

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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December 5, 2016

Submitted electronically to: www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-A63
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Department of Labor, RIN 1210-AB63: Annual Reporting and Disclosure Proposed Rule and Proposed Revision of Annual Information Return/Reports

Dear Ladies and Gentlemen:

The National Coordinating Committee for Multiemployer Plans (NCCMP) appreciates the opportunity to provide comments on the above-referenced proposed rule issued by the Department of Labor (the Department) relating to new requirements for the Form 5500 Annual Return/Report of Employee Benefit Plan and the related Proposed Revision of Annual Information Return/Reports issued simultaneously by the Department of Labor, the Department of Treasury and the Pension Benefit Guaranty Corporation (PBGC) (collectively, the “Agencies”). These two pieces of proposed guidance are collectively referred to here as the Proposed Rule. The NCCMP appreciates the opportunity to provide comments on the Proposed Rule. The NCCMP comments focus on the Proposed Rule as it relates to multiemployer plans, including pension and group health plans.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the over 20 million active and retired American workers and their families who rely on multiemployer plans for retirement, health and other benefits. The NCCMP’s purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans and contributing employers in every major segment of the multiemployer plan universe, including in the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service, steel and trucking industries.

Our comments are organized by topic. First is discussion of “General Comments” which relate to both pension and health plans, followed by comments relating to pension plans and, lastly, comments relating to health plans.

A. General Comments

1. Detailed reporting requirement such as those in the Proposed Rule involve significant costs and should be limited to information required for compliance and enforcement.

Proposed Rule: For all plans, the scope and detail of information requested would be expanded dramatically under the Proposed Rule. The preamble indicates that the expansion has multiple purposes, ranging from up-dating the forms to reflect changes in the law and aid enforcement to assisting private researchers.

NCCMP Comments:

The NCCMP is concerned with the scope of the Proposed Rule and the reasons behind the increased information reporting as reflected in the preamble. We appreciate the need for the Agencies to obtain appropriate information regarding employee benefit plans in order to assist in compliance and enforcement. Obtaining such information is not costless, however, and nowhere is the impact of increased costs more apparent than it is with multiemployer plans, where every dollar spent for administrative purposes directly reduces the amount in the trust fund that is available to provide benefits.

The Proposed Rule would require all types of plans to report additional information. Some of this is information that the plans may not now have or have a reason to have. In other cases, while the data may be available, the Proposed Rule would require it to be provided in a different form than it is captured now. In determining what reporting should be required, a primary objective of the Agencies should be to focus on whether the data is needed for compliance purposes, particularly when the information is not compiled for any other reason. The Agencies should limit reporting to necessary information, not information that is intended for a more general purpose, such as to provide information to third parties, like private researchers, that have no role in the enforcement process. It is not appropriate for plans or plan sponsors to bear the costs of such broad reporting requirements.

We urge the Agencies to reconsider each aspect of the new requirements to balance the Agencies' need for the information with the costs that are imposed on plans, and retain only those requirements that are needed for compliance¹. This type of balancing is very familiar in the employee benefits area, due to the fact that both our employment-based health and pension benefit systems are voluntary. Imposing additional requirements on employee benefit plans, particularly when those costs are not needed for compliance and enforcement purposes, raises the costs of such plans, lowers their value, and ultimately may cause more exiting from the system.

2. The compliance questions should be revised to provide plan trustees with clear guidance as to the due diligence required to avoid the penalties.

Proposed Rule: The Proposed Rule adds a number of new compliance questions to Form 5500. Thus, for example, with respect to health plans, the compliance questions require certification that the plan is in compliance with numerous laws, including GINA, MHPA, MPAEA, and the ACA. With regard to both health and retirement plans, one of the new compliance questions

¹ For example, the Agencies solicited comments on whether collection of information with regard to ETI and ESG investment activities or COBRA coverage would add value. Both collection efforts are outside of what is necessary for compliance, and in our view, would be an unnecessary burden on plan sponsors.

requires certification that the plan is in compliance with the detailed content and distribution timing requirements for SPDs and SMMs. These certifications are apparently subject to enforcement through the requirement that the signer of the Form 5500 attests that, under penalties of perjury, the Form is true, correct, and complete to the best of his/her knowledge and belief.

