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Comments on Proposed Rule Relating to Reportable Events and Certain Other Notification Requirements

January 22, 2010

Pension Benefit Guaranty Corporation
29 CFR Parts 4000,4001,4043,4204, 4206, 4211 and 4231
[RIN 1212-AB06]

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the proposed rule relating to reportable events and certain other notification requirements issued by the Pension Benefit Guaranty Corporation on November 23, 2009 [RIN 1212-AB06].

ASPPA is a national organization of more than 6,500 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. **Well-funded Plan Exception**

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

II. **Reporting of Active Participant Reductions**

The current waivers for small plans and well-funded plans in PBGC regulation §4043.23 (c)(1) and §4043.23 (c)(2) should be retained.

III. **Reporting of Missed Required Contributions**

The final rule should include relief for reporting of missed quarterly contributions by small plans. The final rule should also retain the exception for missed required contributions paid within 30 days of the due date.

IV. **Reporting for AFTAPs less than 60%**

The final rule should waive reporting of an adjusted funding target attainment percentage (AFTAP) of less than 60% if the plan has been in existence for less than five years.

V. **Regulatory Process**

After comments are received and a public hearing held, re-proposed changes should be issued.

Discussion of Issues

I. **Well-funded Plan Exception**

Current regulations provide an exception to most reportable event notice requirements for well-funded plans. The concept of waiving reporting for well-funded plans makes sense because there is little or no risk to PBGC or to the benefit security of plan participants. However, the proposed rule eliminates these waivers.

ASPPA COPA recommends that the broad waiver of the reportable event notice requirements continue to be available to well-funded plans. The current funding-based waivers encourage plan sponsors to maintain well-funded plans to avoid the notice requirements, which is in the best interest of plan participants and the PBGC. The proposed elimination of reporting waivers for plans with no variable rate premium or plans with less than $1 million in unfunded vested benefits indicates PBGC has found plans that meet these criteria pose a significant risk to PBGC. ASPPA COPA asks that PBGC publicly present the data and analysis that lead to the proposed elimination of the waivers, and consider modifying the current criteria to address the risks instead of eliminating the waivers. ASPPA COPA asks that PBGC allow the public to comment on a revised proposal before finalizing the rule.

ASPPA COPA further suggests that plan sponsors be permitted to reflect only the guaranteed portion of benefits for majority owners when determining funded status for purposes of a reporting waiver. Majority owners typically waive unfunded benefits in situations where waiver of the majority owners' unfunded benefits is necessary and sufficient for a standard termination.

II. Reporting of Active Participant Reductions

A reportable event occurs under current law when a plan experiences a decline in the number of active participants to less than 80% of the number at the beginning of the plan year, or less than 75% of the number at the beginning of the prior year (ERISA §4043(c)(3)). Current regulations waive the reporting requirement in certain situations, including plans with fewer than 100 participants at the beginning of the current or prior year, and well-funded plans (PBGC regulation §4043.23 (c)(1) and §4043.23 (c)(2) respectively). The proposed rule would both eliminate these waivers and eliminate the extension of the notice due date (currently 30 days after the latest of the PBGC Form 1 or Form 5500 due dates or the PBGC Form 1-ES due date, if applicable.) As a result, small plans not only would have to provide the notice, but would also be required to do so by the 30th day following the day the event occurs.

A. ***ASPPA COPA recommends*** that the small plan and well-funded plan exceptions be retained. Small plans are particularly sensitive to reductions in workforce that could trigger this reporting requirement, and the reduction would frequently be the result of normal employment patterns rather than the impending collapse of the business and transfer of liability to PBGC. An extreme example is an employer with four employees, all of whom are participants in a plan with a year of service requirement for entry. If one employee leaves for any reason, a new hire will not be participating in the plan until the following year. As a result, there will be a more than 20% reduction in the number of active participants. Under the proposed rule, the notice will be required within 30 days after that employee leaves employment. Normal turnover creating the reduction in active participation will be far more common for small employers who sponsor defined benefit plans than a reduction reflecting a business downturn that signals trouble for PBGC. This reporting requirement will be a burden to the employer and not result in any significant savings or beneficial information to PBGC.

