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Memorandum



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PBGC Proposed Regulations: Reportable Events and Certain Other Notification Requirements

On April 3, 2013, the Pension Benefit Guaranty Corporation (the "PBGC") issued proposed regulations (the "Proposed Rules") to effect changes in the PBGC's reportable event program which are expected to relieve more than 90% of plans and sponsors from many of the existing reporting requirements under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

In 2009, the PBGC issued proposed regulations (the "2009 Proposed Rules") which, if adopted, would have eliminated most reporting waivers, and consequently increased reporting requirements. Under the aegis of Presidential Executive Order 13563, the PBGC has reviewed its existing regulations with the purpose of identifying those which could be made more effective and less burdensome. In connection with its review, together with its consideration of the public comments received in respect of the 2009 Proposed Rules, the PBGC has issued the Proposed Rules, which (i) establish a financial soundness "safe harbor" allowing qualifying plans or plan sponsors, as applicable, to avoid many of the reporting requirements under ERISA relating to the funding-based waivers, expand small-plan waivers, modify certain waivers and eliminate certain waivers; (ii) specify the timing of the advance reporting threshold; and (iii) revise the definitions of certain reportable events.

The PBGC will receive public comments on the Proposed Rules through June 3, 2013, and will hold a public hearing on June 18, 2013.

Below is a summary of the key changes contained in the Proposed Rules. This memorandum also includes summary charts excerpted from the Proposed Rules which provide additional detail regarding the proposed changes.

CHANGES TO WAIVER STRUCTURE

Section 4043 of ERISA delegates authority to the PBGC to define reportable events and waive reporting obligations, and requires that the PBGC be notified of certain "reportable events," which include, with respect to plans, events such as missed contributions, insufficient funds (inability to pay benefits when due) and large pay-outs (such as distributions to substantial owners and extraordinary dividends), and with respect to plan sponsors, events such as loan defaults and controlled group changes. The current regulations also provide for automatic waivers and extensions for most of the reportable events. In addition to implementing certain changes to conform the existing reportable events regulations to changes to the funding and premium rules effected by the Pension Protection Act of 2006 (the "PPA"), the Proposed Rules also create a "safe harbor" relating to five reportable events. Under the Proposed Rules,

many of the existing individual automatic waivers would be replaced by use of a financial soundness “safe harbors,” and all existing automatic extensions will be eliminated.

Establishment of a Financial Soundness “Safe Harbor”

This safe harbor will relate to the following post-event reporting requirements that the PBGC has identified as being less likely to result in involuntary plan termination (together, the “Safe Harbor Reporting Events”):

- active participant reduction
 - distribution to a substantial owner
 - controlled group change
 - extraordinary dividend
 - transfer of benefit liabilities
- The safe harbor will not apply to two reportable events to which a funding-based waiver applies under the existing regulations: liquidation and loan default.

Safe Harbor for Plan Sponsors

Under the Proposed Rules, upon the occurrence of any of the Safe Harbor Reporting Events, a plan sponsor may avail itself of the safe harbor and thereby relieve itself of a reporting obligation if, generally, the applicable financial soundness criteria are met by (i) the plan’s contributing sponsor (in the case of a single employer plan), (ii) by all participating sponsors (in the case of a multiple employer plan), and (iii) by the highest level U.S. company in the controlled group that is in the contributing sponsor’s chain of ownership (in the case of a plan whose contributing sponsor is a member of a controlled group). A plan sponsor (or other applicable entity) meeting the financial soundness criteria would be considered “financially sound.”

- With respect to transactions which result in a change in the contributing plan sponsor, the availability of the safe harbor is determined by looking to whether the post-transaction sponsor group is financially sound. With respect to transactions in which there is a transfer of benefit liabilities, **both** the transferor and surviving transferee plans’ sponsor groups must be financially sound in order for the safe harbor to be available.

