AMERICAN BENEFITS COUNCIL

April 24, 2017

Submitted via email

W. Thomas Reeder
Director
Pension Benefit Guaranty Corporation
1200 K St., NW
Washington, DC 20005-4026

Dear Tom:

On behalf of the American Benefits Council (the "Council"), I am writing regarding the Early Warning Program, as described on PBGC's website, updated as of December 2016.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We thank the PBGC for publishing this guidance and for inviting questions on it. We are grateful for your openness to a dialogue with the community on this key issue. More broadly, your leadership in engaging with the community on defined benefit plan issues is very much appreciated.

In this context, we believe that it is important to put the Early Warning Program in a broader context. Our members are very concerned about the future of the defined benefit plan system.

As our members consider the future of the defined benefit plan system, here is what they see:

- The defined benefit system, including frozen plans, continues to provide valuable benefits to millions of participants.

- The continued volatility in the balance sheet treatment of defined benefit plans, due to the use of short-term measures to determine long-term funding obligations, is very difficult for businesses trying to make business plans.

- The continued volatility in defined benefit plan funding presents another very serious challenge for businesses.

- Single-employer premiums have skyrocketed to the point that they are a major factor in pushing employers to exit the system in whole or in part, thus eroding PBGC's premium base.

- With employers leaving the system in whole or in part at a rapid pace, there is concern that in the future the few left in the system could be saddled with the liabilities of the struggling plan sponsors that cannot afford to leave the system, thus further accelerating the exodus in whole or in part from the system.

- There is a concern that PBGC's single employer plan system could be tapped to pay for multiemployer plan liabilities. This too is causing some companies to accelerate their plans to exit the system.

- Treasury nondiscrimination rules will effectively prohibit employers from keeping closed plans alive for existing employees, and proposed Treasury regulations do not solve the problem.

- Proposed mortality tables assume large future improvements in life expectancy, thus increasing funding and premium liabilities.

All of the above factors are pressing employers towards exiting the defined benefit plan system, which is by far the greatest threat to the PBGC's single employer plan program. As the Early Warning Program expands, it becomes a significant contributor to this threat.

We need to consider the Early Warning Program in this context.

Under the updated criteria, almost every company in the country could be subject to the Early Warning Program. Under the program (as revised in December 2016), a company could be subjected to the Early Warning Program if, for example, it has "a downward trend in cash flow or other financial factors." There is probably almost no company in the country that, over the course of a business cycle, does not have a downtrend in some financial factor. Another trigger is "a change in the group of companies legally responsible for supporting a pension plan (a controlled group),

including a spin-off of a subsidiary." Large companies make acquisitions and dispositions routinely as a matter of everyday business and further, many changes to controlled groups are the result of internal reorganizations and do not involve any transfer to unrelated parties. Any or all of these situations could result in a company being engaged in the program.

It is important to note that the December announcement regarding the program was the first public statement that the program can apply when there is not a business transaction that can undermine the ability of the plan sponsor to adequately fund the plan. This is a major departure from past guidance and a departure that provides PBGC with the ability to apply the program to almost any plan sponsor in the country.

The PBGC Participant and Plan Sponsor Advocate, Connie Donovan, addressed this issue very well in her 2016 report:

> Early reaction by the sponsor community to the new [Early Warning Program] guidance is that it seems to suggest that PBGC can and will intervene in routine business transactions, which is hardly helpful in encouraging the maintenance of pension plans and calls into question whether Congress ever intended PBGC have this kind of authority. This guidance also significantly expands on the types of situations that might trigger an Early Warning Program case, as PBGC has now added "significant credit deterioration" and "a downward trend in cash flow or other financial factors" to the standard list of considerations.
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> Although PBGC has historically taken into account a company's "creditworthiness" or other financial factors relating to the company under the Early Warning Program, it did so in the context of a particular transaction. Now it appears that such factors may be the basis for an Early Warning Program demand absent a particular transaction. For plan sponsors, that is a troubling expansion of the reach of the Early Warning Program. As a result, PBGC may be contacting employers to request that the employer make an excess contribution to the plan or provide some other form of protection to PBGC and/or the plan, in the absence of any transaction, and threaten involuntary termination of the plan if the employer refuses, making it almost impossible for the employer to overcome financial difficulties.

Adverse effects of broader application of the program: we understand that PBGC would like to retain discretion to give itself the ability to intervene when it believes necessary. But this retention of broad discretion comes at a huge cost. The perception is that anyone could be subject to the program at any time. PBGC may answer that there are only around five settlements per year. But this is not an accurate measure of the damage being done by the program.

As noted on the website, PBGC engages with about 300 situations per year. That can mean that 300 major employers may need to put transactions on hold (potentially jeopardizing them) and/or reserve large amounts of assets in case the PBGC's inquiry turns into a full-fledged and difficult negotiation (which can also lead to unexpected

second and third-order effects, for example, under financial covenants). Further, the disruption to corporate staff and direct and indirect costs generated by having to deal with the PBGC under the Program should not be underestimated. And beyond the 300, many other employers have no certainty as to whether they will suddenly become the target of this Program, with the intense disruption that it can cause.

This Program needs meaningful guidelines where employers understand the circumstances under which it will apply. Defined benefit plan sponsors deserve more than a general document on a website that allows PBGC to invoke the program with respect to almost any defined benefit plan sponsor in the country. (As noted, almost every company has a downward trend with respect to some financial factor and almost every large company enters into business transactions or reorganizations.)

