January 18, 2011

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Annual Funding Notice for Defined Benefit Plans

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to request for comments on the proposed regulation, Annual Funding Notice for Defined Benefit Plans, issued by the Department of Labor ("Department") on November 18, 2010.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

The proposed regulation is meant to implement the annual funding notice requirement imposed by ERISA, as amended by the Pension Protection Act of 2006 ("PPA") and the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"). Originally, ERISA section 101 only applied to multiemployer plans. The amendments implemented by the PPA and WRERA expanded the scope of the annual funding requirement to include single-employer defined benefit plans. In general, we appreciate the care with which the proposed regulation was crafted. Our primary concerns are to ensure that the information it requires plans provide to participants is useful and that providing that information is not unduly burdensome to plan sponsors. Our comments below focus on these issues.

Comments

The Exception for Certain Terminating Plans Should Apply to a Period of Time Before the Actual Termination. Generally, the annual funding notice is due 120 days after the end of the plan year. However, the proposed regulation allows for certain exceptions. We appreciate these exceptions. In particular, the proposal provides an exception if the notice is due on or after the date the PBGC is appointed trustee of the plan or the plan has distributed assets in satisfaction of all benefit liabilities.[1] In the proposal, the DOL states that "because of the separate disclosure requirements applicable to such plans under title IV of ERISA, a funding notice may be unnecessary or confusing to participants."

We appreciate the DOL's recognition that participants might become confused if they received an unnecessary annual funding notice at such a time; however, we believe that they might also be confused by annual funding notices given when it is soon expected that the PBGC will be appointed trustee or that the plan will satisfy all its benefit liabilities. We believe that the information in the annual funding notice would not materially assist participants under those circumstances. Therefore, we recommend that the exception should also apply while the plan administrator reasonably expects the PBGC to appoint a trustee within the next 12 months or after the distribution of assets in satisfaction of all benefit liabilities has begun.

Plans Should be Allowed to Estimate Year-End Unfunded Liabilities Based on the Most Recently Available Information. The proposal asks for comments on a reasonable manner of allowing for plan administrators to estimate their year-end unfunded liability for the notice year. Plans often invest in non-publicly traded assets; thereby, making a year-end asset valuation difficult. Rather, valuations of non-publicly traded assets are typically completed a significant number of months after the end of the plan year. A common example would be a limited partnership interest. In many cases, valuation of the limited partnership interest is determined as part of the partnership tax return, due October 15, with extensions, assuming a calendar-year taxpayer. The taxpayer, and not the plan, is in control of when the valuation for such a limited partnership is prepared. Therefore, we believe that the plan administrator should be able to provide an estimate based on the most recent valuation available. In addition, the plan administrator should provide the date of the valuation.

The Final Regulation Should Not Include the Five-Percent Test for Determining Whether an Event has a Material Effect. The proposed regulation provides two methods for determining whether an event has a material effect. The first method requires the plan administrator to determine if the event results, or is projected to result, in an increase or decrease of five percent or more in the value of assets or liabilities from the valuation date of the notice year.[2] The second method states that an event has a material effect if the plan's enrolled actuary determines that the event is material for purposes of the plan's funding status under Internal

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[1] Proposed Regulation section 2520.101-5(a)(2)(ii).
[2] Proposed Regulation section 2520.101(g)(1)(i).

Revenue Code section 430 or 431, "without regard to an increase or decrease of five percent or more in the value of assets or liabilities from the prior plan year."[3]

We believe that both tests are not necessary and would only serve to increase administrative burdens on employers. Particularly since the second method applies regardless of the findings of the first method. If the plan's enrolled actuary determines that the event is not material for purposes of the plan's funded status, the plan sponsor should not then have to administer another test to see if the event is material for purposes of a benefit notice. Consequently, we recommend that the DOL eliminate the five percent method.

As another alternative to both tests, the DOL could simply use an already established trigger for determining when an event has a material effect. For example, under Internal Revenue Code 436, certain benefit restrictions apply to plans that are less than 80 or 60 percent funded. These triggers could be used to define whether an event has a material effect. As such, plan sponsors would not be burdened with having to perform yet another funding test.

The Final Rule Should Adopt the Policy Stated in FAB 2009-01 Regarding an Event with Material Effect. In February of 2009, the DOL provided interim guidance in FAB 2009-01. Question 12 of the FAB states that in addressing when an amendment, scheduled increase, or other known event would have a "material effect" on plan liabilities or assets, if an otherwise disclosable event first becomes known to the plan administrator 120 days or less before the due date for furnishing the notice, such event is not required to be included in the notice. In the proposed rule, the DOL states that the policy behind the FAB was based on the impracticality of providing the detailed information required in such a short time period. Moreover, the information would be fully detailed in the subsequent annual funding notice. We believe that this rational still applies. As such, the final regulation should include the same policy included in FAB 2009-01.

