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August 21, 2019

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RIN 1212-AB34

RE: PBGC Proposed Regulations RIN 1212-AB34

The comments included herein on the PBGC's proposed regulations entitled *Reportable Events and Certain Other Notification Requirements, Annual Financial and Actuarial Information Reporting, Termination of Single-Employer Plans, and Premium Rates* were developed through the coordinated efforts of members of the Conference of Consulting Actuaries' (CCA) Corporate Qualified Pensions Community. The members of the CCA Corporate Qualified Pensions Community represent a broad cross-section of actuaries whose extensive experience with private corporate pension plans provides the framework for our response. However, these comments do not necessarily reflect the views of the entire Corporate Qualified Pensions Community, the CCA, the CCA's members, or any employers of CCA members, and should not be construed in any way as being endorsed by any of the aforementioned parties.

We appreciate the PBGC's efforts to periodically examine regulations and processes and update them to facilitate compliance, eliminate unnecessary reporting, and provide clear, workable rules. We believe the changes and clarifications in the proposed regulations further these objectives.

Following are our comments on the proposed regulations, categorized by topic.

Premiums

We believe that the proposed rule governing plans that terminate during a plan year after experiencing a spinoff is clear and workable. Similarly, we appreciate the clarification of the rules regarding when the Participant Count Date changes to the first day of the current plan year, and when it remains the last day of the preceding plan year, when spinoffs and/or mergers occur on the first day of a plan year. However, we also believe both of these represent changes (not clarifications) to the rules in the current regulations, and ask that the final regulation make clear that the new rules are applicable only to premium payment years that begin after the regulations are finalized.

In addition, we believe that this rule making process is a good opportunity to clear up confusion about spinoffs and mergers that occur on the last day of a plan year. We believe that the simplest way to do this is to eliminate the distinction between de minimis and non-de minimis events, and to treat events that occur on the last day of a plan year or the first day of the next plan year in the same manner – that is, treat them both as occurring "at the stroke of midnight" as one plan year ends and the next one begins. Under such an approach, when these spinoffs or mergers occur, participants would always be counted on the first day of the plan year, post-event, so that premiums for an individual would be paid by the plan in which the individual would participate for the plan year. We believe this is a straightforward and logical approach.[1]

[1] We believe that PBGC may have originally distinguished between de minimis and non-de minimis events to avoid forcing a change to a beginning of year Participant Count Date in situations where the plan had a beginning of year entry date. In such situations, the number of new participants picked up by a change to beginning of year might be large relative to the size of the event. While that may have been a very valuable accommodation when most plans were open, it is less important now.

If the change suggested above is not made, we believe the treatment of spinoffs and mergers that occur on the last day of the plan year still needs to be clarified. Several interpretations are possible (using calendar year plans as examples), including the following:

- **Interpretation 1.** A January 1 and a December 31 event are the same – the event essentially occurs "at the stroke of midnight" as one plan year ends and the next plan year begins, and thus (a) the effect on premiums is the same whether the event occurs on December 31 or January 1 and (b) in the case of a spinoff to a "new plan", there is no one day plan year on December 31 that would trigger a premium filing with 1/12 of the annual premium owed.
- **Interpretation 2.** December 31 is different from January 1; all transactions on December 31 occur **before** participants are counted for purposes of the following year's premium. Thus:
  - For mergers, all participants of the merged plan are counted on the December 31 Participant Count Date;
  - For plan-to-plan transfers, all participants are treated for premium purposes as being in the plan they are actually in post-transaction, and;
  - For spinoffs to a standalone plan, the Participant Count Date remains December 31 and each of the resulting plans pays premiums on the participants who are in that plan post-spinoff. However, we ask that there not be considered to be a one day plan year for the spun-off "new plan", which would trigger a filing and payment of 1/12 of the annual premium
- **Interpretation 3.** December 31 is different from January 1; all transactions on December 31 occur **after** participants are counted, and thus:
  - For mergers, participants from the disappearing plan are not counted, because that plan does not have a plan year beginning on January 1;
  - For plan-to-plan transfers, all participants are treated for premium purposes for the next plan year as being in the plan they were in before the transaction, and;
  - For spinoffs to a "new plan", the spun-off participants are double counted. Again, we ask that there be no short plan year for the spun-off "new plan", and thus the Participant Count Date for the spun-off "new plan" is January 1.

