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December 22, 2010

John H. Hanley
Director
Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005

Re: Comments on PBGC Proposed Rule on Reportable Events

Dear Director Hanley:

Enclosed are comments on PBGC proposed rule on reportable events. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles H. Egerton".

Charles H. Egerton
Chair, Section of Taxation

Enclosure

cc: Catherine B. Klion, Manager, Regulatory and Policy Division, PBGC
Deborah C. Murphy, Attorney, Regulatory and Policy Division, PBGC

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**ABA SECTION OF TAXATION
COMMENTS ON PBGC PROPOSED RULE
ON REPORTABLE EVENTS
REGULATION IDENTIFIER NUMBER (RIN) 1212-AB06**

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, the Comments should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Harold Ashner, Carol Buckmann, Matthew J. Eickman, Stuart Sirkin, and Deborah West of the Employee Benefits Committee of the Section of Taxation. The Comments were reviewed by Martha L. Hutzelman, Committee Vice Chair, and Eleanor Banister, Immediate Past Committee Chair. The Comments were further reviewed by members of the Quality Assurance Group of the Committee, which is chaired by Pamela Baker, by Tom Jorgensen of the Section’s Committee on Government Submissions, and by Thomas R. Hoecker, Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal regulatory principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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December 22, 2010

EXECUTIVE SUMMARY

These Comments are submitted with respect to the proposed regulation (the “Proposed Regulation”)¹ issued by the Pension Benefit Guaranty Corporation (“PBGC”) on November 23, 2009, regarding its regulation on Reportable Events and Certain Other Notification Requirements (the “Regulation”).²

As discussed in greater detail below, while we applaud PBGC for taking a fresh look at the Regulation in light of the unprecedented challenges PBGC is facing and the critical role reportable events play in PBGC’s efforts to protect participants, premium payers, and the pension insurance program as a whole, we respectfully offer a number of recommendations that we believe will help to balance the needs of PBGC and the other stakeholders affected by the Regulation.

The following is a summary of our recommendations with respect to the Proposed Regulation:

1. We recommend that: (a) particularly in light of the significant negative effect that we believe the elimination of the current waivers and extensions for reportable events would have on employers’ corporate³ agreements, PBGC re-examine the proposed elimination taking into account PBGC’s need for information and the interests of the regulated public; (b) PBGC retain the automatic waivers and extensions that would not significantly increase PBGC’s risk; and (c) if PBGC eliminates one or more of the waivers or extensions, the effective date of the changes be delayed for at least one year to provide time for employers, lenders, and other affected parties to negotiate revisions to their corporate agreements, and for all other stakeholders to prepare for compliance.
2. We recommend that PBGC make changes to the definition of what constitutes a well-funded plan that take into account recent statutory and regulatory changes, but that, with respect to plans that are well-funded under that updated definition, PBGC retain the existing waivers and extensions of notices for reportable events.
3. We recommend that: (a) PBGC retain the existing waivers regarding Foreign Non-Parents;⁴ (b) in the alternative, if PBGC concludes that some or all of the existing waivers regarding Foreign Non-Parents should be eliminated, PBGC provide an extension that is keyed to actual knowledge with respect to

¹ 74 Fed. Reg. 61,248 (2009).

² 29 C.F.R. pt. 4043.

³ Throughout this document, for simplicity, we refer to “corporate” agreements, but these comments are equally applicable to agreements of businesses that are not corporate in form (*e.g.*, sole proprietorships and partnerships).

⁴ A “foreign entity” is a foreign controlled group member that is not a contributing sponsor of a plan and that meets one of three criteria indicating that it does not have a significant economic presence in the United States. 29 C.F.R. § 4043.2. In these Comments, the term “Foreign Non-Parent” refers to a foreign entity that is not a direct or indirect parent of the plan sponsor.

reportable events involving those entities; and (c) PBGC retain the existing extensions with respect to Foreign Parents⁵ and Foreign-Linked Entities,⁶ which are keyed to actual knowledge.

4. We recommend: (a) retention of the existing two-step approach for providing information on reportable events, which permits filers to make a limited initial submission for PBGC reporting purposes, with PBGC retaining the authority to require more extensive information if necessary in particular cases; and (b) modification of the proposed expanded requirement regarding “before and after” financial statements such that (i) public companies are required to provide the same financial reports that are required to be provided to the Securities and Exchange Commission (the “SEC”) no earlier than the date that the SEC requires such financial reports and (ii) non-public companies are required to provide the most recent financial statements required to be provided to the company’s commercial lenders or that have been produced for another business purpose.
5. We recommend: (a) retention of the existing waiver of the notice for active participant reductions with respect to small plans; (b) that PBGC clarify that the start of the 60-day reporting period for Employee Retirement Income Security Act of 1974 (“ERISA”)⁷ section 4062(e) events occurs at the later of the date of the cessation of operations described in section 4062(e) and the date the 20% threshold of section 4062(e) is crossed; and (c) retention of the existing extensions with respect to notice of reportable active participant reductions that are not based on a section 4062(e) event.
6. We recommend: (a) retention of the existing waiver of the notice for missed quarterly contributions that are contributed to the plan within 30 days of the due date or, in the alternative, that notice be waived with respect to one missed quarterly contribution per plan year, provided the contribution is made within 30 days of the due date for making the contribution; and (b) incorporation of a waiver of notice for small plans that is at least as broad as the waiver in PBGC Technical Update 09-4.⁸
7. We recommend retention of the existing waivers for notices related to substantial owner distributions up to the Code⁹ section 415 limit and up to one percent of plan assets.

⁵ In these Comments, the term “Foreign Parent” refers to a foreign entity that is a direct or indirect parent of a person that is a contributing sponsor. 29 C.F.R. § 4043.2.

⁶ In these Comments, the term “Foreign-Linked Entity” refers to a person that is neither a foreign entity nor a contributing sponsor of a plan and is a member of the plan’s controlled group only because of ownership interests in or by foreign entities. 29 C.F.R. § 4043.2.

