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BENEFITS BRIEF

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PBGC Proposes Significant Changes to "Reportable Event" Regulation

On April 3, the Pension Benefit Guaranty Corporation ("PBGC") released a revised proposed regulation on reportable events under section 4043 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). 78 Fed. Reg. 20039 (April 3, 2013). The proposed rule replaces the agency's controversial 2009 proposal, which PBGC reconsidered in light of the President's 2011 Executive Order calling for streamlining of regulations.

The new proposed rule would, among other things,

- replace many automatic reporting waivers with "safe harbors" based on the financial soundness of plan sponsors and plans,
- preserve the small plan, foreign entity, and de minimis waivers,
- make the advance reporting threshold consistent with the Pension Protection Act of 2006 ("PPA"),
- change various other reportable event rules,
- require the use of prescribed PBGC forms, and
- make electronic filing mandatory.

PBGC expects the revised proposal to reduce reporting requirements for more than 90 percent of companies and pension plans.

ERISA section 4043 and the reportable event regulation (29 C.F.R. Part 4043) require plan administrators and sponsors to notify PBGC of certain events that may signal problems with a pension plan or contributing employer. Generally, reportable event filings must be made within 30 days after the event (unless waived altogether), but some plans are subject to an advance reporting requirement. PBGC may assess a penalty of up to $1,100 per day for failure to comply with the reportable event requirements, although the penalty generally is reduced for most reportable events. ERISA § 4071; 29 CFR § 4071.

We summarize the new PBGC proposal below. (We note that, with the proposed regs, PBGC included a helpful chart comparing the current rules with the 2009 and 2013 proposals.) PBGC has requested comments on the proposed regulations and, in particular, the proposed safe harbors for financially sound plan sponsors and plans. Comments must be received by PBGC by June 3, 2013. A public hearing will be held – for the first time in PBGC's history – on June 18, 2013.

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New Financial Soundness Safe Harbors for Plan Sponsors and Plans

The proposed rule replaces many automatic waivers with "safe harbors" that allow financially sound plan sponsors and plans to avoid having to report certain events. A plan would fall within the safe harbor if it were either 100 percent funded on a termination basis, or 120 percent funded on a PBGC premium basis. The proposed rule, like the prior proposal in 2009, would require the calculation of unfunded vested benefits for purposes of the advance reporting threshold test to be made as of the valuation date for the preceding plan year. This amendment would resolve ambiguity created by changes to plan funding rules made by the PPA.

A plan sponsor would fall within the proposed safe harbor if it met the following five financial soundness criteria:

- "Credit report" test. The company must have a credit report score from a commercial credit reporting company, such as Dun & Bradstreet ("D&B"), that is commonly used in the business community, and the score must indicate a low likelihood that the company would default on its obligations. For example, a D&B score of 1477 would have met the standard for 2011.
- Positive net income for the past two years.
- No secured debt (with some exceptions, such as mortgages and equipment leases).
- No default on outstanding loans of $10 million or more for the past two years.
- No missed pension plan contributions for the past two years (with some exceptions).

All employers in a multiple employer plan would have to meet the above tests.

The financial soundness waiver applies to reportable events for active participant reduction, distribution to a substantial owner, controlled group change, extraordinary dividend, and transfer of benefit liabilities.

Other Waivers Retained

The proposal retains several waivers from current or prior proposals, including the following:

Small Plan Waiver

The proposed rule retains a modified version of the small plan waiver for active participant reductions and makes it applicable to more events. Small plan status would be determined in the same way as for purposes of the premium filing rules, meaning that the waiver applies to plans that had fewer than 100 participants for whom flat-rate premiums were payable for the plan year preceding the year of the reportable event. The small plan waiver would be extended to controlled group changes, benefit liability transfers, and extraordinary dividends.

