participant*** (or whatever).

<u>Liability</u>

Two issues about how the liability (determined by the PBGC apparently) is calculated came to mind and should be clarified. The proposed rules say "should not take account of changes in assets or liabilities after the cessation date." The "cessation date" seems pretty clearly to be after the primary attrition at the facility but would be before the secondary attrition at other locations that pushes the attrition percentage over 20%. Since often terminated employees who are entitled to immediate early retirement pensions in such circumstances defer such pensions while unemployment benefits run out it would be good to clarify how the liabilities for those are valued.

<u>Misleading section title</u>

We suggest changing -

> "(c) *Follow-on operations disregarded." to*

> "(c) *Follow-on operations disregarded (except for determining the percentage decrease in the active participant count)"*

<u>A new, financially sound employer continues</u>

The PBGC wants to provide clear rules for the defined benefit plan community and make them well reasoned enough to have courts give deference to the PBGC's policies. One section lacked such clarity. We propose changing **–**

> "Or, in appropriate cases, where a new, financially sound employer continues or resumes an operation, and the original employer's workers are employed by the new employer, the proposed regulation would enable PBGC to consider the original employer's liability satisfied through the new employer's adoption of the original employer's plan (or the portion of the plan covering the affected operation)" to

> "Or, in appropriate cases, where a new, financially sound employer continues or resumes an operation, and the original employer's workers are employed by the

> new employer, the proposed regulation would provide that the PBGC will customarily consider the original employer’s liability satisfied through the new employer’s adoption of the original employer’s plan (or the portion of the plan covering the affected operation) unless the PBGC's investigations indicate that the plan's future financial prospects have been downgraded materially."

PBGC needs this information

The reference to unions seems a bit tangential to that purpose. Press releases might be related to the PBGC’s duties.

Size

We have experience with these events and the assertion "should make compliance relatively easy" is, in our experience, not remotely accurate and have sent such a commentary to OMB in accordance with the procedures when rules are open for public comments. We estimate an expense of $25,000 per case. That is truly burdensome for a smaller case. Having driven through a lot of the country recently while on vacation noting the freshly shuttered small businesses the assertion that "this rule will not have a significant economic impact on a substantial number of small entities" should either be changed or the quantitative analysis that the PBGC used should be presented (a link to a separate web page would suffice, if it provides enough detail). The assertion "4062(e) is generally not relevant for small employers" also seems strained since a manufacturing facility within a small business might well be shut down for a period of years while the business continues on using existing inventory and outside production facilities. **Section 604(b) of the Regulatory Flexibility Act** should almost undoubtedly be directly and fully addressed in the final rule including "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes" as so required.

Compliance with all laws, meeting the reasonable objectives outlined in the proposed rules, avoiding putting smaller enterprises who offer defined benefit pension plans at an economic disadvantage versus their counterparts who do not provide such benefits, avoiding undue damage to the economy (especially during the current phase), managing your own workload, and focus of resources can be improved if you include -

> "If the actuary for a plan with fewer than 1,000 active participants certifies that the gross liability for accrued plan benefits has not increased by more than 10% as a result of the event, only simplified initial reporting will be required. Such initial reporting should include that signed statement and a brief description of the plan, the event, the number of affected employees, and the employer's near-, mid-, and long-term viability. The PBGC will then review its records to decide the extent to which it should pursue these matters while acknowledging the objectives of the Regulatory Flexibility Act."

Conclusion

Thank you for your attention and the real progress you have already made in this regard.

If you have any questions or comments please contact Tom Schryer, A.S.A. at 216/875-1917 or at tschryer@findleydavies.com.

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Dear Sir or Madam:

Regulation Identifier Number (RIN) 1212-AB20

This letter is the response of Towers Watson to proposed changes to PBGC's regulation regarding ERISA section 4062(e) as published on August 10, 2010 in the Federal Register.

Towers Watson is a leading global professional services company specializing in employee benefits, human capital strategies, and technology solutions. Towers Watson was established on January 1, 2010 as a combination of the former Watson Wyatt and Towers Perrin, and employs approximately 14,000 associates on a worldwide basis. Our more than 600 Enrolled Actuaries under ERISA provide actuarial and consulting services to more than 1,500 defined benefit plans in the U.S. The undersigned have prepared our firm's response with input from others in the firm.

We support the effort PBGC is making to better define the rules regarding events that trigger reporting under ERISA section 4062(e). Further, given the fact that 4062(e) events may, in some cases, be indicative of a sponsor's poor health, we understand PBGC's desire to cast a wide net in the application of 4062(e), and to obtain information in a timely fashion to protect participants and the pension insurance system. However, PBGC's desire to apply 4062(e) in a broad range of situations, and resulting need for information, must be constrained by its statutory authority and balanced against the increased administrative and financial burden placed on defined benefit plan sponsors. In particular, we believe the PBGC's proposed definition of a 4062(e) event inappropriately expands the range of transactions potentially subject to reporting and, through negotiation with PBGC, significantly accelerated funding requirements not otherwise required under current pension funding law. In addition to modifying the definition of a 4062(e) event, we believe that certain waivers for reporting and liability imposition should be provided to cover the many situations in which there is no substantial increase in risk to the PBGC.

Specifically, we believe that the proposed regulation strikes the wrong balance in a number of respects and, if implemented as proposed, could contribute to the trend away from defined benefit plans. In particular:

1. **Scope.** The expansive interpretation of a section 4062(e) event taken by the PBGC in the proposed regulations (which we believe is inconsistent with the language in the statute and prior PBGC guidance) could sweep in many routine business transactions, such as changing product lines, moving to another facility (even a nearby facility which is simply more efficient or better suited to the plan sponsor's needs), or selling a business, even if the transaction poses no additional risk (or actually reduces the risk) to the PBGC and participants. The statute refers to "cessation of operations at a facility", not "cessation of an operation". We believe the expansion of the scope of 4062(e) beyond what the statute provides is beyond the PBGC's authority, destructive to the voluntary pension system, and will have unintended and detrimental effects on businesses which sponsor pension plans.

2. **Lack of specificity.** The proposed regulations are vague in many areas, likely leading to inconsistent interpretation of the regulation among different plan sponsors and between plan sponsors and PBGC. This situation exposes plan sponsors to potentially onerous penalties for not filing in situations in which they have reasonably determined that a 4062(e) event has not occurred. Given the requirement to preserve records for five years about potential section 4062(e) events, it also creates a burdensome need to maintain data in situations in which the plan sponsor has determined in a reasonable manner that a 4062(e) event has not occurred, including the potentially very significant data needed to calculate plan termination liabilities in case the PBGC should subsequently determine that a 4062(e) event did in fact occur. And most importantly, it puts plan sponsors in the untenable position of not being able to make routine business decisions with certainty about whether such actions will trigger a significant acceleration of funding under the plan or some other financial arrangement to be negotiated with PBGC.
3. **Compliance issues.** The regulations create practical compliance problems for sponsors (e.g., requiring sponsors to "get into the minds" of employees to determine if their voluntary departures were the result of an impending 4062(e) event).
4. **Automatic waivers.** The proposed regulation does not include automatic waivers for well-funded plans, small plans, or other situations which pose relatively little risk, or no additional risk stemming from the 4062(e) event, to the PBGC and participants.

We discuss each of these in more detail below. We also address interpretations in the proposed regulations that are inconsistent with the statute and note where additional clarification would be helpful.

<u>Scope of the proposed regulation</u>

- ***"An operation" vs. "operations."*** The most significant and troubling aspect of the proposed regulation is the re-defining of a 4062(e) event. The proposed regulation requires merely "cessation of an operation", rather than "cessation of operations" as provided by the statute, greatly expanding the number of events which will trigger 4062(e). Under the proposed regulation, if a facility has multiple operations, a cessation of one of those operations may result in a section 4062(e) event. However, the statute literally would require all operations at a facility to cease before a 4062(e) event can occur. We request that PBGC observe the clear wording of ERISA in this regard.

- ***Effect on routine business decisions.*** Under the proposed regulation, a number of routine business transactions (e.g., selling a business, moving to a more modern, efficient facility, or changing product lines), could result in a "cessation of an operation" (and, if a sufficient number of active participants are separated as a result, trigger section 4062(e)) even if the event poses no risk – or reduces the risk – to the PBGC and participants.

  <u>Asset sales</u> **-** Under the proposed regulation, a sale of assets would be treated as a cessation of an operation at a facility even if the purchaser continues the operation at the same facility with the same employees and, if 20 percent of the employees participating in a plan are transferred in the sale, section 4062(e) would be triggered. We disagree with this interpretation. Under these facts, there has been no "cessation of operations" and no employees have been "separated from employment," as contemplated by the statute. Although the legislative intent of this provision is unclear, we believe that a literal reading of ERISA indicates that a cessation of operations occurs when an employer actually shuts down a facility and operations actually cease. This makes sense since such circumstances may be a sign of current or impending financial trouble and a bond or escrow protects the PBGC against a potential distress termination. PBGC has also successfully used its Early Warning Program to monitor such situations and provide additional protection to PBGC where warranted.

  At the very least, PBGC should not apply section 4062(e) in situations involving arms-length transactions where the new employer continues the operations at the facility, the original employer's workers are employed by the new employer, and the new employer adopts the original employer's plan (or assets and liabilities related to such employees are transferred to a plan of the new employer). This is a reasonable interpretation of the statute that PBGC has agreed with in the past. For example, see PBGC Opinion Letters 76-52, 77-147, 78-29, 82-29, 85-8 and 86-13.

In addition, we believe PBGC's interests are adequately served through the Early Warning Program and current reportable event requirements, even where the new employer does not adopt the original employer's plan or accept a transfer of assets and liabilities (e.g., active participant reduction (4043.23), reporting of a change in contributing sponsor or controlled group (4043.29), plan merger, consolidation or transfer (4043.28), or transfer of benefit liabilities (4043.32)) We do not believe that PBGC, plan sponsors or plan participants are well served by piling on multiple reporting requirements for the same event.

We note that the proposed regulation would enable PBGC to consider the original employer's liability satisfied if a new, financially sound employer continues or resumes the operation, employs the same employees, and adopts the original employer's plan, or if assets and liabilities of affected employees are transferred to a plan sponsored by the new employer. However, burdensome reporting would still be unfairly imposed and there would be no certainty that PBGC would actually take such a position in any given case. As mentioned previously, the potential for a 4062(e) event and associated liability may unnecessarily inhibit companies from taking normal business actions in many situations where such actions would pose no increase in risk to the PBGC. We suggest that the regulation contain waivers for these situations so that companies can act with certainty rather than rely on the discretion of PBGC.

<u>Stock sales and spin-offs</u> - The proposed regulation does not specifically address stock sales or spin-offs. Because the employer does not change at the moment of the transaction under either of these situations, the regulation should specifically provide that such event does not result in "separations from employment" and thus 4062(e) does not apply.

<u>Moving an operation or undertaking a new operation</u> - Under the proposed regulation, moving an operation from one facility to another (e.g., moving/updating from an out-of-date facility to a new state-of the-art facility) or changing operations at a facility (e.g., in response to changing customer demands or seasonal changes in consumer buying patterns) would result in a cessation of operations (and trigger 4062(e) if there is a 20 percent drop in the active participant-count).

In these situations, we do not believe there has been a "cessation" of operations as contemplated by the statute. Moreover, it is difficult to see what interest the PBGC would have in these routine business operations. There is no reason to think that a sponsor is in financial distress simply because an operation has been moved to another facility or operations at the facility have changed. PBGC should not apply section 4062(e) to routine operations such as these entered into by companies for legitimate business reasons since to do so is inconsistent with the statute and the increased burden on sponsors is not justified by an increased risk to PBGC or participants. The increased funding of the pension plan and/or posting of security with PBGC potentially caused by such routine company actions could be a disincentive to engage in them, making the company financially weaker.

We note that the proposed regulation indicates that PBGC may assess risk in making arrangements for purposes of satisfying the 4062(e) liability. However, burdensome reporting would still be required and there would be no certainty that PBGC would exercise this authority in any given case. The uncertainty will greatly complicate employer business decisions and could lead employers to forgo actions which absent 4062(e) are clearly in the company's, employees', and PBGC's best interests.