⁷ Pub. L. No. 93-406, 88 Stat. 829.

⁸ PBGC Technical Updates are available at <http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/index.html>.

⁹ Internal Revenue Code of 1986, as amended (the “I.R.C.” or the “Code”).

8. We recommend retention of the existing waiver for notice of events involving the liquidation of a *de minimis* controlled group member if each plan that was maintained by the liquidating member is maintained by another member of the plan's controlled group after the liquidation.
9. We recommend the retention of existing waivers: (a) for *de minimis* transfers of benefit liabilities to other plans (with respect to both plans); and (b) in situations in which both plans involved in the transfer are fully funded.
10. We recommend that the regulation, when finalized, provide that, once the plan administrator has reported the plan's adjusted funding target attainment percentage ("AFTAP")¹⁰ as less than 60%, no additional reporting be required if the AFTAP remains below 60% on subsequent certifications or presumptions.
11. We recommend, with respect to transfers under Code section 420(f), that reporting be required only (a) when the funded ratio of the plan falls below 110% or (b) if the funded ratio is not increased to 120% within the statutory required time period.
12. We recommend that PBGC repropose the Proposed Regulation and include an explanation of the problems the existing waivers and extensions have caused to enable the public to offer more meaningful alternative approaches and specific recommendations regarding "whether [PBGC] has struck the correct balance between ensuring relevant information is received timely and increased reporting burden on the regulated community"¹¹ with respect to each waiver and extension PBGC proposes to eliminate.

¹⁰ I.R.C. § 436(j)(2).

¹¹ 74 Fed. Reg. 61,248, 61,251 (2009).

COMMENTS ON PBGC PROPOSED RULE ON REPORTABLE EVENTS

REGULATION IDENTIFIER NUMBER (RIN) 1212-AB06

BACKGROUND

On November 23, 2009, PBGC published the Proposed Regulation, which includes amendments to the Regulation regarding reportable events and certain other notification requirements. The Regulation implements ERISA section 4043, which requires that PBGC be notified of the occurrence of certain “reportable events.” One purpose of the Proposed Regulation is to conform the Regulation to statutory changes made by the Pension Protection Act of 2006 (“PPA 2006”).¹² Further, the Proposed Regulation would eliminate most of the automatic waivers and filing extensions currently provided and create two new reportable events based on provisions in PPA 2006 dealing with funding-based benefit limits and with asset transfers to retiree health benefits accounts.

We recognize the unprecedented challenges PBGC faces in the current economic environment and the critical role reportable events play in PBGC’s efforts to protect participants, premium payers, and the pension insurance program as a whole. We applaud PBGC for taking a fresh look at the Regulation, re-evaluating the balance of stakeholders’ interests that was struck 14 years ago when the Regulation was promulgated, and making adjustments in light of PBGC’s experience and the different economic environment that exists in 2010. We appreciate both the opportunity to provide comments on the Proposed Regulation as well as PBGC’s specific request for comments as to “whether it has struck the correct balance between ensuring relevant information is received timely and increased reporting burden on the regulated community.”¹³ We believe that in several respects the Proposed Regulation does not strike the correct balance. We commend and welcome PBGC’s willingness to re-examine all stakeholders’ interests and to re-assess what might be the correct balance among them.

The reportable events described in ERISA section 4043 have been part of ERISA since its enactment. The Retirement Protection Act of 1994 (“RPA”)¹⁴ revisited those requirements, providing several new reportable events and creating advance reporting for certain large non-public plan sponsors. Significantly, RPA left intact PBGC’s authority to waive events and create new events. Following passage of RPA, PBGC developed the Regulation through the process of negotiated rulemaking.

Because of the potential magnitude of borrowers’ liabilities under ERISA, commercial lenders have incorporated the concepts of reportable events and potential or actual liability to PBGC into their credit agreements as indicative of problems that might impair the borrower’s ability to repay and that may constitute events of default. While

¹² Pub. L. No. 109-280, 120 Stat. 780.

¹³ 74 Fed. Reg. 61,248, 61,251 (2009).

¹⁴ Pub. L. No. 103-465, 108 Stat. 4809.

provisions (representations and warranties) and consequences (reporting, inability to draw new funds, default, etc.) differ among credit agreements, these credit agreements generally tie the consequences to the borrower having a reportable event for which there is required reporting to PBGC (*i.e.*, for which no waiver exists). These provisions may or may not have materiality qualifiers.

Similarly, other important business transactions, including stock and asset purchase agreements, typically contain representations that no reportable event for which the reporting requirement has not been waived has occurred prior to (or will occur as a result of) the consummation of the transaction involved. These provisions may or may not have materiality qualifiers.

We believe that changes included in the Proposed Regulation would result in:

- a significant increase in the reporting burden on employers and plans;
- a need for significant additional controlled-group-wide monitoring;
- an increase in penalty exposure tied to the increase in reporting obligations, some of which are difficult to monitor; and
- a potentially significant negative effect on corporate loans and other corporate agreements.

For these reasons, we respectfully request consideration of the recommendations discussed below.

I. CORPORATE LOANS AND OTHER AGREEMENTS

A. Summary

As discussed above, the Proposed Regulation would eliminate most automatic waivers and extensions for reportable events. We believe elimination of the automatic waivers and extensions would have a significant negative effect on corporate loans and other important corporate agreements.

B. Recommendation

We recommend that: (a) particularly in light of the significant negative effect that we believe the elimination of the current waivers and extensions for reportable events would have on employers' corporate agreements, PBGC re-examine the proposed elimination taking into account PBGC's need for information and the interests of the regulated public; (b) PBGC retain the automatic waivers and extensions that would not significantly increase PBGC's risk; and (c) if PBGC eliminates one or more of the waivers or extensions, the effective date of the changes be delayed for at least one year to provide time for employers, lenders, and other affected parties to negotiate revisions to their corporate agreements, and for all other stakeholders to prepare for compliance.

