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PBGC's Guidance Ruffling Feathers Of Sponsors on Early Warning Program

Pension plan sponsors may be surprised to know that a drop in credit rating or some other financial circumstances not involving a corporate transaction may trigger the attention of the federal pension insurer under a program designed to uncover threats to plans.

New guidance recently posted to the Pension Benefit Guaranty Corporation's website lists examples of corporate transactions, events or trends that could trigger the agency's interest under its Early Warning Program. Under that program, the PBGC seeks to identify and deal with matters affecting plan sponsors that increase risk to the viability of plans and to the pension insurance system.

Plan sponsor advocates and advisers, however, question whether the PBGC should be using the Early Warning Program to investigate a plan sponsor in the absence of the sponsor engaging in a specific transaction.

Two of the items listed in the agency's new guidance as being possible triggers for a PBGC investigation have raised plan sponsor concerns. Those items are a significant drop in a sponsor's credit rating and a downward trend of a sponsor's cash flow or other financial factors.

''Plan sponsor advisers are concerned that the guidance indicates a significant expansion of the type of situations that will trigger an inquiry under the Early Warning Program,'' Constance A. Donovan, the PBGC's participant and plan sponsor advocate, told Bloomberg BNA.

The PBGC, for its part, told Bloomberg BNA in a statement that review of sponsors' credit quality and cash flows has always been part of the program.

Vague and Unintended Criteria. The sponsor community is concerned the new guidance is very vague regarding these two points and may exceed what Congress intended the PBGC to be doing under the program, Donovan said.

The PBGCs authority for the Early Warning Program is derived from Employee Retirement Income Security Act Section 4042, which gives the agency the power to initiate under certain circumstances an involuntary plan termination.

Under this new guidance, a plan sponsor that's ''not planning any transaction but has some financial challenges might face a PBGC demand to add money to the plan, with the implicit or explicit threat of an involuntary termination,'' Harold J. Ashner, a partner with Keightley & Ashner LLP, told Bloomberg BNA.

''There's a question whether Congress wanted the PBGC to be subjecting sponsors in these situations to such threats,'' said Ashner, who formerly served as the PBGC's assistant general counsel for legislation and regulations.

PBGC Wants Ongoing Dialogue. The PBGC said it knows that plan sponsors have questions about the Early Warning Program and that it looks ''forward to an ongoing dialogue.''

In addition, the agency said the program's purpose isn't to impair the ability of sponsors to maintain and fund their plans, but to work with them to preserve their plans.

As to sponsors' concerns about a company's cash flows and credit quality potentially triggering an investigation under the program, the PBGC said it ''reviews a range of standard financial indicators'' when ''examining the risk of pension failure, including the sponsor's credit quality and cash flows.'' These indicators have always been a part of the program, the agency said.

By David B. Brandolph

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The PBGC's Early Warning Program guidance is at http://src.bna.com/kZk