Lack of specificity

There are also numerous interpretive issues related to these provisions.

- ***Geographic proximity.*** Can geographically dispersed buildings constitute one “facility” such that moving operations from one building to another would not result in a cessation of an operation under the rule described above?

  The proposed regulation defines the term “facility” or “facility in any location” associated with an operation as “the place or places where the operation is performed” and indicates that a facility may include multiple buildings. Although the proposed regulation does not discuss whether geographically dispersed buildings may constitute a “facility,” the use of the phrase “place or places” suggests this is possible. Assuming this is correct, how far apart may the buildings be?

  We recommend that PBGC confirm that, for purposes of determining whether there has been a cessation of operations at a facility, significantly geographically dispersed operations are not considered to be a single facility. For example, if a plan sponsor operates 200 retail stores nationwide, and closes ½ of them, the regulation should make clear that this would be treated as 100 facility closings, none of which would be likely to result in a reduction of 20% of the active employees participating in the plan. Of course, to the extent employees of these stores constitute a significant part of a plan’s active participant population, this event would be reportable to PBGC as an active participant reduction reportable event (4043.23).

  By contrast, buildings that are in a reasonable proximity to one another should be able to be treated as a single facility. For example, a plan sponsor should be able to move operations into a new, more efficient facility within the same geographic region without triggering 4062(e) liability, despite the fact that some employees whose commutes are adversely affected may decide to terminate employment as a result. We propose that a new facility which continues the operations of the original facility and is within a prescribed distance of the original facility be considered part of the original facility. Without such a provision, companies will be in an untenable position in which outgrowing a facility, losing a lease, or simply desiring a more efficient facility can result in triggering significant 4062(e) liability.

- ***Operation.*** As discussed above, we believe PBGC should employ the statutory definition, requiring “cessation of operations”. However, if PBGC defines a 4062(e) event as potentially occurring whenever there is a “cessation of an operation”, in order for sponsors to determine whether a new operation has begun and an existing operation has been discontinued, it is necessary to further clarify the term “operation.” For example, does a relatively routine change in product lines produced by a factory in response to changing customer demands constitute a “cessation of an operation”?

  The proposed regulation defines the term “operation” as a set of activities that constitutes an organizationally, operationally, or functionally distinct unit of an employer. The proposed regulation also indicates that whether a set of activities is an operation depends on how it is treated in the relevant industry, in the employer’s organizational structure or accounts, in relevant collective bargaining agreements, by the employer’s employees or customers, or by the public.

  This definition is highly subjective and will mean different things to different individuals. PBGC should clarify the term “operation” in the final regulations. We note that the preamble includes an example that treats manufacturing and shipping as separate operations. Other examples would also be helpful.

However, beyond simply providing examples, we recommend that PBGC not use the public's or customers' views of product lines as being separate to determine whether separate operations exist. For example, if a manufacturing plant produces different products seasonally (e.g., winter holiday decorations and patio furniture), the regulations should be revised to be clear that the seasonal changes in product lines do not result in "cessation of an operation", and any reasonable down-time needed to switch between product lines does not constitute a cessation of an operation either. PBGC should also provide examples that confirm that manufacture of related items or items requiring similar components (e.g., cars vs. trucks, different types of paper products, lawnmowers and motorcycles) do not constitute separate operations. Without such clarification, plants which produce different products at different times may be treated as having a cessation of operations (particularly if there is some down-time needed to switch the product lines). There is no justification under the statute for having such business decisions influenced by the likelihood of triggering a 4062(e) event, particularly since the statute refers to "cessation of operations, not "cessation of an operation".

- ***"Significant" activity.*** Under the proposed regulation, an employer is considered to cease an operation at a facility when the employer "discontinues all significant activity at the facility in furtherance of the purpose of the operation."

  The regulation does not define "significant." However, according to the preamble, continued processing of materials on hand would typically constitute significant activity in furtherance of the purpose of an operation. On the other hand, sales of left-over inventory would typically not. Also, continuing activity that does not further an operation's purpose (e.g., maintenance and security activities) would be disregarded.

  Further guidance on the meaning of "significant" is needed. For example, if production is scaled back by 80 percent due to decreased demand, has there been a cessation? What about 90 percent? Given the potentially significant 4062(e) liability, penalties for failure to file and the requirement to maintain a significant amount of data in any case where a 4062(e) event may have occurred, undefined terms like "significant" are troublesome.

- ***Aggregation of unrelated events.*** If the "cessation of an operation" approach is adopted, we recommend that the regulations clarify that headcount reductions from unrelated cessations of unrelated operations at a single facility are not aggregated for purposes of meeting the 20% threshold.

In summary, plan sponsors need guidelines that are specific enough that they can be comfortable that if they reasonably apply the guidelines to determine each of their individual "operations", then that determination will not be second guessed or overruled, resulting in potential penalties and significant unanticipated consequences of an employer action.

Compliance issues

Given the expansive scope of the proposed regulation, virtually every defined benefit plan sponsor, even if they are financially healthy and their plan is fully funded, will need to watch for transactions that might constitute a cessation of operations. Once it is determined that there has been a cessation of an operation at a facility, the sponsor would then need to track separations and make a determination as to whether the separation "resulted" from the cessation.

Under the proposed regulation, a separation is considered to "result" from the cessation if the separation would not have occurred when it did if the employer's cessation of the operation at the facility had not occurred. This standard is particularly troublesome with respect to employees who voluntarily separate from employment. For example, under the proposed regulation, if an employee had been planning to retire in a year or two but chose to retire sooner upon learning of a shutdown, the separation would be the result of the shutdown. On the other hand, if (before learning of the shutdown) the employee had been planning to retire immediately and retired as planned after learning of the shutdown, the separation would not be a result of the shutdown. Clearly an employer would have a difficult time making determinations under such a standard (which relies on knowing the state of mind of an employee and how or whether his or her decision was influenced by an event). Further, it would be administratively burdensome for an employer to set up a system to routinely elicit such information (e.g., through exit interviews). PBGC's idea of establishing rebuttable presumptions is helpful. However, the presumptions that apply under the proposed regulations (i.e., treating all separations occurring on or after the earliest date the employer decision to cease operations becomes known, and all involuntary cessations occurring after the employer has made the decision resulting in the 4062(e) event, as having resulted from the cessation) does not seem appropriate since, in practice, it will result in all turnover after the decision becomes known being classified as resulting from the cessation and all involuntary termination after an earlier date also being so treated (even if managers making termination decisions are not aware of the decision). As is the case with the definition of a cessation of operations, we believe this is too expansive a view of the terminations resulting from a cessation.

As an alternative, we would suggest a presumption that treats an individual who voluntarily separates at an age when subsidized early retirement benefits are available or at or after normal retirement age as not having separated as a result of the cessation. In addition, plan sponsors should be able to carve out an estimate of the "normal level of turnover", based on recent historical patterns. Consider a plan sponsor who announces that a facility is closing in 12 months, during which time period the employer does not expect to replace voluntarily terminated employees. If the employer's turnover has recently averaged 10% per year, voluntarily terminating employees up to 10% of the number of employees at the time of the announcement should be able to be considered "normal attrition" and there should be a rebuttable presumption that such terminations are not as a result of the 4062(e) event.

Automatic waivers

The proposed regulation includes a provision explicitly authorizing PBGC to grant waivers where warranted by the circumstances. However, it does not include automatic waivers for well-funded plans or small plans (e.g., fewer than 500 participants), despite the fact that the potential exposure to the pension insurance system with respect to such plans is likely to be relatively small and does not justify the administrative burden and cost of compliance.

In the preamble, PBGC notes that the better a plan is funded, the lower (other things being equal) would be its liability for a section 4062(e) event, and if a plan were so well funded that it had no termination liability under ERISA section 4062(e), its liability for a section 4062(e) event would be zero. PBGC also notes that, to the extent small plans present less underfunding potential than large plans, the liability under section 4062(e) will also be less. However, sponsors and administrators of such plans would still incur the expense of monitoring for 4062(e) events and, on the occurrence of a 4062(e) event, compiling a significant amount of information and documentation and preparing Form 4062-E. Sponsors and administrators would also be required to preserve records about potential 4062(e) events for five years. In addition, such sponsors may be required to perform complex and expensive calculations to determine the plan's funded status on a plan termination basis. Perhaps most importantly, such sponsors may find that concern over these issues interferes with the normal course of running their businesses and inhibits them from taking routine actions that are in the best interest of their business.

We believe that the additional burdens placed on these plan sponsors are not warranted, given the relatively small risk to the system. Also, as we have repeatedly seen with respect to ERISA 4010 reporting, waivers for well-funded plans provide an incentive for sponsors to keep their plans well-funded so as to avoid the burdens and costs of reporting and, in the case of 4062(e), the much more significant potential 4062(e) liability. We believe that plan sponsors, participants and the pension insurance system are all better served by having such automatic waivers.

We believe that PBGC should also consider providing exemptions in situations in which the event itself poses no increased risk to PBGC and the existence of the event is not indicative of an increase in PBGC's risk. The classic example of this is a largely inactive plan which has only a handful of active employees participating. The risk such a plan poses to PBGC is completely independent of the number of such active employees (since the funding for that plan is clearly not being supported by the operations in which such employees are engaged), and it defies logic that a 20% reduction in that handful of employees (e.g., from 5 to 4) should trigger potentially very large 4062(e) liability.

Other Comments

- ***Plan status.*** The final regulations should explicitly provide that the applicability of a section 4062(e) event is based solely on the plan as it is constituted on the cessation date, and not involve any look-back to the plan's status at any earlier point in time.

- ***Timeframe for separations.*** The proposed regulation provides that a separation occurring before, on, or after the cessation date may be as a result of the cessation. According to the proposed regulations, an operation may not cease instantaneously, and some employees may leave before the cessation date because the operation in which they are employed is in the process of shutting down, although significant activity in furtherance of the purpose of the operation is still ongoing. However, the proposed regulation does not provide a timeframe for making this determination. For example, is it possible for a separation that occurs five years after the cessation date to "result" from the cessation? PBGC should set a reasonable period of time surrounding the cessation date as a boundary.

- ***Involuntary cessations.*** Under the proposed regulations, two situations are considered to be "involuntary" cessations and special rules apply. In each situation, a cessation would occur not when all significant activity stopped, but at a later date – unless the employer in the meantime resumed the operation (in which case there would be no cessation) or decided not to resume it (in which case the cessation would occur when such decision was made).

  The first special rule applies if the discontinuance of activity is caused by employee action such as a strike or sickout. In that case, the cessation date is the date when the employee action ends, unless within one week after that date the employer has resumed significant activity at the facility in furtherance of the purpose of the operation. The second special rule applies if the discontinuance of activity is caused by a sudden and unanticipated event such as a natural disaster. In that case, the cessation date is considered to be 30 days after the discontinuance.

In both of these situations, the timeframes for resuming significant activity appear unnecessarily short. For example, after a major storm or flood, it may take some time for damaged buildings to be repaired and reopened. This adds another issue and another potentially major expense for such an employer to deal with at a time when the employer is already trying to handle a difficult situation. Rather, PBGC could require that operations resume within a reasonable period of time based on a facts and circumstances determination taking into account the level of disruption caused by the event, with a rebuttable presumption after one year in either of these types of situations that operations have ceased. Alternately, there could be no set time limit - cessation is based only on an affirmative action (for example, sale of the damaged property) or a decision not to resume operations.

- ***Seasonal operations.*** Under the proposed regulations, employers engaged in seasonal operations could face 4062(e) liability every year. Consider a plan sponsor which operates amusement parks, or baseball stadiums. The proposed regulation requires that the "expectation of resumed operations" be disregarded. The regulations should accommodate seasonal businesses, such that the typical seasonal variations in employment levels do not trigger 4062(e). In addition, seasonal shifts in product lines (i.e., a factory producing tee shirts in the summer and sweaters in the winter) should be accommodated in the event that the previously discussed broader issues regarding the definition of a cessation are not addressed.