NCCMP Comments:

The NCCMP is concerned that the new compliance questions will subject the signers of Form 5500, including multiemployer plan trustees, to significant penalties without providing sufficient guidance as to what actions are required to avoid the penalties and without sufficient explanation as to what the penalties themselves may be. The NCCMP recommends that any new compliance questions be limited to specific actions, such as completing the DOL self-auditing tool mentioned in the preamble to the Proposed Rule. 81 Fed Reg at 47637. We believe this approach will provide a more appropriate balance among the goals of fostering compliance, providing clear guidance to plan fiduciaries regarding their obligations, and avoiding unnecessary administrative burdens.

All of the laws to which the compliance questions relate contain specific provisions relating to enforcement and penalties. Thus, for example, the ACA and other group health plan requirements are generally enforced through the Internal Revenue Code by the potential imposition of a \$100 per day per violation. ERISA separately provides for enforcement actions by the Department and plan participants and beneficiaries. The Proposed Rule appears to go beyond this, and apparently would hold signatories responsible for a new and separate penalty, potentially even in circumstances in which no penalty is imposed for violation of an underlying provision.

The Proposed Rule, however, does not provide sufficient guidance to signatories as to what they must do to avoid a penalty with respect to the compliance questions. While the preamble does make reference to information on the Department's website, including self-audit questions with respect to the ACA requirements, there is no specific guidance as to the due diligence that is required in order to avoid a penalty with respect to the compliance questions. There is also no discussion from which signatories can fully evaluate the risks involved, that is, the potential penalties that could be imposed. While the penalties of perjury statement is not new for Form 5500, the difficulty of ensuring that the plan is in full compliance with every aspect of applicable laws raises new questions and issues of risk for plan trustees. Providing plan fiduciaries with the information that they need to understand their duties and the risks involved in taking on this important position is an essential part of ensuring the continuation of our employment-based pension and health care system.

To accomplish these objectives, we recommend that new compliance questions should be formulated in terms of specific actions relating to compliance activities, rather than broad statements regarding compliance. For example, with respect to compliance with the matters addressed in the ERISA Part 7 compliance tool referenced by the Department, the Form 5500 could include a check box as to whether the compliance tool has been reviewed/completed for the plan. Similar questions could be developed with respect to other areas. Consideration should also be given to particular situations to make sure that the proper response is clear. For example, under the Proposed Rule, it is not clear how retiree-only plans exempt from the ACA requirements should respond. Are they in compliance because the requirements do not comply

or will there be an opportunity to indicate “not applicable”? We understand that the Department may change compliance tools available from time to time, so that it may be appropriate to provide options or to change the specific references.

3. Guidance for fiduciaries on hard-to-value assets and alternative investments is needed before additional reporting and accountability standards are applied.

Proposed Rule: The Proposed Rule would “modify the asset breakouts on the balance sheet component of the Schedule H to enable more accurate and detailed reporting on the types of assets held by plans, including alternative investments, hard-to-value assets, and investments through collective investment vehicles.” 81 Fed Reg at 47539.

NCCMP Comments:

Summary

We have serious concerns that plan fiduciaries do not have the guidance needed to meet the greater “accountability” standards the Agencies seek in the Proposed Rule with respect to hard-to-value assets. Plan fiduciaries take their duties very seriously, as they should; however, they are placed in an untenable position when they do not know what their duties require. Existing guidance with respect to hard to value assets is inadequate. Thus, we ask that no new rules be issued in this area until the Department issues much-needed guidance on prudent valuation of hard-to-value assets as urged by the OIG, the ERISA Advisory Council,² AICPA and other experts.