Under the Proposed Rules, a sponsor (or other applicable entity) would come within the financial soundness safe harbor if it passes the credit report test and satisfies four other criteria:

- I. Credit Report Test. The sponsor has a credit report score reported by a commercial credit reporting company commonly used in the business community (e.g., Dun & Bradstreet) reflecting a credit score indicating a low likelihood that the company would default on its obligations.
 - For 2011, a minimum Dun & Bradstreet financial stress score of 1477 would have satisfied the PBGC’s standard with respect to this criteria.
- II. Secured Indebtedness. The sponsor’s only secured indebtedness is incurred in connection with the acquisition or improvement of property, and is secured only by such property (e.g., mortgages and equipment financing (including capital leases)).

- III. Positive Net Income. For the past two years, the sponsor has had positive net income under generally accepted accounting principles or International Financial Reporting Standards (IFRS).
 - For non-profit entities, “net income” will be measured as the excess of total revenue expenses as required to be reported on Internal Revenue Service (“IRS”) Form 990.
- IV. Debt Service. For the past two years, the business would have to have avoided an event of default with respect to any loan with an outstanding balance of \$10 million or more, regardless of whether the default was cured or if the lender entered into a forbearance agreement or waived the default.
- V. Pension Plan Contributions. For the past two years, the business would have to have no missed pension contributions, other than quarterly contributions for which reporting is waived.

Safe Harbor for Plans

The Proposed Rules also establish a financial soundness safe harbor relating to the Safe Harbor Reporting Events for plans, and create a special rule to accommodate the needs of small plans in order to determine funding status.

In order to fall within the financial soundness safe harbor, a plan will have to satisfy **either** of two tests below, both of which would be based on plan funding level, but calculated using different assumptions:

- I. Fully Funded Test. The plan is fully funded on a **termination basis** on the last day of the plan year preceding the event year.
 - The PBGC has determined that assessing funding levels using termination-basis assumptions is more appropriate than ongoing-plan assumptions for purposes of determining the magnitude of the financial impact the PBGC and plan participants would suffer if the plan then terminated.
- II. 120% Test. A plan is 120% funded on a **premium basis** for the plan year preceding the event year.
 - Recognizing that most plans generally do not use termination-basis assumptions for measuring funding levels, the PBGC includes this second financial soundness test as an alternative, more accessible means of qualifying for the safe harbor.
 - For many small plans, the variable-rate premium funding information for a plan is generally unavailable until early in the following year. Therefore, under the Proposed Rules, small plans (those with fewer than 100 participants) are given a one-month filing extension from the prior year’s premium filing due date (*i.e.*, five months after the end of the prior year) for the notice date on any of the Safe Harbor Reporting Events. Additionally, under the Proposed Rules, a small plan need not have satisfied the funding level test for the preceding year in order to qualify for this extension.

Small-Plan Waivers

The Proposed Rules include a modified version of the small-plan waiver, which will apply to all of the Safe Harbor Reporting Events other than a distribution to a substantial owner. For this purpose, small plans will include all plans with fewer than 100 participants for whom flat-rate premiums were payable for the plan

year preceding the event year.

Foreign Entity & De Minimis Waivers

Under the Proposed Rules, the PBGC will retain all post-event reporting waivers relating to foreign entities and *de minimis* transactions in the existing regulations, and will also add *de minimis* waivers for loan defaults and non-bankruptcy insolvency. The *de minimis* waivers will be available in the event of liquidation, loan default or insolvency only if the entity involved in such event is not the contributing sponsor.

ADVANCE REPORTING THRESHOLDS

Under the existing regulations, the PBGC is required to receive notice of reportable events within 30 days after the occurrence of the event, except in certain instances requiring advance reporting. Non-public sponsors must provide advance reporting if, as of the *close of the preceding plan year*, the aggregate unfunded vested benefits of plans (subject to Title IV of ERISA) maintained by the sponsors and members of its controlled group exceeded \$50 million *and* the funded vested benefits percentage for such plans was less than 90% (the “Threshold Test”). The PPA created ambiguity with respect to the timing of the advance reporting Threshold Test as it effected changes to ERISA which prescribed that a plan’s unfunded vested benefits would be determined based on the valuation date which, for most plans, would be the *first day of the plan year*.

In order to address this ambiguity, the Proposed Rules, consistent with the 2009 Proposed Rules, specify that the Threshold Test will be applied as of the valuation date for the preceding plan year. The Proposed Rules also provide that a plan whose funding status is taken into account in applying the Threshold Test is determined as of the due date for the report, and that the “public company” status of a contributing sponsor or controlled group member to which the event relates is also determined as of that date.