- ***Late filing penalties.*** PBGC indicated that failure to timely report a 4062(e) event may result in substantial harm to participants and PBGC and may warrant penalties larger than the "general" ($25/$50-per-day) penalty under the PBGC penalty policy. Given that the key terms in the proposed regulation for determining whether a section 4062(e) event has occurred are defined in a subjective fashion (i.e., there is no bright line test for determining whether a 4062(e) event has occurred), this seems extraordinarily unfair. PBGC should not apply penalties larger than the general penalties in these situations in the absence of evidence of willful disregard of the requirements of 4062(e). Also, PBGC should exempt an employer from penalties altogether if the employer made a determination, based on a reasonable, good faith interpretation of the rules, that such an event had not occurred.

In summary, PBGC should consider its statutory authority and the implications of the proposed rule on defined benefit plan sponsorship, and avoid unnecessarily burdensome requirements that might further accelerate the decline in defined benefit plans.

Thank you for the opportunity to comment on the proposed regulation. If your staff has any questions concerning our comments, please contact either of the undersigned directly.

Sincerely,

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October 12, 2010

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Re: RIN 1212-AB20
Comments regarding Proposed Regulations under ERISA Section 4062(e)

Dear Sir or Madam,

I am writing to comment on the proposed regulations amending your Liability for Termination of Single-Employer Plans regulations under ERISA Section 4062(e). The proposed regulations were published in the Federal Register on August 10, 2010.

We have significant concerns regarding the overly broad scope and inflexibility of the proposed regulations. The intent of ERISA Section 4062(e) was to protect the Pension Benefit Guaranty Corporation ("PBGC") when an employer who sponsors a defined benefit pension plan is restructuring its business and significantly reducing its workforce as a result. The proposed regulations are unfair in that they impose liability on any employer that has experienced a work stoppage for any reason for even short periods of time, such as 30 days. In addition to these concerns, we are worried that the PBGC may attempt to apply the concepts and rules set forth in the regulations to events that occurred before the final regulations are issued. We request clarification in the final regulations that the PBGC will not do so.

Our specific comments on the proposed regulations are as follows:

1. **The time period under the proposed regulations in which an employer must resume operations after an "involuntary cessation" other than a cessation caused by employee action is too short and not sufficiently flexible.**

Proposed regulation Section 4062.26(b)(1) provides that, in the event of a discontinuance caused by employee action such as a strike or sickout, the employer has one week after the employee action ends to resume operations. This strict one-week rule does not take into account the myriad of issues and circumstances that an employer must consider and manage when resuming operations after a strike or sickout. This is especially true if the strike or sickout has lasted for any lengthy period of time.

In addition, under proposed regulation Section 4062.26(b)(2), if the employer does not resume activity within 30 days after an operation has been discontinued due to any other "sudden and unanticipated event ... such as a natural disaster," a cessation of operations will have been deemed to occur under Section 4062(e), even if the situation that caused the discontinuance has not yet been abated. The 30 day period is unreasonably short in the event that a natural disaster or environmental problem damages a facility or the surrounding infrastructure and forces an employer to cease a facility's operations until repairs can be made.

We believe that the final regulations should acknowledge that certain circumstances may leave an employer unable to resume operations within a strict one week or 30-day time period, as applicable. Therefore, we suggest that the final regulations provide that no cessation of operations occurs while an employer reasonably expects to resume operations at a facility following a temporary involuntary discontinuance of activity and takes reasonable steps to reopen the facility as soon as practicable. In addition, a cessation of operations for purposes of a Section 4062(e) event should not be deemed to occur until the event that has caused the involuntary cessation of active has ceased to impact the facility's operations.

2. **The definition of "operation" under the proposed regulations expands the reach of the regulations beyond the intent of the statute.**

Under the proposed regulation, an ERISA Section 4062(e) event is triggered if an employer ceases an operation at a facility. Proposed regulation Section 4062.24 defines "operation" as "a set of activities that constitutes an organizationally, operationally, or functionally distinct unit of any employer," and the PBGC considers, among other things, how the activities are treated in the relevant industry, in the employer's organizational structure, or by the public, in its determination of whether a particular set of activities is an operation. Furthermore, under proposed regulation Section 4062.25, a single facility may be associated with more than one operation.

By contrast, the language of ERISA Section 4062(e) provides that a Section 4062(e) event occurs only if an employer ceases "operations" at a facility and, as a result of such cessation, 20 percent or more of the employees who are plan participants are separated from employment. Section 4062(e) had been understood to be triggered only if an employer closed a particular facility and ceased to perform substantially all operational activities at that location. However, the language of the proposed regulations expands upon this provision and could trigger a Section 4062(e) event if the employer ceases one, but not all, distinct types of operational activities at a particular facility.

In addition, under the proposed regulations, a cessation of operations for purposes of a Section 4062(e) event could occur even if the activity is moved to a different location or if the employer substitutes one type of activity for another.

Section 4062(e) is meant to protect the PBGC in the event of a closure of a facility, which can signal employer distress. The proposed regulations' test of whether a set of activities is an operation for purposes of Section 4062(e) would result in the imposition of liability on an employer in many circumstances, such as a reorganization of operations beneficial to the employer, that do not justify concerns about the funded status of the employer's pension plan.

We appreciate this opportunity to comment on this proposed regulation and your consideration of these comments. If you have any questions about these comments, please contact us.

Very truly yours,

Davis Wright Tremaine LLP

E.Y. Deckman

Elizabeth Deckman
Partner

AMERICAN BENEFITS COUNCIL

October 12, 2010

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

RE: RIN 1212-AB20

Dear Sir or Madam:

I am writing today on behalf of the American Benefits Council (the "Council") with respect to the proposed regulations under ERISA section 4062(e). The Council is a public policy organization principally representing 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 recognizes the difficult mission of the Pension Benefit Guaranty Corporation (the "PBGC"). The PBGC is charged with:

- Encouraging the continuation and maintenance of voluntary private pension plans for the benefit of their participants;
- Providing for the timely payment of benefits under covered plans; and
- Maintaining premiums at the lowest level needed to carry out its responsibilities.

In these economic times, balancing those missions is quite difficult. The Council has worked with PBGC in the past on this delicate balancing process and we look forward to future work together. It is in that spirit that we deliver this message. We believe that the proposed regulations under section 4062(e) should be withdrawn. The proposed regulations would:

- **Go beyond the Congressional intent underlying the enactment of section 4062(e), as evidenced in part by the fact that the proposed regulations are not consistent with longstanding written positions of the PBGC.**
- **Give the PBGC the power to rewrite the carefully crafted funding rules that Congress has enacted.**
  - **As discussed below, as frozen plans age, it will be difficult in many cases to avoid triggering section 4062(e) liability through insignificant transactions. The proposed regulations explicitly state that PBGC may well use these occasions to require (1) funding beyond the amounts required by law, and (2) credit balance waivers. This result is very concerning. Congress' carefully crafted rules should only be modified in extreme circumstances, not as a result of de minimis normal transactions.**
- **Interfere with normal business operations and transactions.**
  - **In effect, the proposed regulations would be placing a severe toll charge on normal business transactions. Companies with healthy plans that want to engage in a normal business transaction may have to pay hundreds of millions—or billions—of dollars extra, either into escrow or in addition to the otherwise applicable funding requirements.** ***This would do great harm to the economy and would have a severely negative effect on businesses' efforts to retain jobs and compete in the global market. In short, this regulation is in direct conflict with the efforts of the Administration and Congress to stimulate the economy*****.**
- **Apply sanctions on plan sponsors maintaining well-funded plans that do not pose a threat to the PBGC.**
- **Have an extremely adverse effect on companies' willingness to maintain defined benefit plans. Companies without defined benefit plans would be able to freely enter into normal business transactions; companies with such plans would be severely restricted with respect to such transactions. Accordingly, the movement to freeze and even terminate defined benefit plans would greatly intensify, which is in conflict with PBGC's statutory mission.**

Following the withdrawal of the proposed regulations, we urge PBGC to propose new regulations that are clear, administrable, and consistent with Congressional intent. These new regulations should address all of the specific problems identified in this letter and should focus section 4062(e) on plans and transactions that pose real risks for the PBGC. Such new regulations should include clear safe harbors that exempt plans and transactions that do not pose such a risk, and should recognize that financial backing for a plan comes from the entire controlled group maintaining the plan—not just discrete operations within a controlled group.

Section 4062(e)

Section 4062(e) provides as follows:

> If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 4063, 4064, and 4065 shall apply.

The statute is clearly aimed at employers that shut down all operations at a single facility. Section 4062(e) gives the PBGC the power, in such cases, to require the employer to provide the PBGC with short-term security in the form of a bond or escrow amount based on the plan's unfunded termination liability.

In fact, as discussed below, PBGC itself has followed this approach in all formal guidance issued prior to the proposed regulations. The proposed regulations actually formalize a complete reversal of PBGC's prior position.

Proposed regulations

The proposed regulations expand the scope of section 4062(e) beyond the Congressional intent. Examples illustrate this expansion. For purposes of these examples, please assume that the plan has a funding target of $5 billion and assets valued for funding purposes at $5 billion, so that the plan is 100% funded under the funding rules. Assume, however, that under the assumptions used by PBGC, the plan has a termination liability of $6 billion, so that the plan has $1 billion of unfunded termination liability.

Example 1. A profitable plan sponsor sells a business unit that includes 25% of the active employees who are participants of the plan. All employees of the business unit become employed by the buyer, so no one loses his or her job, there is no shutdown of a facility, and there is no signal of any weakness on behalf of the plan sponsor. Yet the plan sponsor has a liability under section 4062(e) of $250 million (i.e., 25% of the $1 billion unfunded termination liability).[1] Thus, the plan

[1] The proposed regulations state that if the buyer assumes the part of the plan covering the transferred employees, the PBGC "may permit" the section 4062(e) liability to be deemed to be satisfied. Since the PBGC has the discretion to settle the liability under section 4062(e) in all cases, we view this part of the

sponsors must either place $250 million in escrow for the PBGC, post a bond for $375 million, or agree to other terms prescribed by the PBGC.[2]

The proposed regulations' application of section 4062(e) to this situation is a reversal of PBGC's consistent written position, dating back many years. See PBGC Opinion Letters 86-13, 85-8, 82-29, 78-29, 77-147, 76-52, and 76-89.

Example 2. Same as example 1, but with more detail. The plan was completely frozen in 1995, so that it only has 500 active employees who are plan participants. The company itself has 35,000 employees. So in this example, a $250 million liability is triggered by the transfer of 125 employees—.36% of the employer's employees—to another business.

The plan is 100% funded, the company is doing well and poses no threat to the PBGC, and the company engages in a de minimis and normal transaction that has almost no effect on its business operations. Yet the proposed regulations would create a $250 million liability.

Example 2 is a scenario that will in the near future be confronted by countless plans. Plans across the country have been frozen, so that over time the number of active employees who are plan participants will dwindle to very small numbers. Accordingly, tiny business transactions of no real significance will trigger enormous liabilities under section 4062(e).

Example 3. The plan is maintained for a business unit that is very profitable and expanding rapidly. Due to the unit's growth, and its marketing success in another area, the unit needs to move to a bigger site in a different part of the country. Twenty-five percent of the work force chooses not to move; all of these employees are replaced by new employees. And many more employees are hired due to the business expansion. None of the new employees become plan participants (either because the plan has a one-year waiting period or the plan is frozen to new hires). This rapidly growing profitable company maintaining a fully funded plan would have a $250 million liability under the proposed regulations, a result inconsistent with PBGC's prior written position. See PBGC Opinion Letter 77-134.

Please note that under the proposed regulations, this result would occur even if the business unit only occupied part of a facility, so that the facility is not shut down, a result clearly not covered by the statutory language quoted above.

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regulation as having no real significance. The PBGC still has the power to impose an enormous penalty on the employer for a normal business transaction.

[2] A sale of business assets would clearly trigger section 4062(e) under the proposed regulations, and a sale of the stock of a subsidiary may also.

Example 4. A bad storm causes damage to a company facility where 25% of a company's workers covered by the plan are employed. It takes five weeks to repair the facility, during which time the company's other facilities are able to absorb the extra work. All workers employed at the damaged facility are paid for the five-week period and resume their duties at the end of the period. The proposed regulations would impose a liability of $250 million on the plan sponsor, again a result clearly inconsistent with the statute, since the facility was never shut down and no one lost their job.