   While ASPPA COPA believes that the small plan waiver should remain in its current form, if the small plan waiver must be modified, ASPPA COPA recommends that the current exception should be retained for plans with less than 50 active participants. A reduction of 10 or fewer active participants does not warrant the cost of producing or processing the required filings.

B. The elimination of the extended due date makes it very likely the employer will not file a timely notice. Small employers, and many larger employers, rely on third party administrators or actuaries to complete required filings. 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. ***ASPPA COPA recommends*** that the regulations provide an extended 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.

III. Reporting of Missed Required Contributions

Current regulations provide a reporting waiver for missed required minimum contributions if the contribution is made within 30 days of the due date. In addition, PBGC Technical Update 09-03 provided a special rule for small plans and missed quarterly contributions for 2009. Technical Update 09-04 extends the special rule to 2010, and indicates that the final version of these proposed rules will supersede the relief in 09-04 when the final rule is issued. The proposed rule would eliminate all waivers for missed required contributions.

ASPPA COPA recommends that the final rule include the waiver of the notice requirement for missed quarterlies in effect for all plans under 100 lives from 1997 through 2008 (Technical Update 97-4). As noted in our letter of March 24, 2009, it is common business practice for small employers to forego making quarterly contributions. Limiting reporting to contributions that are not made by the final contribution due date (8 ½ months after the end of the year) will allow PBGC to focus on employers that are truly in trouble. Furthermore, plan sponsors with end-of-year valuation dates generally do not know the amount of the required quarterly contribution when the first payment is due, and so cannot accurately report in any event. If PBGC is unwilling to restore the relief under Technical Update 97-4, the final rule should be modeled on the relief for reporting of missed quarterly contributions by small plans included in Technical Update 09-03.

ASPPA COPA recommends the final rule also retain the exception for contributions paid within 30 days of the due date. Allowing plan sponsors a reasonable amount of time to cure missed required contributions will eliminate many filings and provides plan sponsors an incentive to promptly contribute missed contributions.

IV. Reporting for AFTAPs less than 60%

Under ERISA §206(g)(4), benefit accruals are frozen when a plan's AFTAP falls below 60%. ERISA §206(g)(6) provides an exception to this restriction for new plans, waiving the restriction for the first five years of a plan's existence. A new proposed regulation §4043.36 creates a reportable event when a plan's AFTAP falls below 60%.

ASPPA COPA recommends that the new plan exception to benefit restrictions in ERISA §206(g)(6) be applied to the reporting requirement for plans with an AFTAP of less than 60%. This exception recognizes that underfunding in new plans is due to the youth of the plan, not financial difficulty of the employer.

V. Regulatory Process

The broad impact of the proposed changes to the current regulations is to remove waivers and extensions from the regulatory process. The preamble indicates that PBGC will monitor the resulting filings and "determine whether some automatic waivers and extensions can be restored (or newly crafted waivers or extensions provided) without jeopardizing efforts to protect the benefits of participants in troubled plans and the pension insurance program." Comments were solicited on whether each individual waiver or extension that was removed "struck the correct balance" between PBGC's need for information and the burden on plan sponsors.

ASPPA COPA has commented on the unjustified burden that will result from several specific changes in sections I through IV of this letter. These proposed additional notice requirements would significantly increase the cost of administration for small defined benefit plans. The increased cost should not be incurred unless it is clear that there will be a compensating benefit to the system. While ASPPA COPA appreciates PBGC's willingness to consider adding back exemptions at a later date, this approach creates confusion for both practitioners and plan sponsors and adds to the cost of administering the plan. This is true even if the exemption is restored at a later date. Because of the substantial reporting burden created by these proposed changes, ***ASPPA COPA recommends*** that, after the comment period has closed and a public hearing is held on these proposed changes, re-proposed rules be issued for another round of public comment.

These comments were prepared by ASPPA's Defined Benefit Subcommittee of the Government Affairs Committee and the ASPPA College of Pension Actuaries. Please contact us if you have any comments or questions on the matters discussed above.

Thank you for your consideration of these comments.

Sincerely,

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