Detailed Comments

In support of the changes in the Proposed Rule, the Agencies note that “[t]he proposed changes to the Schedule H . . . are consistent with the DOL-OIG recommendation that the Form 5500 . . . be revised to improve reporting of hard-to-value and alternative investments.”³ However, they seem to have overlooked the fact that the Inspector General’s recommendation for improved reporting was only one of several recommendations. In that same September 30, 2013 report cited by the Agencies, the Inspector General implored EBSA to heed the advice of the experts and issue uniform guidance for hard-to-value alternative investments:

While the ERISA Advisory Council, General Accountability Office, and the American Institute of Certified Public Accountants (AICPA) have all recommended EBSA provide guidance to fiduciaries using alternative investments, EBSA has not yet implemented these recommendations. In addition,

² As far back as 2008, the ERISA Advisory Council recommended that:

the Department of Labor . . . issue guidance which addresses the complex nature and distinct characteristics of Hard to Value Assets. This guidance should define Hard to Value assets and describe the ERISA obligations when selecting, valuing, accounting for, monitoring and disclosing/reporting these assets.

Advisory Council Report on Hard to Value Assets and Target Date Funds <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/hard-to-value-assets-and-target-date-funds>.

³ 81 Fed Reg at 47539. *U.S. Dep’t of Labor Office of Inspector Gen., 09-13-001-12-121, Employee Benefits Security Administration Needs to Provide Additional Guidance and Oversight to ERISA plans Holding Hard-To-Value Alternative Investments*, at 4 and 19 (“2013 OIG Report”).

EBSA has not formalized into regulatory guidance a letter the Boston Regional Office Director issued to specific plans notifying them that failure to properly value alternative investments violates ERISA. Similarly, EBSA proposed, but never finalized, guidance that would have required written documentation relating to the determination and basis of fair market value of securities without a generally recognized market. In 2010, the . . . IRS Emerging Issues Task Force determined and reported to EBSA that significant assets invested by plans in alternative investments may be a serious problem.

2013 OIG Report, at 3.⁴

By demanding greater transparency and, by extension accountability, without providing plan fiduciaries with the necessary guidance to determine what is prudent valuation of hard-to-value assets, the agencies will discourage diversification into many alternative investments, which is contrary to a fiduciary's obligation under ERISA §404(a)(1)(C). We recognize that many alternative investments "may be complex, illiquid or opaque, and therefore require careful scrutiny and analysis," but we also understand that for many multiemployer pension plans in particular, "alternative investments can provide the opportunity to better manage or lower overall portfolio risk by proper diversification of (low correlation) assets, and allow pension funds, as long term investors, to benefit from the illiquidity premium that may be associated with less liquid instruments." *OECD/IOPS Good Practices*, at 2.

Therefore, in conjunction with these proposed rules, we ask EBSA to issue much-needed guidance on prudent valuation of hard-to-value assets as urged by the OIG, the ERISA Advisory Council,⁵ AICPA and other experts.

3. The Departments should clarify that only one multiemployer plan trustee is required to sign Form 5500 and that the signature of two trustees is optional.

Proposed Rule: Under the Proposed Rule, the signature section on Form 5500 would be revised to add a check box to indicate whether the plan is a Taft-Hartley plan (such as a multiemployer plan) and to provide a dedicated signature area for both a "management" and a "labor" trustee. 81 Fed Reg at 47565, 47572 (July 21, 2016).

⁴ See also, 2013 OIG Report, at 10-11 ("EBSA takes the position that ERISA Sec. 404(a) provides adequate guidance to plan fiduciaries. In addition, EBSA asserts that the 1996 Ludwig letter which provided guidance on investments in derivatives, would be 'equally applicable . . . [to] hard to value alternative investments.' However, this letter was never formalized as guidance for investments other than derivatives; even so, EBSA's position on guidance is not supported by the OIG's findings and the statements and recommendations made by the ERISA Council, AICPA, IRS, and GAO, *all of which have found that more guidance is necessary.*" (emphasis added).