C. Explanation

As noted above in the Background section, agreements regarding commercial transactions such as corporate loans and stock and asset purchase agreements typically require representations with respect to PBGC reportable events. A typical representation is that no reportable event has occurred for which the reporting requirement has not been waived. If the changes to the Regulation were adopted as proposed, the changes might significantly and adversely affect existing corporate arrangements. For example, under the Proposed Regulation, if finalized, commercial lenders, in many situations, would have the ability to default loans or deny new credit based on circumstances that were not contemplated when the parties entered into the agreement. We believe, at a minimum, the changes in the Proposed Regulation would lead to uncertainty; at worst, we believe the changes might create serious problems in the credit markets due to unintended defaults and result in significant adverse consequences for some employers. In either case, we believe that the changes in the Proposed Regulation would have the unintended effect of increasing the ability of commercial lenders to declare loans to be in default or to deny drawdowns of credit, leading to the very real possibility of additional tightening of credit that would negatively affect employers.

Under many existing corporate credit agreements, borrowers make representations that there has been no reportable event for which the reporting requirement has not been waived, and that there is no outstanding liability (including, *e.g.*, liability for penalties based on failure to comply with the new reporting obligations that would be imposed by the Proposed Regulation) that has been or could be assessed under Title IV of ERISA, other than liability for unpaid premiums. Credit agreements typically are multi-year agreements and these representations are renewed each time there is a drawdown of credit. Notice provisions in credit agreements typically require notice from the borrower each time a reportable event for which notice has not been waived occurs. Numerous examples of such provisions involving Fortune 500 companies and major lenders can be found in many public filings on EDGAR (for example, as exhibits to Form 8-K); these provisions illustrate the extent to which credit agreements are tied into PBGC's reportable event regulations.¹⁵

If the proposed changes to existing automatic waivers were adopted, the inability of a borrower to repeat its representation that there has been no reportable event for which notice has not been waived might give the lenders to such borrower a basis for refusing to advance additional funds or extracting further concessions from the borrower as a condition for advancing additional funds. The withdrawal of credit upon which an employer relies (*e.g.*, to meet payroll) might have negative consequences for the employer and might affect its ability to fund and continue its plan, which we believe would not be in the interest of PBGC.

¹⁵ We would be happy to provide PBGC with examples of such provisions.

Borrowers also might find themselves in technical default under agreements that define an event of default to include a reportable event for which notice is not waived. While many agreements include a materiality qualifier, not all do. A materiality qualifier may be subjective or may be an objective standard such as whether the plan has a specified amount of underfunding. We believe there would be disputes as to whether particular events meet any applicable materiality test in the agreement, or whether the old reportable event Regulation should apply under the agreements. We also believe it is not in the interest of any parties to these agreements or PBGC to have unnecessary disputes or litigation clouding the ability of credit-worthy borrowers to draw on previously agreed credit lines.

As mentioned in the Background section, agreements regarding other corporate transactions, including stock and asset purchases, also typically contain representations that no reportable event for which the reporting requirement has not been waived has occurred or will occur as a result of the consummation of the transaction involved, and buyers also may ask for representations that no event or set of facts has occurred that might lead to liability or plan termination under Title IV of ERISA.¹⁶ We believe that the elimination of almost all waivers of reportable events under the Regulation would cloud the ability to make these representations, the truth of which is typically a condition of closing, and would cloud the issue of whether the closing conditions have been satisfied.

As indicated above, we commend PBGC for re-examining the Regulation and making changes in light of both PBGC's experience in the 14 years since the Regulation was promulgated and the current difficult economic environment. We recognize that some of the existing waivers and extensions may no longer be appropriate. However, because we believe the wholesale elimination of existing waivers and extensions would have a significant negative effect on corporate transactions without a corresponding benefit to the strengthening of the insurance program, we recommend that PBGC re-examine whether the Proposed Regulation strikes the correct balance of interests with respect to each particular waiver and extension regarding each particular reportable event, and that PBGC retain the existing waivers and extensions for reportable events that would not increase PBGC's risk. For example, as discussed in the next section of these Comments, if the Proposed Regulation were adopted, an employer whose pension plan is very well-funded might nonetheless find itself in technical default under its credit agreements. Those defaults likely would necessitate, at a minimum, discussions with the lenders about the defaults, and would serve to increase the lenders' leverage, at least to some degree. In a world in which credit is tight, increasing the number of reportable events for which reporting is required would increase the power of lenders and might lead to further tightening of credit availability, which might have a significant negative effect on employers. While such a result may be unavoidable if the change is necessary to protect the insurance program, we do not believe it should occur if the additional burden on employers provides no countervailing benefit to the insurance program.

¹⁶ We would be happy to provide PBGC with examples of such provisions.

Finally, because eliminating any of the existing waivers and extensions might have unintended and significant adverse effects on existing credit and other corporate agreements, and on the credit markets, we believe that the effective date of the final regulation should be delayed for a transition period of at least one year. Such a transition period would provide time for all affected parties to revise their agreements to take into account the changes made to the Regulation.

II. WAIVERS AND EXTENSIONS FOR WELL-FUNDED PLANS

A. Summary

The Regulation includes waivers¹⁷ and extensions¹⁸ of the notice for most reportable events for well-funded plans, although for some events additional conditions apply (*e.g.*, notice is waived with respect to a liquidation event if the plan is 80% funded, the plan's contributing sponsor is a public company, and each plan that was maintained by the liquidating member is maintained by another member of the plan's controlled group after the liquidation).¹⁹ The Proposed Regulation would eliminate virtually all of these waivers and extensions.

B. Recommendation

We recommend that PBGC make changes to the definition of what constitutes a well-funded plan that take into account recent statutory and regulatory changes, but that, with respect to plans that are well-funded under that updated definition, PBGC retain the existing waivers and extensions of notices for reportable events.