Example 5. The plan and the employees covered by the plan are transferred from one government contractor to another government contractor pursuant to the transferee contractor being awarded the government contract. In this situation, the section 4062(e) liability is $1 billion. Since the plan is 100% funded, no one lost his or her job, and the new employer was chosen by the federal government, this result does not seem justified. Under the rationale underlying all of the PBGC Opinion Letters listed above, this transaction would not be subject to section 4062(e) under current law, but would be under the proposed regulations.

Example 6. The plan is maintained by the AB joint venture, which is owned 80% by Company A and 20% by Company B. A and B decide to modify the ownership arrangement slightly, so that A owns 70% of the joint venture and B owns 30%; the change has no effect on the employees or the operations of the joint venture. Because an 80% ownership stake makes AB part of A's controlled group, but a 70% ownership makes AB a separate company, this minor adjustment in ownership on its own triggers a $1 billion liability under the proposed regulations with respect to a plan that is 100% funded.

Other adverse effects of the proposed regulations.

The enormous expansion of section 4062(e) would have extremely adverse effects even without the actual imposition of a dollar sanction or increased funding obligations. First, the specter of PBGC intervening in almost any routine business transaction would have a chilling effect on normal business activity, as companies will recognize that PBGC negotiations could be long and difficult. Second, because of the enormous scope of the proposed regulations and the penalties for noncompliance with the notice rules, companies would be effectively forced to provide PBGC with notices almost routinely. This will exacerbate the involvement of the PBGC in business transactions and will impose a real burden in terms of dollars and time in providing the notices. (Such a burden would actually be enormous if all notice information must be current as of the date of the section 4062(e) event.)

Third, and extremely importantly, under loan covenants now in effect, a section 4062(e) event with respect to a company can trigger a loan default. If these proposed regulations are finalized in their current form, such provisions would be expected to be more common and could also prevent companies from obtaining additional financing under existing loan agreements. Such provisions could also be included in stock or asset purchase agreements. Thus, if the extremely broad definition of a section 4062(e) event in the proposed regulations is retained, the effect on companies could be devastating—bankruptcy in some cases—in an already tight credit market.

We urge the PBGC to withdraw its proposed regulations under section 4062(e) and propose new regulations. We would like to work with you to craft those new regulations in a way that protects PBGC but also is consistent with Congressional intent and does not interfere with normal business transactions that pose no threat to the PBGC.

Sincerely,

Lynn D. Dudley

Lynn D. Dudley
Senior Vice President, Policy

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Comments on Proposed Rule Relating to Treatment of Substantial Cessation of Operations under ERISA Section 4062(e)

October 12, 2010

Pension Benefit Guaranty Corporation
29 CFR Parts 4062 and 4063
[RIN 1212-AB20]

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the proposed rule relating to treatment of substantial cessation of operations under ERISA Section 4062(e) issued by the Pension Benefit Guaranty Corporation on August 10, 2010 [RIN 1212-AB20].

ASPPA is a national organization of more than 7,300 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system. All credentialed actuarial members of ASPPA are members of the ASPPA College of Pension Actuaries (ASPPA COPA), which has primary responsibility for the content of comment letters that involve actuarial issues.

Summary of Recommendations

The following is a summary of ASPPA COPA's recommendations which are described in greater detail in the Discussion of Issue section.

I. **Small Plan Exception**

Events affecting no more than 20 employees pose little or no risk to PBGC, and should be exempt from the reporting requirements.

II. **Well-funded Plan Exception**

Well funded plans pose little or no risk to PBGC, and should be exempt from the reporting requirements.

III. **“Cessation” Issues**

The 7-day and 30-day timeframes should operate as safe harbors. Furthermore, moving operations to a new location, seasonal changes in employment and other cessation and resumptions of employment in the ordinary course of business should be exempt under the final rule.

IV. **Active Participant Definition**

The definition of “active participant” should include employees who are in the plan’s eligibility group and who will be eligible to accrue benefits once they have completed the plan’s entry date requirements.

V. **“Operation” and “Facility” Issues**

The final regulation should provide clarification on how the 20% reduction is measured for businesses performing multiple operations at multiple locations.

VI. **Sale of business**

The sale of all or part of a business in which employment and operations continue seamlessly with the new employer should not be a section 4062(e) event.

Discussion of Issues

I. **Small Plan Exception**

Under the *Regulatory Flexibility Act* section in the preamble, PBGC notes that only a handful of the potential section 4062(e) cases reviewed by PBGC involved plans with 100 or fewer participants. Thus, providing a small plan exception that allows thousands of small plans relief from real-time monitoring and reporting will only put a handful of these plans at risk – and a substantial part of that risk for the smallest of these plans may be addressed by majority owner waivers down the road. This section also notes that 4062(e) is generally not relevant for small employers because they tend not to have multiple operations and terminate the plan when operations cease. However, many small employers may be found to have multiple operations within the framework defined by these proposed rules. For example, a small pension administration firm decides to branch out into flexible spending account administration. After several years, the owner decides it was not a good business decision, and terminates the service and two employees who performed those services. There were nine active participants in the plan, now there are seven. It appears this event would be reportable under the proposed rule.

While small plans are particularly sensitive to reductions in workforce, a 20% reduction in the number of active participants would rarely signify the impending collapse of the business and transfer of liability to PBGC. Under the proposed rule, the notice will be required within 60 days after the more-than-20% threshold is crossed (or if later, when the cessation occurs). This reporting requirement will be a burden to the employer and not result in any significant savings or beneficial information to PBGC.

The reasons for omitting a small plan exception provided in the proposed rule preamble do not make a strong case in support of that decision:

a. *Protection is appropriate for small plans (and their participants) as well as for large plans.* Section 4062(e) does not increase protection for participants; rather, it is aimed at reducing risk for PBGC. Under the statute (ERISA Section 4063(c)(3)(C)), the escrowed funds or bond proceeds are refunded to the employer to the extent they're not needed to meet PBGC's obligations, even if participants' nonguaranteed benefits remain unfunded. Given the focus in the statute on protecting PBGC rather than on protecting participants, it makes sense to provide relief for smaller plans where PBGC's exposure is minimal.

b. *The burden of satisfying liability for small plans is not disproportionate because liability is less.* Although the liability may not be disproportionate, small businesses will generally have less flexibility than larger businesses in finding ways to satisfy the liability (e.g., by redirecting resources, financing, etc.). Furthermore, for many small plans terminating with less than full funding the requirements for standard termination may be satisfied by a majority owner's waiver of liability. This makes the section 4062(e) exercise a waste of time and resources for both the plan sponsor and the PBGC.

c. *The proposed regulatory changes will make compliance relatively easy for small and large plans alike.* The difficulty of compliance does not increase or decrease in proportion to plan size. On a relative basis, compliance will be harder for small plans because they do not enjoy the economies of scale that larger plans enjoy. While the dollar amount of a shortfall may be less because there are fewer participants, the compliance cost will be relatively high. As discussed in our January 22, 2010 letter commenting on the proposed changes to the Reportable Event waivers and extensions, ordinarily, small plans are serviced just once per year. As noted there, "The reduction will only be apparent when data is collected after the end of the year. Extended due dates reflect the reality of the flow of information between plan sponsors and service providers". The proposed rule demands more careful monitoring of participant activity than can be accomplished within the current servicing paradigm. The extensions in the current Active Participant regulation which are tied to Form 5500 filing obligations would be more efficient and less costly.

Additional administrative cost discourages plan formation and maintenance. The proposed rule would increase administrative costs with little or no corresponding benefit to participants in small plans.

ASPPA COPA recommends that the final rule incorporate a small plan exception by excluding events affecting no more than 20 participants. A reduction of 20 participants or less does not warrant the cost of producing or processing the required filings. If there is no small plan exception in the final regulations, ***ASPPA COPA recommends*** that additional cost be minimized by providing an extended reporting due date that is not earlier than the due date of the Form 5500, including extensions, for the plan year in which the event occurs.

II. **Well-funded Plan Exception**

The preamble notes that there is no exception for well funded plans because any resulting liability for the event will be low or nonexistent, and plans should not be required to make computations simply to claim an exemption. However, the fact that liability will be low or non-existent argues against requiring the plan sponsor to go to the expense of reporting with little or no resulting benefit to participants or PBGC. The plan's actuary already provides calculations that can serve as a reasonable basis for estimating section 4062 liability. Plans that surpass a specified threshold funding level using a reasonable estimate should be excluded from the reporting requirement. An exception from the rule for well-funded plans would also encourage plan sponsors to make additional contributions to the plan to obtain an exclusion, an outcome that would benefit both participants and the PBGC.

ASPPA COPA recommends that the final rule provide an exception for plans that are well funded based on a reasonable estimate of termination liability. The reasonable estimate could be based on the funding target with specified adjustments to convert to a PBGC plan termination basis, following similar logic to the Alternate Calculation Method that was used before PPA to convert from a Schedule B current liability basis to a PBGC variable rate premium basis. The reasonable actuarial techniques used to adjust funding liabilities to liabilities reported for the Annual Funding Notice could also be an appropriate methodology. If the plan sponsor can support a finding on such basis that the plan is well funded, monitoring of participant counts and interpretation of regulatory guidance about the type of events to be reported can be avoided. Any concern that this would be too burdensome or costly for the plan sponsor can be addressed by making it optional, so that any employer could choose to report even if the surrogate might lead to a waiver. Alternatively, the actuary could be permitted to certify to the plan administrator and sponsor that, as of the date of the 4062(e) event (or arguable 4062(e) event), the plan's unfunded benefit liability was no more than a specified amount. If such a certification has been made, the plan would be exempt from reporting and, assuming the certification was correct, there would be no 4062(e) liability.

ASPPA COPA further suggests that plan sponsors be permitted to reflect only the guaranteed portion of benefits for majority owners when determining funded status.

Majority owners typically waive unfunded benefits in situations where waiver of the majority owners' unfunded benefits is necessary and sufficient for a standard termination.

III. "Cessation" Issues

a. *Involuntary cessation.* The proposed regulation includes a 7-day timeframe in connection with involuntary cessation of an operation caused by employee action (such as a strike) and a 30-day timeframe for other involuntary cessations.

   ASPPA COPA recommends that the final regulation provide that these timeframes operate as safe harbor periods.

b. *Follow-on operations.* The proposed regulation provides that the determination as to whether or not a cessation of operation has occurred is to be made without regard to whether that operation or a different operation (providing employment that will lead to coverage by the same plan) is to be continued or resumed at another location or by another employer. This rule, coupled with the disregard of new hires that will be covered by the plan after meeting a year of service requirement, will result in reporting of operational changes that do not signal financial distress, and so will provide no benefit for the cost of reporting.

   ASPPA COPA recommends that the final regulation exempt situations in which an operation has simply been moved to a different facility, or in which an employer is simply substituting Operation Y for Operation X (in most cases, because Operation Y is more profitable).

c. *Expectation of resumption of operations.* The proposed regulation states that any hope or expectation that an operation will be resumed at a facility is irrelevant. An employee is considered separated from service when a discontinuance of operations occurs unless it is "reasonably certain" the employee will resume work within 30 days.

   Operations should not be treated as ceasing where the discontinuance is temporary and there is a reasonable basis to expect that operations will resume within some reasonable time period. Seasonal businesses and businesses that shut down for a temporary period to retool for a new model are examples of situations that clearly should not be reportable under section 4062(e).

   Similarly, a fixed 30-day period for considering an employee separated where there has been a cessation of operations is too short, and in any event should not be inflexible. An alternative might be to set the 30-day period as a presumption subject to rebuttal.

   ASPPA COPA recommends that the final regulation provide an exception for seasonal closings or other changes in employment in the ordinary course of business that do not fit the 30 day rule. ***ASPPA COPA*** further recommends that an exception be provided where an employer needs to stop operations for a period of time in excess of 30 days so that appropriate changes can be made before the operations resume.