Demographic Information Should Remain as Simple and Straight-Forward as Possible. The DOL asked for comments on whether the notice should include demographic information covering a longer period of time.[4] Again, we do not believe that this information would provide any additional benefit to participants. In addition, it would increase the administrative burden on the plan sponsors and unnecessarily increase the amount of information contained in the notice. Consequently, we recommend that the final regulations not include any additional demographic information beyond what is currently contained in the proposed regulation.

We Urge the DOL to Consider the Comprehensive Impact of Notice Requirements Upon Participants and Plan Sponsors. As you are aware, plan sponsors are required to provide various notices to plan participants. Our members are increasingly concerned about the volume of required notices and whether participants are becoming overwhelmed with the volume of information being provided.

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[3] 75 Fed. Reg. 70,630 (Nov. 18, 2010). See also, Proposed Regulation section 2520.101(g)(1)(ii).
[4] Id.

Plan sponsors are faced with two increasingly conflicting goals—providing information required under ERISA and providing clear and streamlined information. In addition to required notices, plan sponsors want to provide information that is pertinent to the individual plan and provides greater transparency. However, this is difficult with the amount of required disclosures that currently exist. As noted by the 3rd Circuit, too many requirements could "result in an avalanche of notices and disclosures. . . [T]ruly material information could easily be missed if the flow of information was too great. [A] warning . . . would become meaningless if cried too often."[5]

Allowing plan administrators to coordinate notices to the extent possible would help alleviate some of this concern. While the proposed rule allows for combined notification where possible, there are still instances where this is not possible due to timing issues. For example, both the annual funding notice and the summary plan description (SPD) are required to include information about PBGC guarantees.[6] However, the funding notice is required annually while the SPD is required upon entry into the plan by the participant and every five years thereafter.[7] Therefore, similar information will be provided to participants simply because of a difference in timing of the notices. We understand that the inclusion of this information is required by statute and that the DOL power to override the statute might be limited.[8] However, we urge the DOL to take a comprehensive look at the benefit notices that are required. We are increasingly concerned about the amount of information required to be given to participants. At some point, participants will become overwhelmed, thereby nullifying any intended benefit of the notices. The Chamber is more than willing to assist in such an important endeavor in any way possible.

We Appreciate the Alternative Method of Compliance. If a single-employer plan is less than $50 million underfunded, the plan administrator is not required to furnish a funding notice to the PBGC as long as the administrator furnishes the latest available funding notice to the PBGC within 30 days of receiving a written request from the PBGC. The alternative is permitted under ERISA section 110 which permits the DOL to prescribe alternative methods of complying with any of the reporting and disclosure requirements of ERISA if it meets certain requirements including: consistency with the purpose of ERISA and adequate disclosure; the reporting requirements would increase costs or impose an unreasonable administrative burden; and the application of the reporting requirements would be adverse to the interests of plan participants. This alternative is a perfect example of the DOL and PBGC working together to eliminate duplicative notice requirements that do not provide additional benefit to the recipients of the notice. We thank you for this alternative and encourage further streamlining of notice requirements in this manner.

We are Concerned that the Cost Estimates Under the Paperwork Reduction Act are Not Accurate. The proposal includes estimates for plan professionals that seem low. For example, the proposal estimates that lawyers will spend one hour in the first year and one-half

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[5] Fischer v. Philadelphia Elec. Co., 96 F.3d 1533, 1539 (3d Cir. 1996).
[6] ERISA section §2520.102-3 (m).
[7] ERISA section 104(b).
[8] As discussed in the following paragraphs, ERISA section 110 provides the DOL some leeway amending statutory requirements. We do not rule out the use of this section in dealing with this issue but want to stress that we believe the increasing number of notice requirements is an issue that needs to be dealt with comprehensively.

hour in each following year reviewing the notice. Thirty minutes to review a six page notice seems unreasonable even for a lawyer that is intimately familiar with the plan and able to make all changes and updates without consulting any other plan professionals or the plan administrator. We ask that the DOL review the estimates provided. If necessary, we are willing to work with the DOL to provide more realistic estimates.

Conclusion

Thank you for your consideration of our comments. Ensuring that participants receive useful information is a priority that the DOL and plan sponsors share. In addition, we believe that plan sponsors should not be burdened with providing information that will not provide additional benefit to plan participants. We believe that our recommendations provide an even balance between these two concerns. We look forward to further working with you on these issues.

Sincerely,

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