C. Explanation

We believe that the Regulation's provision of numerous waivers of notice for reportable events for well-funded plans reflects recognition that these well-funded plans represent little potential exposure for the insurance program and for participants. Moreover, waivers for well-funded plans are an incentive to fund to a higher level, which helps PBGC and participants. We agree that PBGC should revise the waivers and extensions to take into account statutory and regulatory changes since the 1996 adoption of the current Regulation. If PBGC's experience warrants, PBGC may need to adjust the applicable funded status thresholds, but we believe there should be a funding level at which PBGC is comfortable that it does not need the detailed information required with respect to reportable events. The fact that well-funded plans represent little potential exposure for the insurance program remains as true today as it was in 1996. Thus, we believe that any new regulation should continue to provide for waivers with respect to well-funded plans.

The Regulation contains several complex measures of what is a well-funded plan. For example, a waiver with respect to particular events may be available if: (1) the plan

¹⁷ 29 C.F.R. §§ 4043.23(c)(2), .27(c)(2), .29(c)(3), .30(c)(3), (c)(4), .31(c)(5), .32(c)(4), .34(c)(3).

¹⁸ 29 C.F.R. §§ 4043.23(d)(1), .27(d), .29(d)(1), .30(d)(1), .31(d)(1), .34(d)(3).

¹⁹ 29 C.F.R. § 4043.30(c)(4).

qualifies for the conditional variable rate premium exemption that applies during the standard termination process;²⁰ (2) the plan has less than \$1 million in unfunded vested benefits;²¹ or (3) the fair market value of the plan's assets is at least 80% of the plan's vested benefits amount²² (and, with respect to some events, another criterion also is met).²³

Statutory and regulatory changes since 1996 (for example, PPA 2006) may provide a basis for revising or updating some of the existing measures. For example, a new measure for a funding-based waiver might be based on a plan's AFTAP, which must be determined in the ordinary course for other purposes.

We also recognize that a downward adjustment to the current \$1 million unfunded vested benefit measure and an upward adjustment to the 80% funded measure may be warranted on the basis of PBGC's experience.

To the extent that waivers for well-funded plans are retained (with or without modifications), we also recommend that corresponding extensions similar to those in the Regulation be retained. These extensions recognize that whether a plan meets the requirements for a particular funding-based waiver may not be known by the time a reportable event notice is due, and extend the deadline until shortly after this would be known, provided that the plan *would meet* the requirements for the funding-based waiver based on earlier funding determinations that are known. These extensions result in a decreased reporting burden on employers because they are keyed to the preparation, in the normal course of business, of other required filings that include the information needed to determine whether the plan meets the requirements for one of the funding-based waivers.

III. WAIVERS AND EXTENSIONS REGARDING FOREIGN AND FOREIGN-LINKED ENTITIES

A. Summary

The Regulation provides a waiver of the notice for several reportable events with respect to Foreign Non-Parents. The waivers apply with respect to five events: (1) change in contributing sponsor or controlled group; (2) liquidation of contributing sponsor or controlled group member; (3) extraordinary dividend or stock redemption; (4) loan default; and (5) bankruptcy.²⁴ The Proposed Regulation would eliminate these waivers.²⁵ With respect to reporting these five events for Foreign Parents and for Foreign-Linked Entities, the Regulation provides for extensions keyed to actual

²⁰ 29 C.F.R. §§ 4006.5(a)(3); 4043.23(c)(2)(i).

²¹ 29 C.F.R. § 4043.23(c)(2)(ii).

²² 29 C.F.R. § 4043.27(c)(2)(iii).

²³ 29 C.F.R. § 4043.29(c)(4).

²⁴ 29 C.F.R. §§ 4043.29(c)(2), .30(c)(2), .31(c)(3), .34(c)(2), .35(c).

²⁵ 74 Fed. Reg. 61,248, 61,250 (2009).

knowledge.²⁶ The Proposed Regulation would eliminate these extensions.²⁷

B. Recommendation

We recommend that: (a) PBGC retain the existing waivers regarding Foreign Non-Parents; (b) in the alternative, if PBGC concludes that some or all of the existing waivers regarding Foreign Non-Parents should be eliminated, PBGC provide an extension that is keyed to actual knowledge with respect to reportable events involving those entities; and (c) PBGC retain the existing extensions with respect to Foreign Parents and Foreign-Linked Entities, which are keyed to actual knowledge.

C. Explanation

Again, we recognize that the balance among stakeholders' interests that the Regulation struck in 1996 may and probably does need to be adjusted in 2010. We believe, however, that the Regulation's waivers with respect to reporting transactions involving Foreign Non-Parents reflect the difficulty in obtaining the requested information and the past and present practical reality that, for a variety of reasons, those transactions are unlikely to have a significant effect on the insurance program. Hence, we believe the Regulation's existing waivers should be retained. If all existing waivers are not retained, at a minimum, we believe that PBGC should re-examine each such waiver separately to determine whether its presence has had a negative effect on the PBGC insurance program and that PBGC should retain those waivers that have had no such negative effect. If, after such a re-examination, PBGC concludes that the elimination of any of the existing waivers is warranted, we believe that extensions based on actual knowledge should be provided with respect to events involving Foreign Non-Parents (and should continue to be provided with respect to events involving Foreign Parents and Foreign-Linked Entities).

The Regulation includes extensions with respect to events involving Foreign Parents or Foreign-Linked Entities that are tied to actual knowledge.²⁸ Information regarding controlled group entities in other countries is more readily available than it was when the Regulation was adopted. However, our experience is that difficulties in getting information continue to exist and, depending upon the parent's country and corporate culture, may be substantial. In some cases involving foreign entities, just determining the controlled group for Code section 414(b) and (c) purposes at any given time can be a major undertaking. Many large companies frequently engage in transactions that affect the controlled group's structure, and information about those transactions may not be readily available for some time after the transaction. Moreover, information regarding reportable events involving Foreign Non-Parents, Foreign Parents, or Foreign-Linked Entities is almost invariably less readily and less promptly available than information regarding the same events when they involve other controlled group members.