IV. **Participant definition.**

The definition of participant in §4062.29 makes it clear that frozen plans are subject to these rules, which is appropriate for liability calculations. However, section 4062.27(b)(2) includes a rule for determining the number of affected participants that disregards separations that have been replaced – if the replacement is a participant in the affected plan. Most defined benefit plans do not provide for immediate eligibility, so this rule does not reasonably reflect the impact of the operational changes on the number of workers who will be covered by the plan.

ASPPA COPA recommends that the definition of participant for this purpose be modified to include employees who are in the plan's eligibility group and who will be eligible to accrue benefits once they have completed the plan's entry date requirements. The occurrence of a 4062(e) event should not depend on whether or not a plan requires a year of service before entry.

V. **"Operation" and "Facility" Issues**

The statute refers to cessation of "operations" at "a facility in any location". The proposed regulation defines "operation" as a set of activities that constitutes a distinct unit of the employer, whether operational, organizational or functional, and applies the section 4062(e) requirements to the cessation of a singular operation. This appears to reach beyond the statutory use of cessation of "operations" as a plural. The proposed rule defines "facility" as the physical location (or locations) where the operation is performed. A facility can be a building, or it can be "one or more open areas or structures where one or more employees were engaged in the performance of the operation". Under the proposed rule, a single facility could include multiple geographic locations, a broader definition than the singular phrase of the statute contemplates.

a. ***ASPPA COPA recommends*** that the final regulation provide clarification on how the 20% reduction is measured for businesses performing multiple operations at multiple locations. The proposed regulation (section 4062.31(g)) says the plan administrator "*may* disregard affected participants who were not employed at the facility associated with the affected operation." It is unclear how this option would be applied where there are multiple operations at one or more locations. For example, a business performs four functions at a single location. Since "operation" is singular, does the plan sponsor have the option of measuring each function separately? If the employer performs all four functions at each of three locations, and the employer stops one of the four functions at all of the three locations, could the calculation be done separately for each location? Would all locations at which the same operation took place have to be combined? Or could the employer select which to combine and which to test separately? Examples of situations involving multiple operations and multiple locations would be helpful.

b. ***ASPPA COPA recommends*** that the final regulation address how telecommuters are handled. A literal reading of the proposed regulation could lead to the conclusion that termination of a home worker is always a 100% reduction in the operation at that home location. The final regulation should describe if and how telecommuters are linked to an employer facility.

VI. Sale of business

The proposed regulation includes a presumption that there has been a cessation of operations and separation from service where employees are employed by a new employer who has continued or resumed the business operation. This presumption does not consider whether or not the new employer has assumed liability for the benefits earned under the plan by the transferred employees. The proposed rule does not explain whether asset sales are treated differently from stock sales.

ASPPA COPA recommends that the sale of all or part of a business (stock or asset sale) or a change in controlled group ownership, in which employment and operations continue seamlessly with the new employer should not be a section 4062(e) event. In such cases, there is no cessation of operations and there is no actual termination of employment.

Furthermore, for stock sales there is no change in the corporate entity directly responsible for the plan. The change in the responsible controlled group is reportable elsewhere and PBGC has other options beyond 4062(e) for minimizing liability to the corporation. In the case of an asset sale, the plan may or may not follow the participants. When the new employer assumes the pension liabilities for the transferring employees, the result parallels the case of the stock sale and should be handled accordingly. While the case of an asset sale in which the new employer does not assume liability for the plan arguably would be treated differently, we believe the existing reportable event rules are sufficient to put PBGC on notice of the change and take suitable action without creating new monitoring and reporting obligations for plan sponsors.

♦ ♦ ♦

These comments were prepared by ASPPA's Defined Benefit Subcommittee of the Government Affairs Committee and the ASPPA College of Pension Actuaries, and were primarily authored by William Held, MSPA, Charles Klose, FSPA, and Marjorie R. Martin, MSPA. Please contact us if you have any comments or questions on the matters discussed above.

Thank you for your consideration of these comments.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO

/s/
Judy A. Miller, MSPA
Chief of Actuarial Issues

/s/
Craig P. Hoffman, Esq., APM
General Counsel/Director of Regulatory Affairs

/s/
David M. Lipkin, MSPA
Co-chair, Government Affairs Committee

/s/
Robert M. Richter, Esq., APM
Co-chair, Government Affairs Committee

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October 12, 2010

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation (PBGC)
1200 K Street, N.W.
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Via email at: reg.comments@pbgc.gov

RE: Liability for Termination of Single-Employer Plans; Treatment of Substantial Cessation of Operations (RIN 1212-AB20)

Dear Sir or Madam:

The Financial Services Roundtable ("Roundtable[1]") submits this letter in response to the Pension Benefit Guaranty Corporation's (PBGC) proposed rule to amend Section 4062(e) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Roundtable believes that the preservation and expansion of the current workplace-based retirement system can best ensure Americans' retirement security. The recent economic downturn has underscored the urgency to ensure that more Americans plan and save for retirement. The Roundtable is concerned about the unintended consequences that may occur due to the broad application of this proposal. Our concerns are outlined below.

General Comments

The Pension Protection Act (PPA) of 2006 established new funding requirements for defined benefit (DB) plans that permitted DB plans to amortize their unfunded liabilities over seven years. This summer, a new law, the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, was enacted, and it amended the PPA to grant DB plans the option to seek additional time to amortize their plan liabilities. Unlike the actuarial outlines within the PPA, the PBGC uses far more conservative actuarial assumptions that provide a larger unfunded liability. Moreover, the proposed rule would institute funding requirements that go well beyond the recently amended PPA. Furthermore, these funding requirements would significantly increase the funds a plan must set aside in escrow to cover a portion of unfunded liabilities. Accordingly, a plan's increased liability could be triggered by a variety of business transactions that occur in the ordinary course of business, including relocation of an operation from one facility to another, sale of an operation to an unrelated company, and cessation of an operation at a facility.

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[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine, accounting directly for $74.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

The Roundtable believes the proposed rule should be reconsidered. The Roundtable appreciates the PBGC's efforts to streamline regulations under Section 4062(e), but we are concerned about the unintended consequences that may occur due to the broad application of the proposal. Our concerns are outlined below.

4062(e) Event

Currently, when a 4062(e) event occurs, an employer must notify the PBGC within 60 days of the triggering event and request a PBGC determination of the plan's liability. Once the event is reported, the PBGC may require the plan to establish an escrow account. If an escrow account is created, the PBGC determines how much money should be contributed to the account by calculating the plan's total liability to the PBGC as if the plan were terminated immediately after the triggering event. In the alternative, instead of placing funds in escrow, a plan may post a bond to secure the liability. If the plan has not terminated within five years of the triggering event, the escrow funds are returned and the bond is cancelled.

The proposed rule would amend current regulation by changing the definition of a 4062(e) event from when an employer "cease(s) operations" to when an employer ceases "an operation." This one change alone greatly expands the breath of the regulation and unnecessarily increases the likelihood of a triggering event. For instance, if a facility conducts more than one operation, and one of those operations were to cease while the facility continued to operate, the proposed rule would be tripped, and liability applied. This would occur even if the operation in question was simply moved and continued from another location.

Next, the rule would also be applied if there is a sale of a facility. The rule would be applied even if the purchasing company does not disrupt, but in fact continues operations without creating harm or negative impact to a company's DB plan. For instance, if a shoe company sells a show factory to a rival competitor and the purchasing company pays fair value for the facility and continues making shoes, the PBGC would consider the transfer as a company "ceasing an operation," potentially triggering increased liability. In short, it appears that the proposed rule does not take into account that there may be a legitimate business purpose for a company to cease one or more operations at a facility without the decision altering a company's risk profile.

Therefore, the Roundtable recommends that the PBGC reconsider these part of the regulation and develop a narrower approach that provides the industry with clearer guidance regarding which actions trigger a 4062(e) event.

Cessation Date

A 4062(e) event requires more than 20 percent of the employees who are participants in an employer's DB plan to be separated from their employment due to cessation of operations at a facility. According to the proposed rule, an employer voluntarily ceases an operation at a facility when it discontinues all significant activity at the facility in furtherance of the purpose of the operation" *(Proposed 29 C.F.R. Sec. 4062.26(a)).* Conversely an "involuntarily" cessation is outside the employer's immediate control such as employee strike. Accordingly, "separated from employment" is defined by the proposed rule as "separated from service with the employer that ceased the operation. *(Proposed 29 C.F.R. Sec. 4062.27)*. The rule establishes four presumptions (two voluntary and tow involuntary) in an effort to help determine whether a "separation from employment" is due to voluntary or involuntary cessation.

The Roundtable believes that cessation presumptions do not provide clear guidance to DB plans, but in fact operate to increase the number of employees who have been "separated from employment" due to cessation of operations. Again, as mentioned above, the Roundtable believes that the PBGC should withdrawn the proposed rule and develop proposals that provide a more targeted approach with clearer guidance that does not increase the cost for plan sponsors.

Effective Date:

The proposed rule does not include an effective date to implement the rule. If and when a final rule is implemented, the Roundtable recommends that the final rule should be applied prospectively.

Conclusion

The Roundtable appreciates the PBGC's efforts to provide additional guidance in this area. However, the Roundtable believes that the proposed rules do not focus on scenarios surrounding plan terminations, but rather on ordinary business transactions that may or may not pose any risk to the long-term health of DB plans ot plan participants. Applying the rule as proposed would significantly increase the cost to administer DB plans and place additional compliance burdens on the industry. The Roundtable also believes that the rule as proposed would undermine the PBGC's ability to encourage the maintenance and expanded use of DB plans in the private sector. In short, the Roundtable recommends that the PBGC reconsider the proposed rule and further consider the potential negative consequences and implications of the proposed rule. The Roundtable supports employer-based retirement plans and will continue to encourage their expansion.

The Roundtable appreciates the opportunity to comment on the PBGC's proposed amendments to 4062(e). Thank you in advance for considering the Roundtable's comments. If you have any questions, please feel free to contact me or Brian Tate at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard Whiting
Executive Director and General Counsel

October 12, 2010

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

Re: RIN 1212-AB20—Liability for Termination of Single-Employer Plans: Treatment of Substantial Cessation of Operations

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we submit this letter in response to a request for comments on the proposed rules under sections 4062 and 4063 of the Employee Retirement Income Security Act of 1974 (ERISA) that were issued by the Pension Benefit Guaranty Corporation (PBGC) on August 10, 2010.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Introduction

We appreciate the efforts of the PBGC in attempting to provide clarity and further instruction on the rules under ERISA sections 4062 and 4063. Our members believe that further guidance in this area is necessary to enable plan sponsors not only to comply with the meaning and intent of the statute but also to ensure the viability of the defined benefit plan system. However, we believe that the PBGC has overstepped the intent of the statute which is to ensure that financially troubled entities set aside money to pay promised benefits and do not increase the financial burdens on the PBGC. The strict interpretation of the statute in the proposed rules runs counter to the common reading and understanding of the statute.

Furthermore, we are concerned that the proposed rules do not take into account the entirety of all circumstances but, rather, focus on particular incidents in isolation. The defined benefit system cannot continue if one party is overly and unnecessarily burdened. As such, we believe that the proposed rule could have the effect of creating greater financial instability for plan sponsors without providing greater security for the PBGC or plan participants. Thus, we urge the PBGC to reconsider these rules in a comprehensive context that takes into consideration the best outcomes for the PBGC, participants, and plan sponsors combined.

General Comments

The impacts of this statute and, therefore, the proposed rule have far-reaching implications. We believe that is of the utmost importance for the PBGC to understand the broader impact of this proposal. Thus, our comments below focus on that impact.

The Financial Burdens of Section 4062(e) are Significant. Section 4062(e) can require a substantial outlay of cash for a company. This can be a significant burden for a company at any time, but at the current time in our country's financial history, it is particularly onerous. The present economic situation may be unique, but significant business downturns are cyclical and will recur in the future. Especially in difficult economic situations, rules that force employers to make significant cash outlays have serious implications. Section 4062(e) liability, especially in bad times, can seriously impact a company's competitiveness—locally and internationally—and ability to contribute to the economy.

In addition to the direct impact on cash flow, the financial burden of section 4062(e) could hurt employers in other ways. Section 4062(e) liability could negatively impact corporate loan and other agreements of plan sponsors. Depending on the terms of these agreements, this liability may constitute a default or negatively impact the employer's negotiating position and future ability to obtain optimal loan terms.