There are of course other interpretations possible. We recommend Interpretation 1, as we believe that in reality there is no functional difference between a January 1 and a December 31 event. We do not recommend Interpretation 3.

We ask that both the regulations and the premium instructions be updated to make the required treatment of end of year mergers and spinoffs clearer.

ERISA §4010 Calculations for Benefit Liabilities or Filing Triggers

Calculating Benefit Liabilities

Cash Balance Plans

We believe the approach specified for calculating annuities under cash balance plans (i.e., the annuities to be valued would be the annuities that would be provided if the plan had terminated as of the end of the plan year ending within the information year) is reasonable; however, as this represents a change from the most recent informal guidance provided (in 2017 Blue Book Q&A 18), plan sponsors need sufficient time to implement this change. Because the valuation dates involved may significantly precede the end of the information year, we ask that the final regulations permit, but not require, this change in approach to be reflected before the second information year that begins after the regulations are finalized. For example, if the regulations are finalized during 2019, a sponsor with a calendar year information year and a February 1-January 31 plan year would reflect this change no later than the 2021 information year, so that the change in approach could be implemented when the valuation for the February 1, 2020-January 31, 2021 plan year is performed.

In addition, we note that Treasury Regulation §1.411(b)(5)-1(e)(2)(iii)(2) provides that, in a case where a mortality table that is regularly updated for mortality improvement (e.g., the Internal Revenue Code (IRC) §417(e) applicable mortality table, or AMT) is used, upon plan termination the table used to calculate benefits at an annuity starting date (ASD) after plan termination must reflect mortality improvement through that ASD. The proposed regulations do not address whether mortality improvement must be projected to the ASD (i.e., the expected retirement age, or XRA) for §4010 purposes, or how such improvement would be projected. Since projecting no improvement would be conservative (i.e., it would produce larger annuities to be valued) and would be simplest, we ask that PBGC clarify that such an approach would be acceptable.

At-Risk Plans

We believe that the proposed regulations should be clarified as to how the §4010 funding shortfall is calculated for plans that are at-risk (i.e., for purposes of the "less than $15 million §4010 funding shortfall" waiver). The proposed regulation refers only to IRC §430(i)(1). IRC §430(i)(1) provides the at-risk assumptions, including loads if the plan was in at-risk status for two of the preceding four years. However, the phase-in between the at-risk and not-at-risk funding targets (FTs), based on the number of consecutive years the plan has been at risk, is in IRC §430(i)(5), thus leaving it unclear whether the phase-in can be applied for this purpose. The proposed regulation also does not refer to IRC §430(i)(3), which prevents the at-risk FT from being smaller than the not at-risk FT. It seems likely that PBGC intends that the provisions of IRC §§430(i)(3) and (5) apply to the FT used for the "less than $15 million §4010 funding shortfall" waiver in the same manner as they do for IRC §430 funding requirements (i.e., the FT used for the §4010 funding shortfall is calculated in the same manner as the IRC §430 FT, except for the use of non-stabilized interest rates), but we recommend the regulation be clearer on this point.

Clarification of the participant count (presumably beginning of year, not end of year) to use for the $700 per participant load, and that the 4% expense load on the not-at-risk FT applies to the not-at-risk FT determined without regard to interest rate stabilization; would also be helpful.

Miscellaneous Assumptions

While we find the rewrite of §4010.8(d)(2) of the regulation (with the assumptions to be used to determine benefit liabilities now provided in an easy-to-read table) to be helpful, the revised table appears not to cover "Other" non-decrement assumptions (e.g., assumptions for marital status and cost of living increases) that are covered in the current regulation in §4010.8(d)(2)(ii). We recommend that a section be added to the table to make clear that these miscellaneous assumptions should be the same as those used under IRC §430.