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Foreign Entity and De Minimis Waivers

The proposed rule preserves all post-event foreign-entity reporting waivers and all reporting waivers for *de minimis* transactions. It also adds *de minimis* waivers for loan defaults and non-bankruptcy insolvency. *De minimis* transactions are those in which the person or persons that will cease to be members of the plan's controlled group represent a *de minimis* 10 percent segment of the plan's old controlled group for the most recent fiscal year(s) ending on or before the date the reportable event occurs. As defined in the proposed regulations, a *de minimis* 10 percent segment means, in connection with a plan's controlled group, one or more entities that in the aggregate meet all of the following for a fiscal year: (1) revenue not exceeding 10 percent of the controlled group's revenue; (2) Annual operating income not exceeding the greater of (i) 10 percent of the controlled group's annual operating income or (ii) $5 million; and (3) Net tangible assets at the end of the fiscal year(s) not exceeding the greater of (i) 10 percent of the controlled group's net tangible assets at the end of the fiscal year(s); or (ii) $5 million.

Other Key Changes to Current Reportable Event Rules

Among other changes, the following are noteworthy.

- *Active participant reduction.* A reportable event occurs when the number of active participants is reduced below 80 percent of the number at the beginning of the year, or below 75 percent of the number at the beginning of the prior year, with several automatic extension provisions. The new rule provides a single extension to 120 days after year end, unless, during the plan year, the participant reduction occurred within a single 30-day period or as a result of a single cause, such as a reorganization or an early retirement program.

- *Missed contributions*. The proposed rule would clarify that the reportable event applies not only to contributions required by statute, but also to contributions required as a condition of obtaining a funding waiver. The rule would retain the current grace-period waiver for missed contributions that are made within 30 days, and would include a waiver for plans considered "small" for purposes of the premium filing rules (*i.e.* having fewer than 100 participants) that miss a quarterly contribution. The current 10-day reporting deadline for missed contributions exceeding $1 million in the aggregate, required under section 303(k) of ERISA and section 430(k) of the Internal Revenue Code of 1986, as amended, ("Code") remains unchanged.

- *Inability to pay benefits when due.* The proposed rule would clarify that the large plan waiver applies to plans that are subject to the liquidity shortfall requirements, *i.e.* plans that do not meet the "small plan" definition in section 303(g)(2) of ERISA and section 430(g)(2) of the Code.

- *Distributions to substantial owners.* The current rule requires reporting if a distribution to a substantial owner exceeds $10,000 a year, with some exceptions. The proposed rule requires reporting only if the distribution exceeds one percent of plan assets or distributions to all substantial owners exceed five percent of plan assets.

- *Controlled group changes.* The proposed rule would clarify that no reportable event occurs when one member of a controlled group merges into another. It would also provide that whether an agreement to change a controlled group is legally binding, which triggers this reporting requirement, should be determined without regard to any conditions in the agreement.

- *Extraordinary Dividends.* A reportable event would occur when a dividend or redemption exceeds 100 percent of net income for the prior fiscal year, simplifying the current rule providing for one-year and four-year testing periods and disregarding distributions within a controlled group.

- *Transfer of benefit liabilities.* The proposed rule would clarify that the payment of a lump sum, or the purchase of an irrevocable commitment to provide an annuity, do not constitute transfers of benefit liabilities that need to be reported. In addition, the proposal would change the advance reporting requirement for this event to require reporting only by the transferor plan, not both the transferee and transferor plan as the current rule requires in a spinoff or similar transaction.

- *Loan default.* The proposed rule would revise the definition of the loan default event to cover acceleration by the lender and default of any kind by the debtor, and expand it to include any amendment or waiver by a lender of any loan agreement covenant for the purpose of avoiding a default.

- *Bankruptcy and insolvency.* The proposed rule would limit the reporting requirement to exclude bankruptcies under the Bankruptcy Code, because PBGC learns of them by other means.

Effective Date

The proposed changes are scheduled to apply to post-event reports occurring on or after January 1, 2014, and to advance reports due on or after that date. This is subject to change when final rules are released.