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Sent by E-Mail to reg.comments@pbgc.gov

May 10, 2011

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Benefits Payable in Terminated Single-Employer Plans;
Limitations on Guaranteed Benefits Proposed Rule
Regulation Information Number: RIN 1212-AB18
Docket ID: PBGC-2011-0001

Ladies and Gentlemen:

On behalf of the more than 12 million working men and women of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and Working America, its community affiliate, we offer our comments on the proposed rule on Benefits Payable in Terminated Single Employer Plans; Limitations on Guaranteed Benefits issued on March 11, 2011 by the Pension Benefit Guaranty Corporation ("PBGC").[1]

The proposed rule implements Section 403 of the Pension Protection Act of 2006, Pub. L. 109-280 (PPA) which limits the guarantee of unpredictable contingent event benefits ("UCEBs") provided under a terminated plan. Section 403 modified the longstanding phase-in rule in Section 4022(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), that the phase-in period of a plan provision providing UCEBs would begin on the later of the date the provision was adopted or effective. Under Section 403, the date of the unpredictable contingent event ("UCE") is treated as the adoption date of the plan amendment providing UCEBs. The statutory change delays the beginning date of the five-year phase-in

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[1] The proposed rule is published at 76 Fed. Reg. 13304-13312.

period in ERISA Section 4022(b)(7) to the date of the event—generally well after the adoption of the plan provision creating the UCEB. The delayed beginning date will result, as the PBGC recognizes, in lower guaranteed benefit payments for workers affected by events occurring within five years of the date that a plan terminates.[2]

The potential impact of the new phase-in rule created by Section 403 of the PPA is heightened by Section 404 of the PPA which compels an even more significant reduction in the benefits guaranteed by the PBGC. Under Section 404, the filing date of the bankruptcy petition is considered the termination date of any plan terminated during a bankruptcy proceeding.[3] By treating the bankruptcy filing date as the termination date for purposes of determining guaranteed benefits, the ending date for the five-year phase-in period will also be earlier. In combination, the changes made by Sections 403 and 404 of the PPA make it even more likely that unpredictable contingent event benefits will not be fully guaranteed, if effectively guaranteed at all.

The modification of the phase-in period for UCEBs can and will harm many participants, an unfortunate outcome resulting from the statutory changes made by the PPA. But, as we discuss below, the proposed rule in some instances may exacerbate the statute's negative impact on participants and should be modified.

For plan participants, the beginning date of the phase-in period is one of the most important determinations to be made. Section 4022.27(d) of the proposed rule provides that:

> For purposes of this section, PBGC will determine the date the UCE occurs based on the plan provisions and the relevant facts and circumstances, such as the nature and level of activity at a facility that is closing and the permanence of the event; the date of the event as conceived, planned, announced, or agreed to by the employer may be relevant but is not determinative.

The broad discretionary authority given to PBGC under the proposed rule raises serious concerns in part because the agency may prefer a later date for the UCE to shorten the phase-in period to reduce guaranteed benefit amounts. The retired participants who became eligible for benefits as a result of the event—the parties affected by the determination of the date that the UCE occurred—will certainly benefit from an earlier date. Importantly, these participants whose benefit payments began before the termination of the plan relied on the eligibility determinations made by their employer and expected to receive benefit payments based on those determinations. Any change in the date of the UCE undermines these expectations and should be made only in the rarest of cases.

The final rule should limit the discretion given the PBGC in recognition that the agency should generally defer to determinations made by the plan sponsor before the termination date, consistent with the treatment of other eligibility decisions made as the agency determines

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[2] 76 Fed. Reg. at 13304.

[3] PPA Section 404 added paragraph (g) to ERISA Section 4022. The PBGC issued a proposed rule implementing this new provision on July 1, 2008 (73 Fed. Reg. 37390).

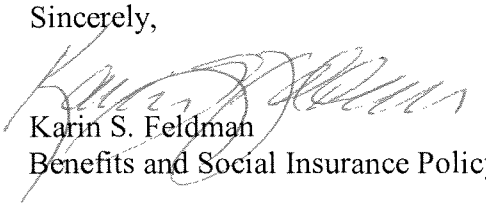
guaranteed benefit amounts. This approach also takes into account the possibility that a third party—an arbitrator under a collectively bargained labor or benefit agreement or a court—may have resolved a dispute regarding the occurrence of a UCE and in such instances, it would be even less appropriate for the PBGC to revisit determinations made before the plan termination.

At a minimum, the final rule should require that PBGC, as part of its benefit determination process, notify participants affected by the phase-in of the guarantee for UCEBs of any change it has made in the date of the UCE. The notification should include a description of the facts, circumstances and plan provisions relied upon by the PBGC and the factors taken into account in determining the date that the UCE occurred. A detailed explanation of the PBGC's determination will provide affected participants with the necessary information to better understand the reason for any unexpected change in the guaranteed benefits they receive and allow them to make an informed and reasoned decision about challenging the determination through an appeal within the agency or other means.

We are also concerned about the participant-by-participant basis for determining the date on which a UCE occurs in the case of a reduction in force. As described in section 4022.27(d)(1) of the proposed rule, layoffs occurring on different dates "... would generally be distinct UCEs." But, in many instances, such layoffs are part of a single event that occurred at an earlier date and treating each layoff separately results in different phase-in periods for participants impacted by the same event as Example 2 in section 4022.27(e)(2) illustrates. Because the lay-offs are in stages, different phase-in periods apply with some participants having a greater percentage of the UCEB guaranteed. The layoffs, however, were all the consequence of the decision to close the facility, and the event should be deemed to occur no later than beginning date of the first layoff. To do otherwise, as the proposed rule provides, effectively divides a single event into multiple events, to the detriment of the affected participants.

We appreciate the opportunity to provide comments on the proposed rule, and we hope our comments are helpful to the PBGC as it prepares the final rule. Should there be any questions about these comments or if we can provide additional information, please do not hesitate to contact me at (202) 637-5169.

Sincerely,



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