REVISION OF DEFINITIONS OF REPORTABLE EVENTS

Active Participant Reduction

Under the existing regulations, a reportable active participant reduction occurs at any time during the year when the number of active participants is reduced below 80% of the number of participants at the beginning of the year, or below 75% of the number of participants at the beginning of the prior year.

Recognizing the administrative burden imposed by the existing definition of active participant reduction, the PBGC has revised the definition such that fluctuations in active participant rates crossing the reporting thresholds *during* the plan year will qualify as reportable events only if such fluctuations occur within a single 30-day period or as a result of a single cause (*e.g.*, the discontinuance of an operation, a natural disaster, a reorganization, a mass layoff or an early retirement incentive program). To measure gradual participant attrition, the Proposed Rules require reporting of active participant rates below the reporting threshold (*i.e.*, if the active participant count at the end of year is more than 20% below the count at the beginning of the year, or more than 25% below the count at the beginning of the prior year), as measured at the end of the year.

Missed Contributions

Under the existing regulations, a missed contribution event occurs when a plan sponsor fails to make any required plan contribution by its due date. The Proposed Rules, like the 2009 Proposed Rules, clarify that

the reportable event triggered by missed contributions applies to those contributions required by statute **as well as** contributions required as a condition of a funding waiver that do not fall within the statutory provisions on waiver amortization charges. The Proposed Rules retain the existing grace-period waiver for missed contributions which are corrected within 30 days after the due date (which would have been eliminated under the 2009 Proposed Rules). The Proposed Rules also add a small-plan waiver (to replace the existing waiver provided by Technical Update) which would apply only to failures to make a quarterly contribution. The small-plan waiver would apply to all plans having fewer than 100 participants.

Inability to Pay Benefits When Due

Under the existing regulations, generally, a reportable event occurs when a plan fails to make a benefit payment timely or when a plan's liquid assets fall below the level needed for paying benefits for six months. With respect to larger plans, the PBGC believes that the inability to pay benefits when due is an unnecessary reporting event if such plans are also subject to the more stringent "liquidity shortfall" rules, and therefore included a provision in the Proposed Rules which waives such reporting unless the plan is exempt from the liquidity shortfall provision.

Distribution to Substantial Owner

Distributions to substantial owners must generally be reported under the existing regulations if they exceed \$10,000 in a year unless the plan is fully funded for nonforfeitable benefits. Under the Proposed Rules, distributions to substantial owners will be reportable if (i) the distributions to one substantial owner exceed 1% of "plan assets" (the end-of-year current value of assets required to be reported on IRS Form 5500) or (ii) the distributions to all substantial owners exceed 5% of plan assets, in each case, for the each of the prior two years. The Proposed Rules also simplify reporting requirements relating to distributions to substantial owners in the form of annuities such that only one notice will be required so long as the annuity does not increase.

Controlled Group Change

Under the existing regulations, a reportable event occurs when there is a transaction that results, or will result, in one or more persons ceasing to be members of the plan's controlled group. A "transaction" includes a written or unwritten legally binding agreement to transfer ownership or an actual transfer or change of ownership. The Proposed Rules delete an example from the statute (which indicated that a merger of one member of a controlled group into another member of the same controlled group would be a reportable event) to clarify that a change solely *within* a controlled group will not be a reportable event. The Proposed Rules also clarify that whether an agreement is legally binding is to be determined without reference to any conditions in the agreement, which would include, for instance, a provision conditioning the effectiveness of the agreement on the obtainment of certain government approvals.

Extraordinary Dividends

The Proposed Rules simplify the reporting thresholds relating to extraordinary dividends such that a distribution will qualify as a reportable event when a controlled group member declares a dividend or redeems its stock, and the (cash or non-cash) distribution, alone or together with other cash and non-cash distributions, exceeds 100% of net income for the prior fiscal year.

