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Start preparing for increased reporting to PBGC

by Harold J. Ashner, Esq. and Deborah West, Esq.

The Pension Benefit Guaranty Corp. has proposed major changes to its rules on “reportable events," which are events that may indicate a need to terminate a PBGC-covered single-employer pension plan.

These changes, **proposed on Nov. 23, 2009**, would significantly increase reporting to PBGC and, as a result:

• Create greater exposure to penalties of up to $1,100 per day for reporting delinquencies.

• Create new challenges and potential defaults in the context of corporate loan and other agreements.

If your company has a PBGC-covered plan, it is important to start preparing well in advance of when these changes may go into effect.

List of reportable events

A reportable event may involve the plan itself, a member of the corporate group maintaining the plan (the “controlled group”), or both. Under the existing regulation, there are 11 reportable events:

• Active participant reduction

• Failure to make required funding payments

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- Inability to pay benefits when due
- Distribution to a substantial owner
- Change in contributing sponsor or controlled group
- Liquidation of contributing sponsor or controlled group member
- Extraordinary dividend or stock redemption
- Transfer of benefit liabilities
- Application for minimum funding waiver
- Loan default
- Bankruptcy or similar settlement

PBGC's proposal calls for creating two new reportable events: one where the plan's funded percentage (as determined for purposes of the rules relating to benefit restrictions) is certified or presumed to be below 60%, and another relating to transfers of $10 million or more to a health benefits account.

Timing of report

In most cases, the report to PBGC is due post-event: within 30 days after the sponsor of the plan or the plan administrator knows or has reason to know that the event has occurred. In very limited circumstances, involving privately-held controlled groups with significantly underfunded plans, reporting is required by the sponsor in advance: 30 days *before* the event becomes effective.

Content of report

Under PBGC's **existing reportable events regulations**, reports may be filed using optional forms that call for a reduced initial information submission. PBGC is proposing to make these forms mandatory and to require substantial additional information as part of the initial filing.

Waivers and extensions

Under the existing regulations, there are many automatic reporting waivers and extensions tied to particular reportable events. These waivers and extensions are based on various factors, such as how well funded the pension plan is, whether the plan sponsor is a public company, or whether the controlled group member involved meets a financial *de minimis* test or is a foreign entity or a "foreign-linked entity" (one linked to the sponsor only through a foreign entity).

PBGC's proposal would eliminate most of the automatic waivers and extensions that apply to particular reportable events. Many more events would have to be reported, and the reports would be due in many cases much earlier than under the existing regulations.

Potential effects of proposal

Although the changes are only in proposed form and may be revised before being finalized, the strong likelihood is that the final rules will result in increased and earlier reporting. For example:

• *Well-funded plans:* Sponsors and plan administrators of well-funded plans that currently qualify for waivers for most events may find themselves subject to reporting those events for the first time.

• *Active participant reductions*: Certain active participant reductions involving insignificant numbers (for example, a drop from four active participants to three) may need to be reported with no extensions available.

• *Late quarterlies*: Missed quarterly contributions, even if relating to a small plan, corrected within days, or both, may need to be reported with no extensions available.

• *Foreign entities*: Events involving foreign or "foreign-linked" members of the controlled group may need to be promptly reported in circumstances where it is difficult for the sponsor or the plan administrator to keep track of varied off-shore events involving that entity, or even to know that the particular entity is part of the same controlled group.

Overall, the level of attention that will need to be devoted to reportable events may increase significantly.

Along with increased and earlier reporting, companies with PBGC-covered plans will also face greater exposure to penalties for reporting delinquencies.

PBGC has the authority to assess penalties of up to $1,100 per day for a late reportable event notice. Although its **published policy** calls for lower "guideline" daily penalty rates ($25 per day for the first 90 days and $50 thereafter, subject to limits for smaller plans), the policy also provides that PBGC:

• Will routinely assess the full $1,100 per day for advance reporting delinquencies.

• Reserves the right to assess penalties above the guideline amounts for post-event reporting delinquencies that are willful, reflect a pattern or practice of noncompliance, or result in substantial harm to participants or to PBGC.

The proposed changes may also have significant effects on corporate loan and other agreements. Loan agreements often include a representation that there has been no reportable event for which no waiver applies, and require the representation to continue to be true before any new money is advanced during the life of the agreement.

Depending on the terms of the agreement, the occurrence of a reportable event with no applicable waiver may constitute a default or at least give the lender the ability to declare a default if the event can be argued to have a material adverse effect on the borrower. At a minimum, the event would likely have to be reported to the lender and thus potentially lead to some difficult discussions.

Other corporate agreements, such as stock purchase or merger agreements, may be affected as well, since the agreement may have a representation that there has been no reportable event for which no waiver applies, with a requirement that the representation continue to be true as a condition for the closing.

Preparing for the changes

It is not too early to begin preparing for the changes that may result from PBGC's recent proposal. Key steps to consider taking now include the following:

• *Evaluate existing monitoring systems*: Determine what systems, if any, are in place for identifying events that may need to be reported to PBGC. Evaluate whether those systems will need to be improved to accommodate any of the proposed changes, or perhaps need to be improved right now to ensure compliance with the existing regulations. Consider assigning one key company official to have primary responsibility for ensuring compliance on a controlled-group-wide basis.

• *Coordinate with the actuary*: The plan's enrolled actuary can play a central role in helping the sponsor and plan administrator comply with the reportable events rules. However, the actuary may not be able to help unless someone provides him or her with timely information about events that may need to be reported. Coordinating with the actuary to reach a common understanding of the roles and responsibilities of various parties will help to ensure compliance both under the existing rules and under any new rules.

• *Alert the "deal" experts*: Make sure that the key company officials involved in loan and other corporate agreements—for example, the general counsel, the chief financial officer, the treasurer, the controller or the human resources director—are aware of the recent PBGC proposal. They may want to review existing loan and other agreements to evaluate what may happen if the changes are implemented, initiate discussions with lenders and other parties to those agreements, and consider revising the ERISA representations and other provisions in any agreements the company enters into going forward.

• *Consider commenting on the PBGC proposal*: If your company has concerns about the PBGC proposal, consider submitting comments so that PBGC can address those concerns as part of a final rule.

Comments are due Jan. 22, 2010, and may be submitted to **reg.comments@pbgc.gov**. One of the best ways to prepare for the changes is to have an effect on what those changes will be by submitting helpful comments.

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