Under the Early Warning Program, PBGC has seemingly unlimited discretion regarding what to demand from a plan sponsor. Just as there are no effective constraints on the circumstances in which a plan sponsor can be targeted under the Program, there are similarly no apparent constraints on what the PBGC can ask for in exchange for not pursuing an involuntary termination of the plan. This can only add to the concern of plan sponsors across the country, as they consider all the reasons to exit the system. And, from a plan sponsor perspective, the problems that arise from this lack of limits are exacerbated by the lack of formal process around the program.

The Early Warning Program is a continuation of a counterproductive trend: imposing burdens on plan sponsors when they are least able to deal with those burdens. PBGC only assumes liabilities if a company becomes insolvent. So in that context, it seems logical that PBGC would try to avoid imposing significant burdens on struggling companies trying to recover. But the Early Warning Program goes in exactly the opposite direction – identifying the companies that are struggling the most and imposing the greatest burdens on those companies. This is structured to do great long-term damage to the PBGC, both from the exodus from the system and from more insolvencies and thus more liabilities.

Suggested changes to the program: we are not suggesting that the Early Warning Program is the main factor causing the exodus from the defined benefit system. It is not. But it is a factor. And it is a factor that PBGC has the power to address. It would send a good signal if PBGC were, on its own, to reform the program in a helpful way.

Here are the seven steps we would recommend:

- **Suspend the program for six months while it is evaluated and reformed**. In its current state, the program is counterproductive for PBGC and plan sponsors. Until it is evaluated and reformed, the program should be suspended, except in emergency situations.

- **Reform the criteria for the program.** The program was appropriate when it focused on transactions that undermined the group's ability to fund a plan. For example, if a very substantial portion of a business is leaving a controlled group, but the entire plan is being left behind, that may be a situation where it is appropriate for PBGC to intervene. Another example is the reverse situation where the plan is spun off along with a struggling portion of the company's business. But over the years, PBGC has moved from this logical transaction-based concept to a view that all businesses can effectively be subject to the program at almost any time. We need to get back to the logical roots of the program, so that the program is limited to business transactions that materially undermine the ability to fund the plan adequately in the future.

- **Obtain board of directors approval for large plan involuntary terminations based on long-run loss determinations**. The consequences associated with PBGC initiating an involuntary termination of a large plan, or even of raising the possibility of doing so, are extreme, and could lead to bankruptcy, job losses, and other significant problems. To ensure that such steps are fully vetted from multiple perspectives before they are undertaken in the case of a large plan, we recommend that PBGC first obtain the approval of its board of directors in any case in which the potential termination liability for all plans maintained by the controlled group exceeds $50,000,000.

- **Provide safe harbors from the Early Warning Program.**

    - **Provide an exemption for well-funded plans**. Various rules, including those governing funding and benefit restrictions, limit certain restrictions to plans funded under a specified level. This reflects two policy judgments. First, the additional restrictions are not warranted when a plan achieves the specified funding level. Second, this structure creates incentives to maintain a certain funding level. For both reasons, PBGC should exempt any plan from the Early Warning Program if the plan had an adjusted funding target attainment percentage (as defined under Code Section 436) of at least 80 percent for the previous plan year.

    - **Provide other safe harbors**. Even the effort to identify the types of business transactions that may materially undermine the ability to fund the plan adequately in the future involves substantial discretion. Accordingly, it would be helpful for PBGC to formally designate criteria that, if met, will not trigger the program. PBGC has done this in the past with respect to the program, and it has been very helpful.

- **Reform the "sanctions" under the program.** Informally, PBGC takes the position that the "sanctions" it seeks under the program do not affect the ability of the plan sponsor to carry on its business and recover. Based on input from our

members, we strongly disagree. In this context, we would propose (1) establishing meaningful parameters defining the appropriate sanctions, and (2) adopting a procedure under which there would be binding expedited ***private*** arbitration regarding a sanction that must be reasonable and must not undermine the plan sponsor's ability to recover. If the sanction could have a material effect on a plan sponsor's ability to recover or is otherwise unreasonable or excessive under the circumstances, then the sanction would not apply. We would commit to working with PBGC and the business community to refine the determination of (1) when a sanction would undermine a plan sponsor's ability to recover and (2) when a sanction would otherwise be unreasonable or excessive.

  - **Expedite resolution of Early Warning Program cases.** Early Warning Program cases have in the past taken years to resolve, at great cost to the companies involved, including lost business opportunities. To address this, a company should be authorized to have an arbitrator privately resolve a program case if the case has not been resolved expeditiously by the PBGC.

- **Preclude PBGC from intervening in company businesses without statutory authorization.** In some cases, our members report that PBGC has intervened in company business operations without referencing any statutory basis, such as Section 4062(e) or the possible need to involuntarily terminate the plan. Such interventions have not been authorized by Congress and should cease.

- **Cease publicizing Early Warning Program agreements.** Companies with defined benefit plans have committed a large amount of resources to providing a secure retirement at least to their retirees. In light of the shift in the funding and accounting rules to the use of short-term measurements of funding status, many of these companies have encountered funding challenges, especially during difficult economic times. We find it very concerning that a private negotiation between the PBGC and a company trying to do the right thing for its retirees gets publicized by PBGC and then displayed for years on PBGC's website. PBGC's mission is to promote the defined benefit system. We fail to see how publicizing private negotiations does anything to promote the defined benefit system. All it does is convince plan sponsors to get out of the system before they appear on PBGC's website.

We thank you for your consideration of the issues addressed in this letter. We would like to meet to discuss these issues and will be reaching out to you soon in this regard.

Sincerely,

Lynn D. Dudley
Senior Vice President,
Global Retirement and Compensation Policy