⁵ As far back as 2008, the ERISA Advisory Council recommended:

the Department of Labor . . . issue guidance which addresses the complex nature and distinct characteristics of Hard to Value Assets. This guidance should define Hard to Value assets and describe the ERISA obligations when selecting, valuing, accounting for, monitoring and disclosing/reporting these assets.

Advisory Council Report on Hard to Value Assets and Target Date Funds <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/hard-to-value-assets-and-target-date-funds>.

NCCMP Comments:

Under current practice, one trustee of a multiemployer plan is designated to sign the Form 5500 on behalf of the entire Board of Trustees. It is unnecessary and impractical to require a trustee from both labor and management, and we understand that this was intended to be optional. While we do not see the need for such a signature block, at the least, it should be made clear that two signatures are an option, not a requirement.

B. Comments Relating to Health and Welfare Plans

1. In general, providing that completion of Form 5500 will satisfy reporting obligations under PHS Act Sections 2715A and 2717 is likely to facilitate conformity and avoid unnecessary confusion. However, some modifications to this approach may be needed as rules under the PSH Act provisions are developed to make sure that there is appropriate coordination.

Proposed Rule: The preamble to the Proposed Rule discusses whether completion of the Form 5500 should be deemed compliance with the reporting obligations under Sections 2715A and 2717 of the PHS Act, as incorporated into ERISA.

NCCMP Comments:

Due to the statutory and regulatory structure governing group health plans, the Department has the most experience with private sector self-funded group health plans.⁶ The suggestion that compliance with the Form 5500 will be deemed compliance with the reporting obligations under the PHS Act as incorporated into ERISA reflects this jurisdictional fact. By making this suggestion, the Department appears to be attempting to avoid unnecessary duplication or conflicting reporting requirements. In general, we support this approach.

However, we are concerned that adopting rules for ERISA covered plans now, before the Department of Health and Human Services (HHS) has adopted its rules, may ultimately result in more confusion and extra burden. Thus, some flexibility to adapt to the HHS rules as they are developed should be maintained by the Department.

Specific areas in which we have concerns are as follows:

- Because HHS has not yet issued detailed guidance for insurers about data required under Sections 2715A and 2717, it is unknown what this information collection would include and there is no way to compare the burdens under the Proposed Rule with those placed on insurers. The requirements imposed under ERISA on self-funded plans should not be more burdensome than those imposed on insurers.
- The Department extends the information collection requirements through the Form 5500 on both grandfathered and non-grandfathered plans, but the PHS Act provisions do not apply to grandfathered plans. Grandfathered plans have remained so intentionally – in part to avoid having to comply with new detailed reporting requirements. Form 5500

⁶ In contrast, the Department of Health and Human Services (HHS) does not have jurisdiction over private sector plans subject to ERISA. HHS does have jurisdiction with non-federal governmental plans that are exempt from ERISA.

requirements designed to comply with the PHS Act provisions should not apply to grandfathered plans.

- While many multiemployer plans are self-funded and self-administered, some are fully insured or are administered by the same claims payers and third party administrators as insurers. Because the HHS data collection has not been published, we do not yet know the requirements on these insurers. But if the third-party administrators or claims payers must use one set of data collection processes for their insurance coverage and another for employer-sponsored plans (and perhaps a third for governmental plans) the expenses of the reporting requirements multiply exponentially.
- Additionally, we are concerned that some of the information requested on Proposed Schedule J, such as the details about rebates, may not be readily available. More information needs to be provided about what carriers, pharmacy benefit managers, or other entities must provide to plan sponsors before the plan sponsor is required to provide data to the Department.

2. The reporting requirements for unfunded union-dues financed plans need to be clarified.

Proposed Rule: The existing regulations include an exemption from reporting for unfunded union dues financed welfare plans in 29 CFR §2520.104-26. The Proposed Rules would require unfunded dues financed plans that provide “medical care as defined in section 733(a)(2)” of ERISA to file a Form 5500 and the new Schedule J.⁷ Unfortunately, the definition of “medical care” in section 733(a)(2) is not sufficiently clear to enable many of these unfunded dues financed plans to determine whether or not they are required to file an annual report.