Clearly there are situations in which section 4062(e) liability should be imposed but the proposed rule would impose that liability far too expansively. We believe that the financial burden of such liability needs to be better factored into a determination of when section 4062(e) should be applied.

The Rule Should Give the PBGC Discretion to Waive or Moderate Section 4062(e) Liability. The proposal draws stark lines without room for consideration of individual circumstances. For example, a cessation of operations could be a sign of financial distress for a company. However, a cessation of operations could also reflect financial growth where a company may be ceasing one type of operation to move into a more lucrative type of operation. The proposed rule makes no room for this latter circumstance. As another example, a 20% reduction in the workforce at one operation may not indicate financial distress—if the 20% reduction at one operation or facility represents only a small percentage of the employer's workforce across all operations and facilities. In the proposed rule, the PBGC specifically states that it will not consider risk in the application of section 4062(e).[1] This makes no sense,

[1] 75 Fed. Reg. at 48284, 48291.

however, because the statute should apply only where there the cessation of operations is a harbinger of or potential cause of financial failure. Therefore, we encourage the PBGC to retain discretion to moderate or waive section 4062(e) liability in appropriate cases.[2]

There are Significant Monitoring and Paperwork Burdens Associated with Section 4062(e). In addition, we encourage the PBGC not to lose sight of the significant burdens placed upon employers by the need to monitor for section 4062(e) events and then file the required paperwork. Employers will have to spend significant resources just to determine if the statute applies. Moreover, the notice requirements associated with section 4062(e) also require significant resources and should not be underestimated.

Specific Recommendations

The Use of the Term "Operation" in the Singular is Contrary to the Statutory Language. In the proposed rule, the singular "operation" is used rather than the plural "operations" used in the statute.[3] The use of the word "operations" indicates that the statute anticipates that a plan sponsor may have several operations at a facility. Under the proposed rule, however, ceasing any one of those operations could subject the plan sponsor to additional liability. Therefore, a company may be subject to section 4062(e) liability for ceasing certain operations even if the facility is not closed and several operations continue at the facility.

In addition to creating undue liabilities, this interpretation is inconsistent with the way the other parts of the statute have been interpreted. For example, in the paragraph right before the explanation of "operation," the preamble cites to the statute in determining whether section 4062(e) applies to one plan or the aggregate plans of the employer. Specifically, the preamble states that "[t]his principle is clear from section 4062(e)'s references to 'a plan' and 'that plan.'"[4] Since ERISA Section 4062(e) explicitly refers to "operations," the same principle should hold true. Consequently, we urge the PBGC to reconsider this interpretation in the proposed rule. Instead, a plan sponsor should not be subject to potential section 4062(e) liabilities unless the employer ceases all operations at a facility.

The Final Rule Should Clarify the Definition of Facility. In defining a facility, the proposed rule refers to "place or places" and "building or buildings."[5] Without further clarification it is not clear exactly what constitutes a facility. Is the proximity of buildings a determining factor? Are the types of operations a determining factor? Without further clarification, a "facility" could be interpreted to include every building owned by an employer

[2] The inclusion of safe harbors and additional rebuttable presumptions would be a useful way to achieve this goal.
[3] 75 Fed. Reg. at 48285, 48291.
[4] 75 Fed. Reg. at 48285.
[5] 75 Fed. Reg. at 48285, 48291.

regardless of location. Therefore, we urge the PBGC to further clarify this definition so that a plan sponsor can determine how it should apply.[6]

Temporary Shut Downs Should Not Trigger Section 4062(e). The rules should clearly indicate that temporary shut downs of a facility or operations do not trigger ERISA section 4062. The proposed rule refers to suspensions of operations that give rise to section 4062(e) obligations.[7] We believe that this expands the scope of the statute. For example, an employer may need to re-tool operations for several months but has no intention of ceasing the operation permanently. This situation is not a sign of financial distress and in many instances indicates the opposite. Therefore, applying section 4062(e) in this instance is unnecessary.

The Time Periods for the Discontinuation of Operations is Arbitrary and Should be Reconsidered. For involuntary cessations, such as a natural disaster, the proposed rule states that if operations are not restored within 30 days, it is considered a cessation.[8] However, this is an arbitrary time limit to impose. As we saw with the devastation of Hurricane Katrina, recovering from a natural disaster could take years. Section 4062(e) should not arbitrarily impose additional financial burdens on employers during such a time. As long as an employer in good faith expects to resume operations in the relatively near future, section 4062(e) liability should not be imposed. At the very least, any time limit for resuming operations should be no more than a rebuttable presumption of discontinuance of operations that an employer can overcome by pointing to the facts and circumstances.

Similarly, the time period relating to cessations caused by employee action such as strikes and sickouts is arbitrary. Rather than using an arbitrary period, we recommend that the time period for determining whether a cessation has occurred in a strike or lock-out situation should be tied to the labor law rules for determining when employment ends in these situations.

Going Concern Asset Sales and Stock Sales Should Not Be Considered Section 4062(e) Events. We are very troubled by the interpretation in the proposed rule that an employer who engages in a facility sale may incur additional liability under ERISA section 4062(e).[9] There is no reason to apply section 4062(e) to going concern asset and stock sales because these are not they types of situations to which the statute was intended to apply. In such cases, there is no cessation of operations at the facility and the employer typically is better off financially by virtue of the sale. Hence, we urge that going concern asset and stock sales be exempted from section 4062(e). At the very least, there should be an exception for arm's length asset or stock sales of a facility if the seller reasonably believes that it will remain in operation for at least one year after the sale and either (a) the plan or plan portion covering current and former employees the disposed facility is transferred to the buyer, or (b) the selling controlled group receives the sales proceeds and has not present intention of distributing the proceeds to its owners.

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[6] It may be useful to refer to terms already in use, such as the definition of facility used in the multiemployer plan context or the "single site of employment" definition used under the WARN Act. However, we recognize that these definitions also have limitations and there would still need to be further discussion about how best to make them work.

[7] 75 Fed. Reg. at 48286.

[8] 75 Fed. Reg. at 48291.

[9] 75 Fed. Reg. at 48285, 48291.

We believe that such an exception is consistent with the statute, because there is no facility closure. We believe that the statute was intended to protect the PBGC in situations in which a business may be failing, as evidence by its shutting down its operations. Going concern asset and stock sales are normal business procedures that are not normally a sign of trouble. Moreover, the reportable event rules and the PBGC's early warning program are more appropriate indicators of potential distress in these situations.[10] Applying section 4062(e) to these events will create an unnecessary charge that will negatively impact the costs of an ordinary business transaction.

Moreover, this interpretation directly contradicts previous guidance put forth by the PBGC. In the 1970s and 1980s, the PBGC issued several opinion letters stating that there was no Section 4062(e) event in the context of various "going concern" asset sales.[11] However, the PBGC now seems to be changing that interpretation in the proposed rule. While the preamble briefly acknowledges the previous Opinion Letters by stating that the proposed regulation ''would displace and supersede all of PBGC's prior opinion letter pronouncements addressing section 4062(e)'' it does not give any reason for this change in interpretation.[12]

Furthermore, it seems that a stock sale might also create a Section 4062(e) event because the entity sold would be outside the selling employer's controlled group. While the preamble to the proposal does not specifically address stock sales, the proposed rule cross references to the Title IV definition of employer.[13] A strict reading of the proposed rule could include stock sales as a section 4062(e) event even though operations and employment remain the same at a subsidiary that is sold. However, we do not believe that such a reading comports with the intent of the statute which is to address situations where operations have ceased and employment has ended.

Determining Whether a Separation "Results" From a Cessation of Operations Should be Based on Facts and Circumstances. The proposed rule includes a number of presumptions to be used to determine whether a separation results from a cessation of operations.[14] While we understand the attempt to simplify this analysis, we do not believe that this determination should force plan sponsors to ignore the actual context of the situation. Rather, we believe that the facts and circumstances of a situation should prevail.

We recognize that the proposed rule does allow an employer to rebut the presumptions. However, we believe it is unnecessarily burdensome to have to overcome the presumptions laid out. The employer should be able to rely upon the facts and circumstances in the first instance.

There Should be Waivers for Small Plans and Well-Funded Plans. It is unduly burdensome to impose section 4062(e) liabilities on plans that pose little risk to the PBGC. For certain plans, paying additional amounts to "protect" the plan serves as a financial burden that has no corresponding benefit to participants or the PBGC.

[10] ERISA section 4043; PBGC Technical Update 00-3.
[11] PBGC Opinion Letters 76-8, 76-52, 77-123, 77-147, 78-29, 82-29, 85-8, and 86-13.
[12] 75 Fed. Reg. at 48289.
[13] ERISA section 4001(a)(2).
[14] 75 Fed. Reg. at 48286, 48287, 48292.

In the preamble, the PBGC states that participants in small employer plans should receive the same protection as participants in large plans[15]—implying that the purpose of ERISA section 4062(e) is to protect participants. However, a plain reading of the statute demonstrates that its purpose is to protect the financial resources of the PBGC. If a plan terminates in the five years after a section 4062(e) event, the money put into escrow or secured from the bond is used to secure the benefits payable to participants up to the PBGC maximum benefit levels. Any money over that amount is returned to the employer—even if participants do not receive full benefits promised under the plan.[16] Thus, it is clear that the primary purpose of the statute is to protect the financial interest of the PBG, not participants. Therefore, using this argument to subject small employer plans to an unnecessary financial burden is fallacious.

The preamble further states that to the extent small employer plans present less underfunding potential, the liability under section 4062(e) will be less.[17] We believe that this greatly underestimates the burden on small employers. First, section 4062(e) is much more likely to be triggered by small employers than large ones, due to the 20% workforce reduction threshold, given the small number of workers they employ. Second, small employers generally have smaller cash flows and more difficulty accessing credit. Therefore, any additional liabilities will have a substantial negative impact on their business activities.

Similarly, the preamble states that well-funded plans would not be unduly burdened under section 4062(e) because its liability would be less.[18] The preamble goes on to recognize the complexity of calculating termination liability and states explicitly that it "would not expect plans to make such computations simply to claim exemption from the section 4062(e) event reporting requirement."[19] However, the waiver would by its nature be optional so only those well-funded plans that wanted to make those computations would do so. Also, there are other options for well-funded plans to prove their funded status other than calculating the termination liability. For example, the PBGC could use a surrogate number such as a funding number used for other purposes (e.g., the AFTAP) and require some modifications that would be less complicated to calculate. Or, the PBGC could require that an actuary certify that the plan has no more than a certain amount of underfunding as of the cessation date. Moreover, the preamble does not at all address the necessity of enforcing section 4062(e) against well-funded plans.

For these reasons, we urge that small employer plans and well-funded plans should be exempt from the requirements of ERISA section 4062(e). Subjecting the sponsors of these plans to additional liability only increases their burdens and does not add to the protection of participants or the PBGC.

There are Several Areas Where the Proposed Regulation is Overly Expansive. In addition to the areas noted above, there are other areas where we believe the proposed rule exceeds the intent of the statute. We do not believe that ERISA section 4062(e) should apply to any of the following situations.

[15] 75 Fed. Reg. at 48289.
[16] ERISA section 4063(c)(3).
[17] 75 Fed. Reg. at 48289.
[18] 75 Fed. Reg. at 48289.
[19] Id.

- Relocating a Facility. In Opinion Letter 77-134, the PBGC stated that moving a facility to different location was not a section 4062(e) event. However, the proposed rule now covers such relocations.[20]
- Ceasing One Operation and Simultaneously Starting a New One.[21] Subjecting this situation to section 4062(e) clearly exceeds the intent of the statute as closing one operation and starting another one at the same time is not a sign of financial distress.

Conclusion

Thank you for your consideration of these comments. The defined benefit system covers millions of employees and pays out billions of dollars in pensions; thus, it remains a significant benefit for many workers and retirees. Consequently, it is critical that all interested parties work together to maintain this system and ensure that no party in unnecessarily burdened.