Exempt Plans

A change has been made in the rules for determining whether a plan is an exempt plan that we believe may have been unintended. Current regulation §4010.8(d)(3), with the proposed modifications in red, is shown below. While most of the changes are non-substantive, the movement of the word "for" produces a substantive change. Currently, under §4010.8(c)(1)(ii), a plan is an exempt plan if it has benefit liabilities at the end of the plan year ending within the information year that are less than the market value of plan assets, and §4010.8(d)(3) allows that determination to be made using IRC §430 retirement assumptions rather than the XRA otherwise required to be used when calculating year-end liabilities. The change below would say that the determination could be made using XRA rather than IRC §430 retirement assumptions, which we assume is not intended since the calculation of benefit liabilities generally continues to require use of XRA. So, under this proposed language, there would be no ability to use IRC §430 retirement assumptions to determine whether a plan is an exempt plan, and no reason to mention that XRA "could be used." As PBGC did not discuss such a change in the preamble, we assume this change in meaning was unintentional and should be corrected.

4010.8 (d)(3) Special actuarial assumptions for exempt plan determination.

Solely for purposes of determining whether a plan is an exempt plan for an information year, the value of benefit liabilities may be determined by substituting ~~for~~ the retirement age assumptions in paragraph (d)(2) of this section for the retirement age assumptions used by the plan for minimum funding purposes for the plan year ending within the information year ~~for purposes of section 303 of ERISA~~ without regard to the at-risk assumptions of ~~sub~~section 303(i) of ERISA and ~~Code section 430 without regard to the at-risk assumption of sub~~section 430(i) of the Code.

Filing Triggers – Late Election to Reduce Funding Balance (§4010.11)

Late Contributions

We appreciate this effort to provide an additional alternative ("late funding balance elections") to avoid an ERISA §4010 filing. However, we note that there will still be many situations where this new rule cannot help because the funding balance that would need to be waived did not actually exist. We ask that PBGC consider also reflecting "late contributions" if those contributions, discounted using the plan's effective interest rate under IRC §430 for each plan year, would lift the relevant §4010 funding target attainment percentage (§4010 FTAP) above 80% or reduce the controlled group unfunded benefit liabilities to below $15 million. Additional contributions improve plan funding immediately, while reducing funding balance does not, so it does not seem that reducing funding balance should be favored over contributing.

In addition, the ability to avoid a §4010 filing triggered solely by an acquisition should not be subject to the vagaries of whether the acquired plan had a significant funding balance, assuming that the new plan sponsor is willing to fund the plan before the §4010 filing is due. For example, if a plan sponsor with a 2019 information year acquires, in December of 2019, an entity with a plan with a February 1, 2018 – January 31, 2019 plan year and a §4010 FTAP for that plan year below 80%, that plan would trigger a filing requirement in April 2020 for the acquirer's 2019 information year. The acquirer currently has no opportunity to change the 2018 FTAP for the acquired plan, as the deadline for reducing 2018 funding balance was January 31, 2019 and the deadline for contributing to increase the 2018 FTAP was October 15, 2018.

If PBGC believes it does not have the authority under the statute to permit "late contributions" to be recognized for this purpose, we ask that PBGC recognize that the "late funding balance reduction election" approach will be useful in a limited number of circumstances. As a result, we believe it is important that PBGC continue to actively consider §4010 waivers, particularly in situations where the plan sponsor funds the plan above the §4010 trigger levels before the §4010 filing would otherwise be due, even though the funding is too late to be counted towards the §4010 FTAP and $15 million unfunded benefit liabilities threshold at the valuation date relevant to the §4010 filing.

Late Funding Balance Elections

We note that the regulations under IRC §430 do not permit late elections to waive funding balance – i.e., a funding balance cannot be reduced for a plan year for purposes of IRC §430 if an election to reduce the funding balance is not made by the end of the plan year. Thus, the reference in the proposed regulation to such late elections may cause some confusion. We presume that PBGC intends that the funding balance for a later plan year can be reduced, and it will be treated as a reduction in the funding balance for the plan year ending in the information year for purposes of the "below 80% §4010 FTAP" filing trigger. If that is the case, we suggest the wording be clarified.

It would be helpful to specify whether this election can only be made if the funding balance existed at the valuation date for the §4010 FTAP (i.e., it was not created later due to excess contributions for the plan year beginning on the §4010 FTAP valuation date or, in some cases, the next succeeding year), and was not used in the interim against minimum required contributions (MRC).