²⁶ 29 C.F.R. §§ 4043.29(d)(2), .30(d)(2), .31(d)(2), .34(d)(4); *see also* 29 C.F.R. § 4043.35(d) (providing for an extension keyed to actual knowledge for any entity other than the contributing sponsor).

²⁷ 74 Fed. Reg. 61,248, 61,250 (2009).

²⁸ 29 C.F.R. §§ 4043.29(d)(2), .30(d)(2), .31(d)(2), .34(d)(4).

Indeed, our experience is that plan sponsors and plan administrators often do not know the identities of all controlled group members that are Foreign Non-Parents and Foreign-Linked Entities. None of the five events that are subject to the waivers and extensions – change in contributing sponsor or controlled group, liquidation, extraordinary dividend or stock redemption, loan default, and bankruptcy – involve a plan event; rather, they all pertain to events involving controlled group members. Because the contributing sponsor and plan administrator commonly do not even know that a particular Foreign Non-Parent or Foreign-Linked Entity is a part of the plan controlled group, they are not likely to know about the occurrence of a reportable event involving either a Foreign Non-Parent or Foreign-Linked Entity. And while a contributing sponsor and administrator are likely to know the identity of a Foreign Parent and may know the identity of a particular Foreign Non-Parent or Foreign-Linked Entity, they are much less likely to know of events pertaining to the business operations of any of those entities. Consequently, the costs and burdens associated with establishing new monitoring systems, gathering the necessary information, and reporting events involving Foreign Non-Parents, Foreign Parents, and Foreign-Linked Entities would be significant.

We recognize that Title IV provides that the plan administrator or contributing sponsor must report the occurrence of a reportable event within 30 days after it knows “or has reason to know” that the event has occurred.²⁹ However, by eliminating the extension regarding Foreign Parents and Foreign-Linked Entities that is tied to actual knowledge, the Proposed Regulation would create significant uncertainty among plan administrators and contributing sponsors. For example, plan administrators and contributors are likely to be concerned as to what steps they must take to learn of events across the globe involving currently unknown controlled group members. It also would create significant uncertainty as to whether, when the plan administrator or contributing sponsor had no actual knowledge of an event involving a Foreign Non-Parent, Foreign Parent, or Foreign-Linked Entity, the plan administrator or contributing sponsor nevertheless may be deemed by PBGC to have had “reason to know” of that event, and thus may face substantial penalties.

In sum, because of the difficulties, costs, burdens, and uncertainties associated with obtaining relevant information regarding Foreign Parents and Foreign-Linked Entities, we believe that the existing extensions for reportable events based on actual knowledge should continue to be provided with respect to any reportable events involving Foreign Non-Parents for which notice has not been waived.

IV. INFORMATION REQUIREMENTS

A. Summary

The Proposed Regulation would require every filer, in the initial filing, to submit detailed information using a mandatory PBGC reporting form.³⁰ Under the Regulation, use of the PBGC reporting form is optional and, if it is used, the initial information

²⁹ 29 U.S.C. § 1343(a).

³⁰ PBGC Prop. Reg. § 4043.5, 74 Fed. Reg. 61,248, 61,255 (2009); *see also* 74 Fed. Reg. 61,248, 61,252 (2009).

submission requirements are limited.³¹ The Proposed Regulation also would impose, for events involving a change in contributing sponsor or controlled group, an expanded requirement for the submission of “before and after” financial statements with respect to the plan’s controlled group.³² In the absence of a waiver of the notice or an extension of the time within which to provide notice of reportable events, we believe the proposed financial reporting requirement would be burdensome and, in some cases, even impossible to satisfy because the required information may be due even before the new controlled group exists.

B. Recommendation

We recommend: (a) retention of the existing two-step approach for providing information on reportable events, which permits filers to make a limited initial submission for PBGC reporting purposes, with PBGC retaining the authority to require more extensive information if necessary in particular cases; and (b) modification of the proposed expanded requirement regarding “before and after” financial statements such that (i) public companies are required to provide the same financial reports that are required to be provided to the SEC no earlier than the date that the SEC requires such financial reports and (ii) non-public companies are required to provide the most recent financial statements required to be provided to the company’s commercial lenders or that have been produced for another business purpose.

C. Explanation

The Regulation gives the filer the option of using a PBGC form, which provides for a reduced initial information submission. PBGC currently retains the right to ask for more information after it reviews the initial submission.³³ This structure works well in that it ensures that the employer need not incur the burden of submitting information that will not be useful to PBGC, while at the same time ensuring that PBGC will be able to obtain the information that will be useful to the agency. In contrast, the Proposed Regulation and related draft forms and instructions would require all filers to submit extensive information in the initial submission. Under this approach, PBGC may, after reviewing a brief description and other limited information about the event, decide that it does not need to review any additional information, but the filer nevertheless will have incurred the burden and cost of gathering and submitting that information. We do not believe that this result serves any of the stakeholders’ interests. Moreover, it may not even be possible to gather within 30 days the voluminous information that would be required with respect to certain events (*e.g.*, the change in contributing sponsor or a controlled group event).

³¹ See 29 C.F.R. § 4043.3(c); compare information specified in the Regulation at 29 C.F.R. § 4043.3(b) and in Part 4043, Subparts B and C with information specified in optional forms at page 2 of Form 10 and at page 2 of Form 10-Advance.

³² PBGC Prop. Reg. § 4043.62, 74 Fed. Reg. 61,248, 61,257 (2009); see also 74 Fed. Reg. 61,248, 61,254 (2009).

³³ 29 C.F.R. § 4043.3(d).

