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PBGC Reportable Events Rule Would Interfere With Credit Marketplace, Commenters Say

The Pension Benefit Guaranty Corporation's proposed reportable events rule would seriously interfere with credit arrangements between companies that sponsor defined benefit pension plans and their lenders, according to comments received by PBGC and in interviews by BNA Jan. 25.

"This is unwarranted interference by a government agency in the credit marketplace," the ERISA Industry Committee said Jan. 22 in written comments to PBGC signed by Mark J. Ugoretz, president.

"PBGC reportable event requirements have become woven into the very fabric of the American financial system," the American Benefits Council said Jan. 22 in its written comments signed by Jan Jacobson, senior counsel for retirement policy. "Most loan covenants and credit agreements contain special provisions that are triggered whenever a plan sponsor is required to file a reportable event with the PBGC," ABC said.

"While the PBGC may have good intentions with respect to the proposed elimination of various reportable event waivers, the impact on plan sponsors who rely on credit agreements may be significant," S. Tony Ling, partner with Jenner & Block LLP, told BNA Jan. 25.

"This impact will not only be financial, but administrative as well," Ling said. "We have already counseled many of our clients to review their credit agreements, suggesting that they reach out to their lenders to discuss the potential impact," he said.

"This proposed rule, if adopted, could have significant negative effects on corporate loan and other agreements," Jim Keightley, partner in the Washington, D.C. law office of Keightley & Ashner LLP and former PBGC general counsel, told BNA Jan. 25. "Hopefully, PBGC will take this into account in deciding whether, and if so, how to proceed with its proposal," he said.

Proposed Rule. PBGC published Nov. 23 a proposed rule to eliminate "most" of its automatic waivers and filing extensions now permitted under existing reportable events regulations and guidance (223 PBD, 11/23/09; 36 BPR 2674, 11/24/09; 74 Fed. Reg. 61,248).

PBGC said it "believes that many of the automatic waivers and extensions in the existing reporting events regulation are depriving it of early warnings that would enable it to mitigate distress situations."

The agency requested comments on "whether it has struck the correct balance between ensuring relevant information is received timely and increased reporting burden on the reporting community," given its proposed elimination of most waivers and extensions.

Written comments on the proposed rule were due to PBGC on Jan. 22.

Default Event. "Many credit agreements between employers and financial lending institutions provide that the occurrence of a [PBGC] reportable event that is not automatically waived is an event of default with respect to outstanding loans, or precludes the employer from receiving additional financing under the existing credit agreements," ERIC said.

ERIC identified three disadvantages for companies that have a defined benefit plan if the rule as proposed were to become final:

- a greater probability of companies defaulting on their loans and lines of credit;
- providing added "leverage" to lenders during renegotiation; and
- creating an impression of poor financial wellbeing for defined benefit plan sponsors relative to those who only sponsor a defined contribution plan or no plan at all.

Doing away with the automatic waivers would significantly increase the potential for defaults on loans and credit lines," ERIC said.

"As a minimum, this proposal would generate significant uncertainty regarding plan sponsor access to credit markets, which could increase plan sponsor cost of debt,'' ABC said. ''In the end, it could result in greater liability for the PBGC.''

Reportable events require a filing with PBGC that may indicate a financial shift in the company putting the lender at increased risk, ABC said. As a result, lenders have come to require limits and default provisions initiated by a reportable event.

Negotiated Rulemaking. ERIC recommended that PBGC withdraw the proposed rule or leave the current waivers in place until a ''negotiated rulemaking process'' is completed. If the agency cannot accommodate either of these requests, the effective date should be delayed to allow companies an adequate period of time to ''renegotiate lending arrangements that rely upon the current waiver provisions,'' it added.

''The existing reportable events regulation was the result of a negotiated rulemaking process involving a committee consisting of representatives of employers, participants, pension practitioners, and PBGC, with a great deal of give-and-take among the various stakeholders,'' Harold Ashner, a partner in Keightley & Ashner LLP and former PBGC assistant general counsel, told BNA Jan. 25. ''Following a similar process in connection with the major changes now being proposed would help ensure that the new rules strike an appropriate balance,'' he said.

By Michael W. Wyand

Comments on the proposed rule are at: http://www.regulations.gov/search/Regs/home.html#docketDetail?R=PBGC-2009-0010.

