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April 12, 2013

PBGC Proposes New Regulations Under Reportable Events Rule

New rules signal relief for financially sound plans and plan sponsors and are consistent with PBGC's section 4062(e) enforcement policy for "plant shutdown" liability.

On April 3, the Pension Benefit Guaranty Corporation (PBGC) issued proposed rules under section 4043 of the Employee Retirement Income Security Act (ERISA) that would substantially change the rules relating to "reportable event" filing obligations.[1] In issuing these proposed rules, the PBGC indicated that the current waiver structure under ERISA section 4043 is not "well-tied to the actual risks and causes of plan terminations," which has resulted in the PBGC not receiving the reports it needs from plans and sponsors andreceiving reports that are unnecessary. As such—and consistent with the PBGC's approach on other initiatives—the proposed rules attempt to focus filing obligations on financially troubled companies and underfunded plans and, conversely, exempt financially sound companies and well-funded plans from the filing obligations. Given the detailed requirements of the rules, it is not entirely clear that the new rules will accomplish the PBGC's stated objectives. However, the proposed rules, if finalized, would result in a significant change in how plan sponsors need to evaluate their reportable event obligations.

Proposed Rules

ERISA section 4043 requires sponsors of defined benefit plans to notify the PBGC of certain "reportable events" that may indicate that a plan or plan sponsor is in financial trouble or may require the PBGC to monitor or terminate the plan involuntarily. Reportable events include plan events, such as missed contributions, insufficient funds to pay benefits, and large payouts, as well as company events, such as loan defaults and controlled group changes.

The proposed rules establish two safe harbors for certain reportable events that exempt financially sound companies and plans from section 4043 reporting requirements. A business is financially sound under the proposed rules if it has the capacity to meet financial commitments in full and on time. Specifically, a business would meet the financially sound safe harbor if it does the following:

- Satisfies the "credit report" test, which requires the business to have a credit report score, from a commercial credit reporting company commonly used in the business community, indicating a low likelihood that the business would default on its obligations.
- Has positive net income for the last two years.
- Has no secured debt (subject to certain exceptions, such as purchase-money mortgages and leases).
- Has no loan defaults or similar issues.
- Has no missed pension plan contributions for the last two years (subject to certain exceptions).

The proposed rules would also retain plan funding as a basis for relief from the reporting requirements, replacing

1. Reportable Events and Certain Other Notification Requirements, 78 Fed. Reg. 20,039 (Apr. 3, 2013) (to be codified at 29 C.F.R. pts. 4000, 4001, 4043, 4204, 4206, 4231), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-04-03/pdf/2013-07664.pdf.

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automatic waivers with a safe harbor for plans that meet certain funding levels. A plan would meet the financially sound safe harbor if it is fully funded on a termination basis or is 120% funded on a premium basis.

The proposed rules would also expand the waivers available for small plans under section 4043, preserve certain waivers for foreign entities and *de minimis* controlled group segments, eliminate reporting for many bankruptcies, and simplify the reporting process.

The PBGC has invited public comments on the proposed rules, with a hearing on the proposed rules scheduled for June 18, 2013. Comments are due by June 3, 2012, and the proposed rules are expected to take effect on January 1, 2014.

Alignment With Other Initiatives

The April 3 proposed rules represent a departure from the PBGC's earlier position on these issues. In 2009, the PBGC proposed a set of rules that would have expanded reporting requirements and eliminated most waivers under section 4043. In response to concerns from the business community that such changes would burden plan sponsors unnecessarily when risks to pension plans were low, the PBGC withdrew this earlier set of proposed rules and formulated the new approach set forth in its most recent set of rules.

Notably, the approach taken in the recent set of proposed rules is consistent with the PBGC's changes to its enforcement policy under ERISA section 4062(e). Section 4062(e) requires companies with defined benefit plans to report to the PBGC when they cease operations at a facility and more than 20% of plan participants are separated from employment in connection with the cessation of operations. The company typically will be required to make additional contributions or provide a financial guarantee to protect the plan. In November 2012, the PBGC stated it would take no action to enforce section 4062(e) against "creditworthy" companies or those plans with 100 or fewer participants.[2] The PBGC will only take action to enforce section 4062(e) against those companies with a substantial risk of default, rejecting its previously announced categorization of a business as a "strong company," "moderately strong company," or "weak company," under which the PBGC's demands for additional funding were based on the company's categorization. The PBGC estimates that this latest approach will relieve 92% of pension plan sponsors from potential enforcement efforts.

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2. Press Release, Pension Benefit Guar. Corp., PBGC Targets Enforcement Efforts to Preserve Pensions (Nov. 2, 2012), *available at* http://www.pbgc.gov/news/press/releases/pr12-32.html.

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