We also are concerned about the proposed expanded requirement for the submission of “before and after” financial statements with respect to the plan’s controlled group for events involving a change in contributing sponsor or controlled group. The Regulation requires financial statements only for the contributing sponsor – both old and new, in the case of a change in the contributing sponsor – and for any persons that will cease to be in the plan’s controlled group.³⁴ Because the Regulation provides that a legally binding agreement that provides for a change in the plan’s controlled group constitutes a transaction that must be reported within 30 days,³⁵ it is possible that the closing of the legally binding agreement – and thus the controlled group change – will not yet have occurred by the time there is an obligation to make a reportable event filing. Thus, under the Proposed Regulation, a filer may have an obligation to provide financial statements with respect to a controlled group that does not yet exist and may not exist for some time.

In order to avoid burdensome, impracticable, or duplicative requirements, we recommend that PBGC require public companies to provide the same financial reports that they are required to provide to the SEC no earlier than the date that the SEC requires such financial reports.³⁶ For example, we believe the most recent unaudited quarterly financial report included in a Form 10-Q should be sufficient for this purpose. In the case of non-public companies, we recommend that PBGC require only the most recent financial statements required to be given to the company’s commercial lenders or which have been produced for another business purpose. Finally, we believe that an appropriate balance of stakeholders’ interests should take into account the difficulty filers would have in obtaining information about foreign entities and information not currently provided on a consolidated basis.

V. SPECIFIC REPORTABLE EVENTS

Most of our recommendations in Sections I through IV apply with respect to multiple reportable events and will not be repeated here. We have the following additional comments regarding the proposed changes pertaining to specific reportable events.

Active Participant Reduction:

A. Summary

The Proposed Regulation would add a waiver if an active participant reduction has been reported in the last year and would eliminate duplicative reporting under ERISA sections 4062(e) and 4043.³⁷ The Proposed Regulation would eliminate the existing waiver with respect to small plans (*i.e.*, those with fewer than 100 participants).³⁸ With respect to reportable active participant reductions that are not based on a section 4062(e)

³⁴ 29 C.F.R. § 4043.29(b)(3).

³⁵ See Reg. S-X; 29 C.F.R. § 4043.29(a).

³⁶ 17 C.F.R. Part 210.

³⁷ PBGC Prop. Reg. § 4043.23(a)(2), (c), 74 Fed. Reg. 61,248, 61,256 (2009).

³⁸ 74 Fed. Reg. 61,248, 61,249 (2009).

event, the Proposed Regulation would eliminate the existing extensions, which are tied to when the active participant information would otherwise be gathered for various government filings (Form 5500, Annual Return/Report of Employee Benefit Plan, and premium filings).³⁹ We commend PBGC for adding a waiver when another reduction has been reported in the last year and for eliminating duplicative reporting under ERISA sections 4062(e) and 4043.

B. Recommendation

We recommend: (a) retention of the existing waiver regarding active participant reductions with respect to small plans; (b) that PBGC clarify that the start of the 60-day reporting period for ERISA section 4062(e) events occurs at the later of the date of the cessation of operations described in section 4062(e) and the date the 20% threshold of section 4062(e) is crossed; and (c) retention of the existing extension with respect to notice of reportable active participant reductions that are not based on a section 4062(e) event.

C. Explanation

We believe that the current waiver in the Regulation with respect to plans with fewer than 100 participants should be retained.⁴⁰ We do not believe these plans represent a significant exposure for the PBGC insurance program; they represented only 1.6% of PBGC's total claims experience throughout PBGC's existence from fiscal years 1975 through 2008.⁴¹ In addition, the burden of monitoring and complying with reporting requirements is disproportionately higher for smaller employers because they do not enjoy the economies of scale that larger employers do. Because the costs of monitoring and reporting are largely unaffected by the size of the plan, the costs on a per-participant basis are significantly higher for a small plan than for a large plan. Consequently, the costs associated with monitoring and reporting an active participant reduction are disproportionately greater for sponsors of small plans, while the benefits to PBGC of receiving those reports are disproportionately smaller. For these reasons, we believe that the balance of interests continues to favor a waiver with respect to plans with fewer than 100 participants.

Because the new proposed waiver for an active participant reduction would be tied to "timely" reporting under ERISA section 4063(a) of a section 4062(e) event,⁴² it would be helpful if PBGC clarified that the start of the 60-day reporting period for section 4062(e) events occurs at the later of the date of the cessation and the date the 20% threshold is crossed.

With respect to reportable active participant reductions that are not based on a section 4062(e) event, the Regulation recognizes that daily counting to determine whether

³⁹ *Id.*

⁴⁰ 29 C.F.R. § 4043.23(c)(1).

⁴¹ *Pension Insurance Data Book 2008* at Table S-14, published Summer 2009 and available at <http://pbgc.gov/docs/2008databook.pdf>.

⁴² PBGC Prop. Reg. § 4043.23(a)(2)(ii), 74 Fed. Reg. 61,248, 61,256. (2009)

a reportable active participant reduction has occurred would be a heavy and unnecessary burden; consequently, the Regulation provides for reporting extensions tied to when the information otherwise would be gathered for various government filings (Form 5500, Annual Return/Report of Employee Benefit Plan, and premium filings).⁴³ We believe that the Proposed Regulation also should provide for extensions tied to the points in time when a participant count is routinely done to prepare for a required annual government filing.

Missed Contributions:

A. Summary

The Regulation provides a waiver of the notice with respect to missed contributions that are made within 30 days of the due date.⁴⁴ The Proposed Regulation would eliminate that waiver.⁴⁵ In addition, PBGC Technical Update 09-4⁴⁶ provides a waiver for plans with fewer than 25 participants with respect to missed quarterly contributions if the failure to make the contribution is not motivated by financial inability. PBGC Technical Update 09-4 also states, however, that its guidance is given only with respect to events that occur during the interim period prior to the effective date of the Proposed Regulation, and notes that the Proposed Regulation would require reporting of missed quarterly contributions without regard to plan size or the motivation for missing the contribution.⁴⁷

B. Recommendation

We recommend: (a) retention of the existing waiver of the notice for missed quarterly contributions that are contributed to the plan within 30 days of the due date or, in the alternative, that notice be waived with respect to one missed quarterly contribution per plan year, provided the contribution is made within 30 days of the due date for making such contribution; and (b) incorporation of a waiver of notice for small plans that is at least as broad as the waiver in PBGC Technical Update 09-4.