The proposed rule is a good first step in providing further guidance under ERISA section 4062(e). However, we believe that significant modifications are needed. We look forward to further conversations with you on this important topic.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration & Employee
 Benefits
U.S. Chamber of Commerce

Aliya Wong
Executive Director, Retirement Policy
Labor, Immigration, & Employee
 Benefits
U.S. Chamber of Commerce

cc: Joshua Gotbaum
[PBGC Desk Officer, OMB]

[20] 75 Fed. Reg. at 48286, 48291.
[21] 75 Fed. Reg. at 48286, 48291.

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October 12, 2010

Via E-Mail
reg.comments@pgbc.gov

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

Re: Regulation Identifier Number (RIN) 1212-AB20
Proposed Regulations under 29 U.S.C. § 1362(e) (ERISA § 4062(e))

Dear Sir or Madam:

This letter is to comment on the proposed regulations from the PBGC regarding ERISA section 4062(e) as published on August 10, 2010 in the Federal Register.

Employers appreciate receiving additional guidance to better assure compliance with section 4062(e). We, however, are concerned that the proposed regulations go beyond the scope of the statute and that the broad nature of the proposed regulations is likely to further deter employers from adopting new defined benefit plans in the future. The absence of exceptions, particularly for small plans, is likely to mean that small employers with defined benefit plans will be restricted from being able to adjust to changing business situations and will deter small employers from adopting new plans.

1. Definition of Operations

A. Background. Section 4062(e) states that it applies if "an employer ceases **operations** at a facility in any location and, as a result of such cessation of **operations**, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment," [1] then the employer may be required to provide an escrow amount or purchase a bond.

B. Comment. The proposed regulations state that section 4062(e) applies if an employer ceases an "operation."[2] This change takes the proposed regulation beyond the scope intended by the statute. The intent under the statute is that if an employer closed a facility (such as a manufacturing plant), then there was a concern that the employer's revenue would be declining. Changing "operations" to "operation" does not recognize that an employer may revise the activities occurring at a facility to address changing business conditions. It also does not recognize situations where an employer may build a larger or newer facility at another location – a change that does not indicate a threat to the employer's financial health or ability to fund a defined benefit plan.

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1 See 29 U.S.C. § 1362(e) (2006) (ERISA § 4062(e)) (emphasis added).
2 Proposed 29 C.F.R. § 4062.24.

This use of "operation" rather than "operations" will also lead to uncertainty. Often, there are a range of activities (operations) that occur at a facility. This requires employers to classify employee's activities and monitor if they change, even if there is no reduction in the number of employees. Employers are left in a position of wondering whether the PBGC will take a different view on how to classify employee activities.

Furthermore, the definition of "cessation" in the proposed regulations also implies that all operations should be considered. A cessation occurs if an employer ceases "all significant activity."[3] If an operation is a single activity, then the cessation should be tied to that one activity. If the cessation is with respect to operations, as stated in the statute, then significant makes sense in the context of all operations (even though it is still inconsistent with the statute which uses the term "operations" rather than "significant operations").

2. Definition of Participant

A. Background. Section 4062(e) states that it applies if "more than 20 percent of the total number of his employees who are participants under a plan" are separated from employment.[4]

B. Comment. The proposed regulations define "participant" as including all participants in the plan employed by the employer regardless of whether the participant is accruing a benefit.[5] The proposed regulations should exclude from participants employees who are no longer accruing benefits. If a plan is frozen or partially frozen, the funding enhancements under the Pension Protection Act provide assurances that the plan will become funded in a short period of time. In addition, if the regulation counts participants not accruing benefits, this may distort employment decisions. If an employer has the choice of terminating an employee not accruing a benefit who a participant or someone who is not a participant (and can never become a participant because the plan is frozen), the employer will be inclined to terminate the individual who is not a participant and cannot become a participant.

3. Cessation of Operations – Relocation

A. Background. Section 4062(e) addresses a situation where "an employer ceases operations at a facility in any location."[6]

B. Comment. Section 4062(e) was not meant to address a situation where an employer relocates operations to another facility. There are a number of business reasons that may lead an employer to relocate operations and if relocations trigger liability, this will limit the ability of employers to respond to changing business conditions and potentially place plans at a greater risk. In addition, if the PBGC retains the definition of "operation" than "operations," at issue is not the relocation of a facility but rather the relocation of an activity. For example, if an employer has accounting functions at multiple locations and decides to consolidate accounting

[3] The proposed regulations defines cessation in part as "an employer is considered to cease an operation at a facility when the employer discontinues all significant activity at the facility in furtherance of the purpose of the operation." Proposed 29 C.F.R. § 4062.26(a).
[4] See 29 U.S.C. § 1362(e) (2006) (ERISA § 4062(e)).
[5] Proposed 29 C.F.R. § 4062.29(c) (stating, "[W]hether an individual is a participant in a plan at a particular time is decided without regard to whether the individual is accruing benefits under the plan at that time.").
[6] See 29 U.S.C. § 1362(e) (2006) (ERISA § 4062(e)).

to a central location and employees are terminated to accomplish this, this could trigger a reporting requirement even if it is merely the relocation of a single activity. We recommend that the PBGC delete the clause in the proposed regulations requiring relocations be disregarded[7] and to adopt a positive statement that a relocation is not a cessation of operations.[8]

4. Cessation of Operations – Exclusion for Sale of Business

A. Background. Section 4062(e) applies to situations where an employer "ceases operations at a facility."

B. Comment. Section 4062(e) was intended to address a situation where a failing employer closed a facility and the PBGC became at a higher risk of having to take over the plan. The statute does not address the sale of a facility. The sale of a facility is distinct from a cessation of operations. A sale may be done for a variety of business reasons, but one thing a sale definitely indicates is that a buyer is interested in the facility and operations. The PBGC in the past has recognized that this is not a concern.[9] Therefore, we ask the PBGC to revise the proposed regulations to define "cessation of operations" in a manner that excludes the sale of a facility.[10]

5. Cessation of Operations – Purchase of Business Where New Employer Assumes Making Contributions to Plan

A. Background. As noted above, section 4062(e) applies to situations where an employer "ceases operations at a facility."

B. Comment. Where a sale occurs and the purchaser continues operations and assumes responsibility for contributions to the plan, it is not reasonable to see this situation as the cessation of operations. The employee participation and contributions under the plan will continue. The PBGC in the past has recognized that this is not a concern.[11] The PBGC should include a waiver in the regulations for this situation. Thus, we ask the PBGC to delete the clause in the proposed regulations that states such a sale is to be disregarded.[12]

6. Requested Waiver – Small Plan

A. Background. Section 4062(e) does not address the scale of the plan at issue.

B. Comment. Small plans pose relatively little or no additional risk as a result of a cessation of operations at a facility. Monitoring for a cessation of an operation, however, would

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7 See Proposed 29 C.F.R. § 4062.26(c)(1)(i).

8 A positive statement that a relocation does not trigger the reporting requirement would clarify this issue now that it has been raised under the proposed regulation. The mere deleting of the clause in the proposed regulation may leave the issue unresolved.

9 See PBGC Opinion Ltr. 78-29 (Dec. 12, 1978); PBGC Opinion Ltr. 77-147 (May 24, 1977).

10 In part, this can be accomplished by deleting Proposed 29 C.F.R. § 4062.26(c)(1)(ii), but it would be helpful for the PBGC to clarify in the regulations that a sale is not a cessation of operations.

11 See PBGC Opinion Ltr. 82-92 (Oct. 22, 1982); PBGC Opinion Ltr. 78-29 (Dec. 12, 1978); PBGC Opinion Ltr. 76-52 (April 14, 1976).

12 See Proposed 29 C.F.R. § 4062.26(c)(1)(ii).

impose a significant burden on an employer that sponsors a small plan.[13] We encourage the PBGC to adopt a small plan waiver to section 4062(e) where a plan has fewer than a limited number of participants (for example, 200 or fewer participants).

7. Requested Waiver – Fully Funded Plans

A. Background. Section 4062(e) does not directly address the funded level of a plan, but the escrow or bond requirement under section 4062(e) applies only if a plan is underfunded. Thus, it is implicit in the statute that section 4062(e) applies only to underfunded plans.

B. Comment. Fully funded plans do not represent a risk with respect to the concerns under section 4062(e). Requiring filing and recordkeeping[14] of such plans imposes an unnecessary administrative burden.

Furthermore, credit agreements may contain provisions that the employer has not had a reportable event (which in some cases is defined to include an event under section 4062(e)). Requiring fully funded plans to provide a report to the PBGC will upset expected notions that were incorporated into these credit agreements and require employers to re-negotiate with lenders regarding these provisions.

For these reasons, we ask the PBGC to provide that if an employer's plan is fully funded as measured in its AFTAP determinations that then the employer would not need to file a report under section 4062(e).

Conclusion

We appreciate the PBGC providing an opportunity to comment on the proposed regulations. In addition, we welcome the opportunity to discuss this comment and any questions you may have regarding the comment. Please feel free to contact me.

Sincerely,

Timothy D.S. Goodman

TDSG/kld

[13] The proposed regulations require reporting and recordkeeping for five years with regards to events under section 4062(e). See Proposed 29 C.F.R. § 4062.31 (filing requirement); Proposed 29 C.F.R. § 4062.34 (reporting requirement).

[14] See Proposed 29 C.F.R. § 4062.31 (filing requirement); Proposed 29 C.F.R. § 4062.34 (reporting requirement).

November 11, 2010

Mr. Joshua Gotbaum
Pension Benefit Guaranty Corporation
Director
1200 K Street, NW
12th Floor
Washington, DC 20005-4026

Re: RIN 1212-AB20

Dear Director Gotbaum:

The undersigned organizations are writing to express deep concerns regarding the proposed regulations under ERISA section 4062(e).

We believe that the proposed regulations are not consistent with the statute. Under the statute, liability is triggered if "an employer ceases operations at a facility in any location". The proposed regulations do not follow the statute, which was clearly intended to be limited to situations where operations at a facility are shut down. Instead, under the proposed regulations, liability can be triggered 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. The proposed regulations need to be revised to conform to the statute.

Moreover, the liability created by the proposed regulations can be vastly out of proportion with the transactions that give rise to the liability. For example, where a plan has been frozen for many years, a de minimis business transaction affecting far less than 1% of an employer's employees can trigger hundreds of millions or billions of dollars of liability. This needs to be addressed.

In addition, the proposed regulations would impose enormous liabilities on plan sponsors even in situations where a plan poses no real risk to the PBGC. There should be exemptions for small plans and for well-funded plans. The exemption for well-funded plans should be based on a plan's funded status for funding purposes. If a company has, for example, little or no funding obligation with respect to a plan under the funding rules, it is inappropriate to impose large obligations on such company based on a theory that the obligations are needed to protect the PBGC.

All of the undersigned organizations believe in the defined benefit plan system. These proposed regulations would clearly hasten the demise of that system. By placing an enormous toll charge on plan sponsors that engage in normal business transactions, these proposed regulations would send a powerful negative message to those left in the defined benefit plan system.

We urge you to modify these proposed regulations in accordance with this letter.

American Benefits Council
ASPPA College of Pension Actuaries
Committee on Investment of Employee Benefit Assets ("CIEBA")
The ERISA Industry Committee
Financial Services Roundtable
National Association of Manufacturers
U.S. Chamber of Commerce

ERIC

The
ERISA
Industry
Committee

November 12, 2010

RIN 1212-AB20
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Comments on Proposed Rule Regarding Liability for Termination of Single-Employer Plans; Treatment of Substantial Cessation of Operations (RIN 1212-AB20)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to submit these comments on the proposed regulation under ERISA § 4062(e), regarding the consequences of a substantial cessation of operations at a facility in any location. The proposed regulation was published in the *Federal Register* on August 10, 2010.

ERIC is a nonprofit association committed to the advancement of the employee retirement 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.

ERIC is deeply concerned that the proposed regulation is inconsistent with the text and purpose of § 4062(e). The proposed regulation would expand the application of § 4062(e) to routine events that are far less significant than "ceas[ing] operations at a facility in any location." For example, the proposed regulation would reach operational changes within an ongoing facility, and the relocation or sale of an ongoing operation.