Transfer of Benefit Liabilities

Under the existing regulations, a reportable event occurs when, in any 12-month period, 3% percent or more of a plan's benefit liabilities are transferred to a person outside the transferor plan's controlled group or to a plan or plans maintained by a person or persons outside the transferor plan's controlled group, and they require the event to be reported by the transferor plan, as well as every other plan in its controlled group. The PBGC has concluded that it is unnecessary to extend the advance reporting requirement beyond the transferor plan and the Proposed Rules accordingly narrow the advance reporting requirement to the transferor plan. The Proposed Rules also clarify that the satisfaction of benefit liabilities through the payment of a lump sum or the purchase of an irrevocable commitment to provide an annuity will not constitute a reportable transfer of benefit liabilities.

Loan Default

Under the existing regulation, a loan default reportable event occurs when a loan payment is more than 30 days late (10 days in the case of advance reporting), when the lender accelerates a loan, or when there is a written notice of default based on a drop in cash reserves, an unusual or catastrophic event, or the debtor's persistent failure to meet agreed-on performance levels. The PBGC believes the occurrence of loan defaults to be so significant that it has revised the definition of loan default to be more inclusive. Under the Proposed Rules, a loan default reportable event occurs for a plan when, with respect to a loan held by any member of the plan's controlled group with an outstanding balance of \$10 million or more, there is an acceleration by the lender or a default of any kind by the debtor.

Bankruptcy and Insolvency

As notice of bankruptcies under the Bankruptcy Code can be reliably obtained by means other than via advance reporting as required under the existing regulations, the PBGC has eliminated bankruptcy under the Bankruptcy Code as a reportable event in the Proposed Rules.

Advance-Notice Extensions

The existing regulations provide for extensions of the advance-notice filing requirements with respect to the following three events: funding waiver requests, loan defaults, and bankruptcy and insolvency. In the Proposed Rules, the PBGC eliminates the reporting extension for advance notice of loan default and insolvency, except in the case of insolvency proceedings filed against a debtor by a party outside the plan's controlled group, based on the rationale that it would be difficult for debtors to anticipate (and report) such adversarial proceedings in advance of their actual occurrence. While the PBGC notes that, like adversarial insolvency proceedings, loan defaults may sometimes be unanticipated by the debtor, it does not include any exception to the advance notice reporting requirement in the Proposed Rules, though it does provide that delinquent filers may request a retroactive filing extension based on the facts and circumstances.

FORMS & INSTRUCTIONS

The Proposed Rules, like the 2009 Proposed Rules, require that notice of all reportable events be given via submission of the Form 10, Form 10-Advance, or Form 200, as applicable. Filers are directed to report only the information requested in the filing instructions of the applicable form.

MANDATORY E-FILING

As part of its ongoing implementation of the Government Paperwork Elimination Act, the PBGC proposes to make electronic filing mandatory.

TIMING & APPLICABILITY

The PBGC proposes to make the changes to the reportable events regulation contained in the Proposed Rules applicable to post-event reports occurring on or after January 1, 2014, and to advance reports due on or after January 1, 2014.