C. Explanation

We recognize that missed quarterly contributions may indicate cash flow problems or other financial trouble. Eliminating the reporting waiver for contributions made within 30 days of the due date, however, also would eliminate an incentive for taking prompt corrective action. Consequently, we believe that the 30-day period to correct a missed contribution should be retained. An alternative would be to allow a waiver for one missed contribution in any plan year provided the contribution actually is made within 30 days of the contribution due date. This would limit reporting to

⁴³ 29 C.F.R. § 4043.23(d).

⁴⁴ 29 C.F.R. § 4043.25(c).

⁴⁵ 74 Fed. Reg. 61,248, 61,250 (2009).

⁴⁶ PBGC Technical Updates are available at <http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/index.html>.

⁴⁷ PBGC Technical Update 09-4, Section I, p. 2.

employers who may have continuing cash flow problems or who persistently overlook the plan contribution deadline.

With respect to small plans, we believe that a waiver regarding missed quarterly contributions should be provided because many small plan sponsors routinely make required contributions only once a year. Indeed, PBGC Technical Updates have repeatedly provided for relief from reporting requirements regarding missed quarterly contributions with respect to small plans.⁴⁸ We recommend that the regulation, when finalized, incorporate a waiver that is at least as broad as that provided for in PBGC Technical Update 09-4, which provides for a waiver with respect to plans with fewer than 25 participants if the failure to make the quarterly contribution is not motivated by financial inability.

Distributions to Substantial Owner:

A. Summary

The Proposed Regulation would eliminate the waivers for substantial owner distributions up to the Code section 415 limit and up to one percent of plan assets.⁴⁹

B. Recommendation

We recommend retention of the existing waivers for notices related to substantial owner distributions up to the Code section 415 limit and up to one percent of plan assets.

C. Explanation

An explanation of PBGC's rationale for eliminating the existing waiver would be helpful because benefit restrictions added by PPA 2006 significantly *decrease* the likelihood that there will be large distributions to substantial owners in significantly underfunded plans that might pose a risk to the PBGC insurance program. Even apart from the new PPA 2006 restrictions, neither of the current waivers for substantial owner distributions appears to pose a significant risk to PBGC. With respect to distributions up to the Code section 415 limit, if the plan is poorly funded, the new benefit restrictions under Code section 436 would limit any accelerated payments (or at least 50% of them). With respect to distributions up to one percent of plan assets, it is not clear how any such distribution might endanger the health of a plan. Finally, we are unaware of any situation in which a distribution to a substantial owner triggered a termination action under ERISA section 4042. We recommend that the existing waivers be retained.

⁴⁸ PBGC Technical Updates 97-6, 08-2, 09-3, 09-4. PBGC Technical Updates are available at <http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/index.html>.

⁴⁹ 74 Fed. Reg. 61,248, 61,250 (2009).

Liquidation:

A. Summary

The Proposed Regulation would eliminate the waiver for reportable events involving the liquidation of a *de minimis* controlled group member⁵⁰ if each plan that was maintained by the liquidating member is maintained by another member of the plan's controlled group after the liquidation.⁵¹

B. Recommendation

We recommend retention of the existing waiver for notice of events involving the liquidation of a *de minimis* controlled group member if each plan that was maintained by the liquidating member is maintained by another member of the plan's controlled group after the liquidation.

C. Explanation

If the Proposed Regulation were adopted, an employer would incur the costs and burdens of monitoring and reporting events that involve controlled group members that meet PBGC's criteria for having *de minimis* value, including mere corporate shells. The incremental costs and burdens that the Proposed Regulation would impose might be quite significant for an employer whose controlled group consists of a large number of entities with *de minimis* value; such an employer would be responsible for ensuring that the appropriate personnel monitor and report potentially numerous changes that have no material effect on the plan or the employer's status or business operations, at the risk of incurring penalties of \$1,100 a day. We see no benefit to PBGC of such reports. We believe that the existing waiver reflects a recognition that, because the plan will continue to have a contributing sponsor, the liquidating entity is a *de minimis* portion of the controlled group, and the remaining controlled group remains responsible for the plan, the effect on the PBGC insurance program, if any, is insubstantial and does not justify the increased costs to employers and the burdens of monitoring and reporting such events. Accordingly, we believe that the existing waiver should be retained.

Transfer of Benefit Liabilities:

A. Summary

The Proposed Regulation would clarify that a lump sum payment or purchase of an annuity is not a transfer and would eliminate all of the existing waivers with respect to transfers of benefit liabilities to other plans.⁵²

⁵⁰ 29 C.F.R. § 4043.2 (providing the definition of *de minimis* 10-percent segment of controlled group), .30(c)(1)(i).

⁵¹ 74 Fed. Reg. 61,248, 61,250 (2009).

⁵² PBGC Prop. Reg. § 4043.32(c), 74 Fed. Reg. 61,248, 61,256 (2009); *see also* 74 Fed. Reg. 61,248, 61,250 (2009).

B. Recommendation

We recommend the retention of existing waivers: (a) for *de minimis* transfers of benefit liabilities⁵³ to other plans (with respect to both plans); and (b) in situations in which both plans involved in the transfer are fully funded.