NCCMP Comments:

Summary

The Departments should exempt unfunded dues financed plans that only pay COBRA or self-pay premiums to another health plan from the Form 5500 filing requirements, as under the current rules. If the Departments decide not to exempt such plans, they should at least clarify whether the payment of the COBRA or self-pay premium to another health plan constitutes providing “medical care” by the unfunded dues financed plan requiring it to File Form 5500 and Schedule J.

Detailed Comments

The existing regulations include an exemption from reporting for unfunded union dues financed welfare plans in 29 CFR §2520.104-26.⁸ This exemption is available only to plans maintained by an employee organization, as defined in §3(4) of ERISA, paid for out of the employee organization’s general assets, which are derived wholly or partly from membership dues and which cover the employee organization’s members and their beneficiaries. This type of plan is “unfunded” because it does not have legally separate assets; the assets to finance this program are general assets of the employee organization.

⁷ See §2520.104-26 as proposed at 81 Fed. Reg. p 47530.

⁸ In addition to an exemption from the annual reporting requirement, the current regulations provide a simplified method of complying with certain reporting and disclosure requirements.

Current regulations provide that such an unfunded dues financed plan has the option of filing a Form LM-2 or LM-3 instead of an Annual Report (Form 5500). In the event the employee organization sponsor of an unfunded dues financed plan chooses to submit its LM Form in lieu of an Annual Report (Form 5500), the assets of the plan must be reflected on the LM Form (pursuant to the Labor Management Reporting and Disclosure Act and the regulations under that Act) since the assets used to provide benefits are assets of the union. The assets, income and expenses of the plan are included on the IRS Form 990 (Return of Exempt Organization) filed with the IRS by the employee organization.

A common arrangement is for an employee organization to agree to pay the COBRA or self-pay premium for unemployed and/or disabled members who have lost their eligibility in the multiemployer health plan in which the employee organization participates. The premiums are paid from union dues. The health care providers are actually paid by the multiemployer plan pursuant to its benefit structure.

Section 733(a)(1) of ERISA defines group health plan as a welfare plan that provides “medical care” ... “directly or through insurance, reimbursement, or otherwise.” In the case of many unfunded dues financed plans of employee organizations, “medical care” as defined in ERISA 733(a)(2) is clearly provided by the multiemployer plan to which the employee organization pays COBRA or self-pay premiums on behalf of members. Given the breadth of ERISA 733(a)(1) which creates a group health plan if medical care is provided directly, through insurance, reimbursement or “otherwise”, it is not clear if this common employee organization arrangement would be considered a “group health plan” that provides “medical care” and for which a Form 5500 is required. If so, a filing requirement for such a “plan” makes little sense because everything about the “plan” is already reported by another entity.

As explained above, under the regulations which are not modified by the Proposed Rules, the “assets” of an unfunded dues financed plan are the assets of the employee organization and are filed with the Department on the applicable LM form of the employee organization. The assets are also reported to IRS on the Form 990 of the employee organization.

If the only benefit consists of paying a COBRA or self-pay premium to a multiemployer health plan in which the unemployed or disabled member of the employee organization participates, the multiemployer health plan will process and pay claims and will report those claims on its Form 5500. The unfunded dues financed plan will not have access to the actual claims information. Even the election of COBRA or self-pay by the member of the employee organization will be reported by the multiemployer health plan.

Therefore, we ask the Agencies to exempt unfunded dues plans that only pay COBRA or self-pay premiums to another health plan from the Form 5500 requirements. Alternatively, the Agencies should clarify whether the payment of the COBRA or self-pay premium to another health plan constitutes providing “medical care” by the unfunded dues financed plan requiring it to File Form 5500 and Schedule J so that such plans can understand their obligations.

4. The need for and details of reporting of denied claims should be clarified.

Proposed Rule: The proposed Schedule J would now require additional claims paid data, including information on claims granted or denied.