EXCERPTS FROM PROPOSED RULES

Events with safe harbors based on company or plan financial soundness ¹ or other factors.					
Event	Waivers under Current Regulation	Waivers under 2009 Proposal	Revised Proposal – if any of these safe harbors applies, no reporting is required		
			Company Financial Soundness Safe Harbor	Plan Financial Soundness Safe Harbor	Other Safe Harbors
Extraordinary Dividend or Stock Redemption	<ul style="list-style-type: none"> Member distributing is <i>de minimis</i> (5%);² Member distributing is non-parent foreign entity (regardless of size); Member distributing is foreign parent, and distribution is made solely to other controlled group members; At least 80% funded; No VRP; or Less than \$1 M in premium underfunding 	<ul style="list-style-type: none"> Member distributing is <i>de minimis</i> (5%) 	Company is financially sound ↑ ↓	Plan is financially sound ↑ ↓	<ul style="list-style-type: none"> Member involved is <i>de minimis</i> (10%); Member involved is non-parent foreign entity (regardless of size); or Small plan (fewer than 100 participants)
Change in Contributing Sponsor or Controlled Group	<ul style="list-style-type: none"> Member leaving is <i>de minimis</i> (10%); Member leaving is non-parent foreign entity (regardless of size); At least 80% funded & public company; No VRP; or Less than \$1 M in premium underfunding 	<ul style="list-style-type: none"> Member leaving is <i>de minimis</i> (10%) 			<ul style="list-style-type: none"> Small plan (fewer than 100 participants)
Active Participant Reduction	<ul style="list-style-type: none"> Small plan (fewer than 100 participants) At least 80% funded if not a facility closing; No VRP; or Less than \$1 M premium underfunding 	<ul style="list-style-type: none"> Prior event reported within 1 year 			<ul style="list-style-type: none"> Small plan (fewer than 100 participants) <p><i>Note: filing extension for reductions due to gradual attrition</i></p>
Transfer of Benefit Liabilities	<ul style="list-style-type: none"> IRC 414(l) safe harbor is used for asset transfer; Plan whose liabilities are all transferred; Both plans fully funded after transfer using 414(l) assumptions; or Amount transferred is less than 3% of assets 	<ul style="list-style-type: none"> None 			<ul style="list-style-type: none"> Small plan (fewer than 100 participants)
Distribution to Substantial Owner	<ul style="list-style-type: none"> At least 80% funded; No VRP; Distributions less than IRC 415 limit; or Distributions less than 1% of assets 	<ul style="list-style-type: none"> None 			<ul style="list-style-type: none"> No other safe harbor

¹ "Company" means the plan sponsor or the U.S. parent company. The proposed financial soundness tests are set forth in § 4043.9 of the proposed regulation and described in the preamble under *Financial Soundness Safe Harbor for Plan Sponsors and Financial Soundness Safe Harbor for Plans*

² *De minimis* is defined in § 4043.2 of both the current regulation and the proposed regulation.

Events with limited or no safe harbors			
Event	Waivers under Current Regulation	Waivers under 2009 Proposal	Safe Harbors under Revised Proposal
Bankruptcy/ Insolvency	<ul style="list-style-type: none"> Member in bankruptcy is non-parent foreign entity (regardless of size) 	<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> Event revised to exclude Bankruptcy Code cases Member causing event is - <ul style="list-style-type: none"> - Not the plan sponsor and is <i>de minimis</i> (10%); or - Non-parent foreign entity (regardless of size)
Liquidation	<ul style="list-style-type: none"> Member liquidating is <i>de minimis</i> (10%) and plan survives; Member liquidating is non-parent foreign entity (regardless of size); At least 80% funded & public company and plan survives; or No VRP or less than \$1 M in premium underfunding and plan survives 	<ul style="list-style-type: none"> None 	<p style="text-align: center;">↑</p> <ul style="list-style-type: none"> Member causing event is - <ul style="list-style-type: none"> - Not the plan sponsor and is <i>de minimis</i> (10%); or - Non-parent foreign entity (regardless of size) <p style="text-align: center;">↓</p>
Loan Default	<ul style="list-style-type: none"> Default cured or waived by lender within 30 days or by end of cure period; Member defaulting is non-parent foreign entity (regardless of size); At least 80% funded; or No VRP or less than \$1 M in premium underfunding 	<ul style="list-style-type: none"> Default cured or waived by lender within 30 days or by end of cure period 	
Failure to Make Required Contribution	<ul style="list-style-type: none"> Missed quarterlies <ul style="list-style-type: none"> - Plans with fewer than 25 participants if missed quarterly was not due to financial inability; simplified reporting for plans with 25-99 participants if missed quarterly was not due to financial inability (relief provided in Technical Update) - Any sized plan, if made within 30 days of due date Any other missed contribution, if made within 30 days of due date 	<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> Missed quarterlies of small plans (fewer than 100 participants) Any missed contribution, if made within 30 days of due date
Application for Funding Waiver	<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> None 	<ul style="list-style-type: none"> None
Inability to Pay Benefits When Due	<ul style="list-style-type: none"> Plan with more than 100 participants (subject to liquidity shortfall rules) 	<ul style="list-style-type: none"> Plan with more than 100 participants (subject to liquidity shortfall rules) 	<ul style="list-style-type: none"> Plan with more than 100 participants (subject to liquidity shortfall rules)

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank partner or a contact listed below:

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