Such an expansion would have the effect of overriding the reporting waivers for many events covered by § 4043. In addition, because the § 4062(e) liability is calculated using the PBGC's termination assumptions (rather than ERISA's funding assumptions), expanding the application of § 4062(e) would require many employers to make contributions far in excess of what ERISA generally requires; this undermines ERISA's detailed and highly reticulated funding rules.

The PBGC should withdraw the proposed regulation and issue a new proposed regulation that corrects the following deficiencies in the current proposal:

1. The proposed definitions of "operations," "facility," and "cessation" are inconsistent with the statute. They should be revised to follow the statutory mandate that § 4062(e) does not apply unless a facility closes.

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2. By stating that the relocation or sale of an ongoing operation triggers the application of § 4062(e), the proposed regulation departs from 34 years of consistent administrative practice.

3. The proposed regulation fails to keep within reasonable bounds the circumstances in which an employee's separation from employment would be deemed to occur "as a result" of a cessation of operations at a facility. It allows all employee separations that can be connected by a virtually limitless daisy chain of events to be deemed to result from a cessation of operations at a facility at the beginning of the chain.

4. The proposed regulation fails to address the special but commonplace circumstances of frozen plans.

5. The proposed regulation fails to include a reasonable exemption for well-funded plans.

ERIC reserves the right to supplement these comments.

Discussion

1. Definitions of "Operations," "Facility," and "Cessation"

Section 4062(e) was first introduced as a provision related to "termination of a substantial facility."[1] In the last 36 years, the language of § 4062(e) has not changed: § 4062(e) applies only if "an employer ceases operations at a facility in any location." This simple phrase has been understood to mean that § 4062(e) applies only if operations cease—*i.e.*, the facility is closed.

Rather than define the statute's phrase as a whole, the proposed regulation breaks it down into separate definitions of "operation," "facility," and "cessation." By doing so, the proposed regulation expands the application of § 4062(e) to routine events that do not rise to the level of a "cessation of operations at a facility in any location." ERIC has the following concerns with each proposed definition:

- "***Operation.***" The statute does not authorize the proposal to replace the term "operations" with "an operation." This change could result in § 4062(e) being triggered by routine events that are anything but cessations of operations—*e.g.*, changing the way a space is used or outsourcing an operation within an ongoing facility.

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[1] *See* H.R. 2, 93d Cong. § 462(g) (as passed by the Senate, Mar. 4, 1974); Staff of S. Comm. on Labor and Public Welfare, 93d Cong., Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform 18 (Comm. Print 1974). Although the heading was changed from "Termination of Substantial Facility" to "Treatment of Substantial Cessation of Operations," the language of the provision has not changed since it was first introduced. Moreover, the heading still indicates that a cessation of operations at a facility refers to something "substantial."

- "***Facility.***" The term "facility" should be defined based on its location, rather than an operation. By stating that a single facility may be comprised of more than one building, without any geographic restrictions, the proposed regulation leaves open the possibility that a single facility can be spread across the country. This possibility ignores the statute's phrase "in any location."

- "***Cessation.***" A stoppage of operations should not constitute a cessation unless the facts and circumstances indicate that the stoppage is permanent. The proposed one-week resumption rule (for a voluntary cessation) and 30-day discontinuance rule (for an involuntary cessation) are arbitrary and would sweep in common events that are not intended to be cessations. For example, a disaster like Hurricane Katrina would have been treated like a cessation of operations for many businesses in New Orleans that never intended to close and eventually resumed operations.

In accordance with the statute, "facility" should be defined by reference to its location: a "facility at any location" means a building (or buildings on a campus) at a particular location. "Operations" should be defined as the work performed at the facility; and a cessation of operations at the facility should not be deemed to occur unless all of the facility's operations have ceased—*i.e.*, the facility has closed. Any concern that an employer might try to avoid § 4062(e) liability by continuing only an operation related to basic maintenance of a building (as distinct from changing the operations performed at the facility) should be addressed through an anti-abuse rule.

In addition, stopping operations should not result in a "cessation" unless the facts and circumstances indicate that the stoppage is permanent. The determination of whether a stoppage is permanent should not be based on a fixed time period. If the PBGC nevertheless determines that a time period is necessary, (a) the time period should be no less than 90 days; (b) the time period should not apply in the case of a labor disruption; and (c) the standard should be rebuttable.

2. Relocation and Sale of Ongoing Operations

PBGC Opinion Letters from the last 34 years have consistently indicated that relocating or selling an ongoing business generally does not trigger a § 4062(e) inquiry. Absent a change to the statute, the new regulation should preserve this history. Accordingly:

- When ongoing operations are relocated, § 4062(e) should not apply if the operations are continued—regardless of how many employees make the move. *See, e.g.*, Op. Ltr. 77-134.

- When ongoing are sold (whether in an asset sale or a stock sale), § 4062(e) should not apply if the operations are continued. At the very least, § 4062(e) should not apply if (a) the facility's employee population does not shrink by more than 20% and (b) the buyer continues the plan or a similar plan without substantial changes. *See, e.g.*, Op. Ltrs. 86-13, 82-29, 78-29, 76-52.

The proposed regulation appropriately allows an employee's separation to be ignored if a replacement is hired before the cessation is complete. This rule should be expanded to apply when replacement employees are hired within a reasonable period after the cessation. For example, if ongoing operations are relocated from City A to City B and the employer intends to replace the employees who do not make the move, the employer should not be penalized merely because some positions are not filled for a reasonable period after the move. Also, replacement employees should be taken into account from their date of hire, without regard to whether they are eligible to participate in the plan.

ERIC appreciates that the PBGC may waive the § 4062(e) liability in appropriate circumstances. However, in order to ensure reasonably consistent results and to ease the burden on employers and the PBGC in cases involving insignificant events, the regulation should include safe harbor standards under which waiver or reduced liability is automatic. At a minimum, the regulation should provide for an automatic waiver of the § 4062(e) liability (including the reporting requirement) in the circumstances described above.

3. "As a Result"

The proposed rule that a separation from employment at one facility can be "as a result" of a cessation of operations at another facility is overly broad and vague. It allows all employee separations that can be connected by a virtually limitless daisy chain of events to be deemed to result from a cessation of operations at a facility at the beginning of the chain.

Although there might be cases where a cessation of operations at one facility affects employment at other facilities, linking causation across facilities should be the exception rather than the rule. The regulation should include a rebuttable presumption that separations at one facility do not result from a cessation of operations at another facility. In other words, the proposed standard for a plan administrator to decide whether a § 4062(e) event has occurred, when to file a notice of an event, and how many affected participants to report should end the inquiry unless there are unusual circumstances.

To the extent that linking causation across facilities is permitted, the regulation should limit the time period over which a chain reaction may occur to 30 days or less. No separation occurring after this period should be linked to a cessation of operations that occurred before the period started.

4. Plans Frozen to New Entrants

When a plan is frozen to new entrants, the percentage of active employees who participate in the Plan declines steadily over time—especially if the plan sponsor's business is successful. By ignoring this fact, the proposed regulation would sweep in many insignificant events.

For example, suppose a plan was frozen to new entrants in the 1990's. At the time of the freeze, the plan sponsor had 20,000 employees in the U.S. and all of them participated in the plan. Since the freeze, attrition has resulted in the number of active employees participating in the plan falling to 1,000, but the size of the business has remained steady or grown. Under the proposed regulation, a cessation that results in only 200 participating employees losing their jobs—1% or less of the total U.S.-based employee population—would be a § 4062(e) event.

As another example, suppose that when a plan was frozen, the employer had 5,000 employees and they all participated in the plan. Since that time, the employer's business has grown and it now employs 20,000 employees. Under the proposed regulation, a cessation that results in 1,000 participating employees losing their jobs—only 5% of the total employee population—would be a § 4062(e) event.

In order to avoid these absurd results, the regulation should include an exemption for frozen plans that meet minimum funding requirements. Alternatively, the regulation should allow the active participant base to include employees who would have been active participants if not for the freeze.

5. Exemption for Well-Funded Plans

ERIC appreciates that the PBGC intends to continue its practice of negotiating with affected employers in appropriate cases. However, in order to ensure reasonably consistent results and to aleviate the burden of a reporting requirement in cases where the risk to the PBGC is not significant, the regulation should specify criteria under which no action will be required.

Many plans that are not fully funded on a termination basis nevertheless do not pose a significant risk to the PBGC. For example, a plan with an Adjusted Funding Target Attainment Percentage ("AFTAP") of 90% or more does not pose a significant risk to the PBGC. The regulation should relieve the sponsors of plans in this category from worrying about § 4062(e).

Adding a reasonable exemption for plans that do not pose a significant risk to the PBGC would not only ease the burden on plan sponsors, allowing them to deliver benefits more efficiently: it would enable the PBGC to allocate its limited resources to the cases that warrant attention.

* * * * *

ERIC appreciates the opportunity to submit these comments. We look forward to working with you to create workable rules that enable the PBGC to protect itself against the cost of terminating underfunded plans without imposing unnecessary burdens on employers. If we can be of further assistance, please let us know.

Sincerely,

Mark J. Ugoretz
President & CEO

November 12, 2010

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

RE RIN 1212-AB20

Dear Sir or Madam

I am writing on behalf of the Principal Financial Group® (The Principal®) with respect to the proposed regulations under ERISA section 4062(e). The Principal is a global, diversified services organization with more than 130 years of financial services experience. We are a member of the Fortune 500, with $305.7 billion in assets under management[1] and 18.9 million customers worldwide. The Principal is one of the leaders in the retirement industry providing full-service solutions for defined contribution, defined benefit, employee stock ownership and nonqualified plans.

As the number one provider of total defined benefit (DB) plans serviced[2], we service nearly 2,700 DB plans - including 1,000 actuarial clients[3]. These include privately held, publicly traded and non-profit organizations ranging from small to large plan sizes. Our clients and their financial professionals are led by a team of 26 actuaries who have more than 22 years of experience[3] and are deployed regionally across the country. With nearly $48 billion in defined benefit assets under management[4] and more than 65 years of experience in the retirement services industry, the Principal Financial Group has the actuarial consulting expertise to help plan sponsors make key short and long-term plan decisions, coupled with the efficiencies and convenience of a full-service provider.

Following is a brief summary of a recommendation for your consideration:

The proposed regulations will determine the liability associated with a 4062(e) event, incorporating the provisions of the final regulations issued in 2006. "The amount of liability for a section 4062(e) event is the amount that PBGC determines to be the amount described in section 4062 of ERISA for the entire affected plan, computed as if the plan had been terminated by PBGC immediately after the cessation date, multiplied by a fraction –

(1) The numerator of which is the number of affected participants, and
(2) The denominator of which is the active participant base."

This head-count calculation may produce a 4062(e) liability with some unreasonable results.

[1] As of 9/30/10.
[2] No.1 provider of DB plans serviced based on plan count. *Investment Advisor Magazine*, November 2009.
[3] As of 12/31/2009.
[4] Includes both full-service retirement plan clients and investment-only clients through subsidiary Principal Global Investors, Inc.

For example, consider a plan with liability heavily weighted by retired or deferred vested participants. Assume a company sponsors a pension plan with 5,000 participants of which 1,000 are active employees and the remainder are retired or deferred vested participants. The plan is underfunded on a PBGC termination basis by $125 million. Also assume that the $125 million underfunding is allocated as follows: $20 million for active participants and $105 million for retirees and deferred vested participants. The company shuts down an operation which results in the termination of 210 participants in the plan. The PBGC termination liability associated with only these 210 employees is $2 million. Under the proposed regulations, there would be an immediate liability to the PBGC of $26.25 million ($125M x 210 affected participants / 1,000 active participants prior to the cessation) – far in excess of the potential liability for the affected participants.

We suggest that the proposed rule be modified so the amount of liability for a 4062(e) event is changed from a head-count ratio to a liability weighted method as follows:

The total liability as determined by PBGC, multiplied by a fraction –

(1) The numerator of which is the PBGC termination liability for the affected participants, and
(2) The denominator of which is the PBGC termination liability for the active participant base.

This method would provide for a more reasonable assessment of $12.5M ($125 x $2M / $20M) for the example as described above.

Thank you for the opportunity to comment on the proposed regulations.

Sincerely,

Linda M. Kirk

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