

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy



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Legislative and Regulatory Department
Pension Benefit Guaranty Corporation (PBGC)
1200 K Street, N.W.
Washington DC 20005-4026
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 (“Roundtable¹”) 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.

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 shoe 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 two 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 withdraw 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:

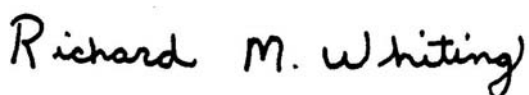
The proposed rule does not include an effective date to implement the rule. If and when a final rule is implemented, the Roundtable recommends that the final rule should be applied prospectively.

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 or 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 Whiting
Executive Director and General Counsel