



THE SEGAL COMPANY - WASHINGTON, DC

MEMORANDUM

To: Jeffrey Turner, EBSA, DOL
From: Judith F. Mazo
Date: March 23, 2011
Re: Proposed Regulation under ERISA s. 101(f) – Annual Funding Notice

Dear Jeff,

Because this is being submitted so late after the official comment deadline, I am sending these comments directly to you, as the person responsible for the regulation. I assume you will circulate them to others in the agency who are working on the project, but will be happy to send a copy to another, more formal address, if that is more appropriate. My comments are generally from the perspective of an advisor to multiemployer plans.

As you know, I thought the Department's guidance on the Annual Funding Notice in FAB 2009-1 was very helpful and well-thought-out, so I support the proposal to adopt so many of its concepts in the ultimate regulation. These comments are mainly responses to questions raised in the Preamble to the proposed rule.

1. In General: Keep It Simple. My strongest recommendation is to make the content requirements as straightforward and pragmatic as possible. These forms should not be treated as if they were tax returns, requiring intense data analysis and legal and accounting review to parse the requirements and assure absolute precision in each of the answers. The idea is to give stakeholders a good picture of what is going on with their pension plan; they will be able to get all of the precise detail they could want a few months later, when the Form 5500 is filed. Given the timing, some of the information reported in the Annual Funding Notice, such as year-end asset values, will be preliminary and subject to revision anyway.

2. Date for Participant Count. The proposal, like the FAB, calls for reporting the participant count based on data as of the valuation date. This is a good, practical approach, because the plans prepare the data as of that date, and it is reviewed by the actuaries in order to identify and resolve anomalies, for purposes of the valuation. An alternative, which for a large plan is not likely to be particularly different, would be the last day of the plan year ending before the notice year. That is the count that is used for the Form 5500 for the year preceding the notice year,

which will typically have been completed and filed in October of the notice year. Please do not move this to the last day of the notice year itself, because those numbers would not be readily available by the due date for the notice and requiring them would create a new data-gathering burden for plan administrators at one of their busiest times of the year.

3. “Known Event” Having a Material Impact on Assets or Liabilities. It would be helpful to clarify that market fluctuations – even substantial ones – do not need to be reported here. Participants will be receiving year-end asset values in the Notice. In a defined benefit plan, swings in those values during the plan year may be of little relevance for participants. Consider the 2009 calendar year: at the end of March, plans were devastated, but by the end of the plan year many of them were well on the way to recovery. On the other hand, if the drop in market value were due to an independent event, say the discovery that the plan had been the victim of a ponzi scheme, that would be reportable on its own.

4. Cut-Off Date for Known Events. FAB 2009-01 included guidance that had the effect of requiring reporting on a “known event” only if the plan administrator knew about it more than 120 days before the due date of the notice. This is not in the proposed regulation, but is flagged for comment in the Preamble. I strongly recommend that that 120-day cut-off be carried forward in the regulation. It significantly relieves the pressure of preparing these notices, by giving a bright-line test that enables plan administrators to close the books and complete the form, rather than worrying about continuously checking and double checking, to identify events that may be reportable and to measure their impact on plan assets and liabilities. Also, 120 days is essentially the end of the notice year, which is a simple deadline to keep track of.

To make it even more clear cut, the deadline could be set explicitly at the last day of the notice year. That way there would be no confusion about counting days and adjusting for leap year. This may sound trivial, but giving plan administrators one less detail to track is always a welcome improvement.

5. Special Rules for Plans Terminated by Mass Withdrawal. Special rules waiving some of the reporting elements and possibly substituting others would definitely be appropriate for plans that have terminated by mass withdrawal. As the preamble to the proposed regulation points out, the funding requirements no longer apply to those plans and therefore they would not otherwise be calculating figures such as the funded percentages. Indeed, after plan termination it is impossible to calculate that number, as the plan no longer has asset or liability values based on the actuary’s funding assumptions and methods. Also irrelevant are questions about such a plan’s funded status (the “zones”) under ERISA s. 305, since that analysis and any funding improvement or rehabilitation plans adopted in accordance with it, are features of the funding rules and therefore no longer apply.

Indeed, there is a serious question whether the Annual Funding Notice itself should continue to be prepared and distributed after a plan has terminated, even though it has not yet distributed all of its assets. For one thing, it is not apparent that the former contributing employers any longer have any interest in the plan’s condition. Once the plan has terminated and withdrawal liability has been redetermined and reallocated under ERISA s. 4219(c)(1)(D), their finances will not be affected by plan-related developments. At that point, any amount of plan money spent on irrelevant notices comes out of the pockets first of the retirees and then of the PBGC.

On the other hand, participants and beneficiaries may have a more acute interest in the plan's funding status than ever before, if they have been paying attention to the long series of notices sent to them warning that after plan termination their pensions will go down as the assets are spent or otherwise decline in value. There may be information related to this that would be of more value to them than the routine material in the Annual Funding Notice. Under Title IV of ERISA they do not start to receive details about the looming cutbacks in benefit payments until the plan is on the verge of insolvency (see PBGC regulation Part 4281, Duties of Plan Sponsor Following Mass Withdrawal). Working with the PBGC, the Department may want to craft a different type of annual notice to participants and beneficiaries of a mass-withdrawal terminated plan.

I appreciate your and your colleagues' consideration of these comments, and will be happy to answer any questions or provide other information that may be helpful to you in this project. My email address is jmazo@segalco.com, phone is (202) 833-6455.