It would also be helpful to clarify the amount by which the sponsor would need to reduce the funding balances. One approach would be simply to reduce the current year's funding balance by the amount needed to bring the §4010 FTAP for the plan year ending in the information year to 80%. Another approach would be to adjust the required reduction by the rate of return on the market value of the plan's assets for the intervening year(s), since unused funding balance would have been credited with that rate of return in the interim.

Using 2019 calendar year plan and information years as an example, IRC §430 funding regulations prescribe a December 31, 2019 deadline to reduce 2019 funding balance, but the §4010 filing potentially triggered by the 2019 §4010 FTAP is not due until April 15, 2020. If a $1,000,000 reduction in funding balance is needed to bring the 2019 §4010 FTAP to 80%, an election is made to reduce 2020 funding balance between January 1, 2020 and April 15, 2020, and the market rate of return on trust assets during 2019 was 6%, an election to reduce 2020 funding balance of $1,060,000 could be required. In the acquisition example discussed under Late Contributions above, the February 1, 2018 funding balance could potentially be credited with two years of actual return on assets, depending on when the reduction election was made. Specifically, under IRC §430 rules, an election made on or after February 1, 2019, and before February 1, 2020 would be an election to reduce 2019 funding balance (and so would be credited with one year of return) and an election made on or after February 1, 2020 and through April 15, 2020 would be a reduction in the 2020 funding balance (and would be credited with two years of return). Alternatively, a simpler approach of requiring a reduction of $1,000,000 irrespective of the intervening period could be specified.

It would be helpful if the required reduction was illustrated by examples (including an example where there are two intervening plan years).

Information Required for ERISA §4010 Filing

We appreciate the: (a) elimination of the requirement to determine and submit individual financial information for each controlled group member; and (b) streamlining of the requirements to report relationships among controlled group members. We ask that PBGC permit these changes to be reflected in 2019 information year filings, even if the regulations are otherwise not yet effective.

We note, however, that the proposed changes to §4010.7 would require a diagram of the controlled group if there are more than 10 members. Based on the preamble, we believe PBGC views such a diagram as less burdensome to provide. This may be the case for many plan sponsors. However, some plan sponsors might not have such a diagram already created, but might have a list of controlled group members and the relationships among them (i.e., the information currently required for §4010 reporting) already prepared. We ask that PBGC make the use of the diagram optional, with the current approach remaining available.

Reportable Events

We have several comments regarding the proposed changes in the reportable events regulations.

Reductions in Active Participants

We appreciate the elimination of the "75% of active participants at the beginning of the prior year" trigger for active participant reduction reportable events.

Change in Contributing Sponsor

We note that the proposed changes to §4043.29 would require reporting of a change in contributing sponsor within the controlled group. We believe this is a new reporting requirement, rather than a clarification, and so we ask that the final regulation make clear that this does not apply to information years that begin before the regulations are finalized.

In addition, we believe there are many situations where sponsorship of a plan changes within a controlled group (e.g., from the parent to a subsidiary, or vice versa) in a manner that does not increase PBGC's risk. This is also a reportable event that could easily be missed, as the actuary is often the party that first identifies that a reportable event has occurred, and this type of change may not be known by the actuary until well after the fact (if at all). Because the plan is remaining within the same controlled group, we also believe that in most cases the risk to the PBGC has not changed as a result of a transfer of sponsorship. We would ask that PBGC more narrowly target this reporting requirement to situations that are most likely to increase risk to the PBGC, and that are not related to other events that are already reportable (e.g., liquidation of a controlled group member).

Public Company Waivers

PBGC requested comments as to whether the "public company waiver"[2] under §4043.4 should be extended to cases where the parent company, who is not a contributing sponsor, timely files an SEC Form 8-K disclosing the event. We support providing waivers for any reportable event if the information the PBGC requires is already publicly available, and so we would welcome the extension of this rule to cases where the parent company disclosed the event.

We thank you for the opportunity to comment. Please contact Kelly Fanella, the CCA's Executive Director, at 847-719-6505 or kfanella@ccactuaries.org, if you have questions or would like to discuss these comments with us.

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[2] Available for the following five reportable events: Active Participant Reduction, Distribution to a Substantial Owner, Extraordinary Dividend or Stock Redemption, Change in Controlled Group, and Transfer of Benefit Liabilities