C. Explanation

We believe PBGC's clarification that a lump sum payment or purchase of an annuity is not a transfer is appropriate because such payments and purchases satisfy the underlying liabilities rather than transfer them to another plan. With respect to the Proposed Regulation's elimination of all existing waivers with respect to transfers of benefit liabilities to other plans, we recognize that PBGC has reason for concern when a significant amount of plan underfunding is transferred from a stronger controlled group to a weaker controlled group. We believe, however, that the waivers that apply when the transfers are *de minimis* with respect to both plans or when both plans are fully funded should be retained because the likelihood that such transfers would harm PBGC's interests is remote. Thus, in the absence of any indication of problems caused by the existence of these waivers, we recommend that they be retained.

AFTAP:

A. Summary

This new reportable event, which is prompted by statutory changes made by PPA 2006, would require reporting with respect to plans with an AFTAP below 60%.⁵⁴

B. Recommendation

We recommend that the regulation, when finalized, provide that, once the plan administrator has reported the plan's AFTAP as less than 60%, no additional reporting be required if the AFTAP remains below 60% on subsequent certifications or presumptions.

C. Explanation

The new reportable event for plans with an AFTAP below 60% seems to require a separate reportable event filing each time the actuary certifies the AFTAP as below 60% or the AFTAP is presumed to be below 60% under the rules of Code section 436. It would simplify the reporting burden if, once the plan administrator has reported the AFTAP as less than 60%, no additional reporting was required if the AFTAP remains below 60% on subsequent certifications or presumptions. We believe a second filing should be due only once the AFTAP is certified to be above 60% for a year and then falls below 60% again because of a new certification or presumption. In other circumstances,

⁵³ 29 C.F.R. § 4043.32(c)(2) (providing waiver where value of assets transferred is less than three percent of the assets of the transferor plan and other criteria are met).

⁵⁴ PBGC Prop. Reg. § 4043.36, 74 Fed. Reg. 61,248, 61,257 (2009).

because PBGC already would have a report that the AFTAP is below 60%, we do not believe PBGC should need another report.

Transfer to Retiree Health Account:

A. Summary

The Proposed Regulation would create a new reportable event that would occur if a transfer of \$10 million or more under Code section 420(f) is made, or if, following such a transfer, the funded ratio of the plan falls below 120% during the transfer period.⁵⁵

B. Recommendation

We recommend, with respect to transfers under Code section 420(f), that reporting be required only: (a) when the funded ratio of the plan falls below 110% or (b) if the funded ratio is not increased to 120% within the statutory required time period.

C. Explanation

PPA 2006 expanded Code section 420 to permit transfers of pension plan assets when assets exceed 120% of the plan's liabilities (rather than 125%) and to permit a transfer period of up to ten years (rather than one year). If the ratio of assets to liabilities falls below 120% at any valuation date during the transfer period, additional contributions must be made to the pension plan, or assets must be transferred back from the health benefits account to the pension plan, to restore the funding ratio to 120%.⁵⁶ We understand PBGC's desire for information if the funding ratio falls, but the Code has a correction mechanism when the ratio falls below 120%. Thus, we suggest that PBGC only require notice if the correction required under Code section 420(f) has not been made timely. It is understandable that PBGC wants a report immediately when the funding falls below 120% because it is concerned that the 120% is not determined on a PBGC termination basis (and, thus, in PBGC's view the plan might not have excess assets). We suggest, however, that requiring a report at 110% or even 100% would provide sufficient warning to PBGC. We recognize that PBGC might have a large liability if a well-funded large plan were to later become underfunded and terminate, but we believe few plans that are funded at more than 120% are likely to terminate in the near future without PBGC having advance warning from other reportable events (*e.g.*, missed contributions, bankruptcy filing).

VI. NEED FOR ADDITIONAL INFORMED PUBLIC INPUT

A. Summary

As discussed above, the Proposed Regulation would eliminate virtually all of the existing automatic waivers and extensions for notice of reportable events. In the preamble to the Proposed Regulation, PBGC solicits public comment on whether, for

⁵⁵ PBGC Prop. Reg. § 4043.37, 74 Fed. Reg. 61,248, 61,257 (2009).

⁵⁶ I.R.C. § 420(f)(2)(B)(ii); 74 Fed. Reg. 61,248, 61,252 (2009).

each waiver and extension eliminated, it has struck the correct balance between ensuring relevant information is received timely and the increased reporting burden on the regulated community.⁵⁷

B. Recommendation

We recommend that PBGC repropose the Proposed Regulation and include an explanation of the problems the existing waivers and extensions have caused to enable the public to offer more meaningful alternative approaches and specific recommendations regarding “whether [PBGC] has struck the correct balance between ensuring relevant information is received timely and increased reporting burden on the regulated community”⁵⁸ with respect to each waiver and extension PBGC proposes to eliminate.

C. Explanation

Reportable event reporting plays a key role in PBGC’s ability to monitor the financial health of defined benefit plans, their sponsors, and members of the sponsors’ controlled groups. Given the unprecedented challenges PBGC faces, we recognize that PBGC should reconsider its needs regarding reportable events and make changes to the Regulation as needed to protect plan participants and the insurance program.

We appreciate PBGC’s explicit request for public comment on whether, for each waiver and extension eliminated, it has struck the correct balance between ensuring relevant information is received timely and the increased reporting burden on the regulated community. PBGC’s request is especially appropriate because the existing Regulation reflects a negotiated rulemaking process through which *all* stakeholders, public and private, reached consensus on the correct balance of interests the Regulation struck. Accordingly, we recommend that PBGC provide an explanation and rationale regarding each waiver and extension that it proposes to eliminate, and then provide an opportunity for the public stakeholders to comment. Without knowing what problem PBGC is targeting by the elimination of each particular waiver and extension, it is difficult to offer meaningful alternative approaches and comments. We believe that issuing a re-proposed regulation based on comments already received and including explanations for the balances struck by PBGC would enable the public to propose solutions to problems PBGC has identified and to make specific recommendations regarding the balance of stakeholders’ interests.

⁵⁷ 74 Fed. Reg. 61,248, 61,251 (2009).

⁵⁸ *Id.*