NCCMP Comments:

It is difficult to evaluate the need for the proposed additional reporting without understanding the reasons for the proposed reporting. Further, additional clarification is needed with regard to what is required to be reported. For example, there is no definition of “denied” claims. Under the claims regulations that are cited in the Proposed Rule, any instance in which the full claim is not paid would constitute a denial. If this is the definition that will be used, then any claim that requires a co-payment or deductible is a denied claim. If this is the intent, data is currently not being collected this way, and will require significant new claims tracking data programming in order to report claims as requested. As noted above in our general comments, these costs underscore the need to ensure that the reporting is limited to a specific enforcement purpose. On the other hand, if the intent is not to include claims that are paid but for co-payments or deductibles as “denials,” then the definition could reference the claims regulations, but specifically exclude denials to the extent that the claim is categorized as “denied” solely as a result of a co-payment or deductible. Other definitions may also increase reporting costs; however, it is not possible to evaluate the impact in the absence of a specific definition.

C. Comments Relating to Pension Plans

1. Reporting with respect to unresolved late or delinquent participant contributions to multiemployer plans should be required for not more than a three-year period, consistent with ERISA’s statute of limitations. The Departments should clarify the reporting requirement with respect to steps taken with respect to overdue amounts.

Proposed Rule: In the Proposed Rule, the Agencies seek to standardize the information reported on Schedule H, Line 4a to foster compliance with regulations and guidance governing delinquent participant contributions and loan repayments. 81 Fed. Reg. at 47563 (July 21, 2016). Specifically, the proposed Schedule H, Line 4a would require plans to identify the amount of late remitted participant contributions, the amount corrected in VFCP, the amount corrected outside VFCP and whether the plan sponsor filed IRS Form 5330 (Return of Excise Taxes Relating to Employee Benefit Plans) and paid the applicable excise tax. Proposed Schedule H, Line 4a also has a specific line for multiemployer plans asking for the amount determined to be “uncollectible” and requesting an explanation of what steps were taken to collect overdue amounts. 81 Fed. Reg. at 47585.

NCCMP Comments:

Summary

NCCMP recommends two changes to proposed Schedule H, Line 4a in order to appropriately balance administrative costs and burdens with the purpose behind the reporting requirements. First, NCCMP recommends that multiemployer plans should be required to report prohibited transactions involving unresolved late or delinquent participant contributions for no more than a period of three years. This would reduce significant administrative costs for plans, while providing sufficient information and time for the Agencies to initiate appropriate enforcement actions. Absent such a limitation, multiemployer plans must continue to report unresolved late or delinquent participant contributions into infinity with no real discernable benefit to plan

participants, beneficiaries or the Agencies. Second, we request that the Agencies clarify that requirement in proposed Schedule H, Line 4a (i)(2) that multiemployer plans must “explain what steps were taken to collect overdue amounts” does not require individualized narratives but only that the plan demonstrate what reasonable, diligent and systematic efforts that the plan took in general to collect overdue amounts.

Detailed Comments

In 2002, the NCCMP requested an advisory opinion from the Department concerning the collection of delinquent participant contributions to a multiemployer 401(k) plan that would extend the provisions of PTE 76-1 to multiemployer 401(k) plans. On January 6, 2003, the Department responded in the form of an information letter advising that the provisions of PTE 76-1 do not “extend relief to arrangements, agreements, understandings, or determinations that arise in connection with the failure of an employer to forward participant contributions to a multiple employer plan.” The Department did note that multiemployer plans could utilize PTE 2003-39 for conditional relief for settlement agreements that arise from the failure of an employer to remit participant contributions on a timely basis.

The Department's response to the NCCMP and PTE 2003-39 did not authorize a plan fiduciary to determine participant contributions to be “uncollectible”. PTE 76-1 specifically permits employer contributions to be determined uncollectible but the Department did not extend PTE 76-1 authority to participant contributions. Nor did PTE 2003-39 or any other guidance issued by the Department address the extent of a fiduciary's obligation to pursue delinquent employee contributions where the amount involved is too small to justify litigation or the employer has disappeared leaving the plan unable to enter into a settlement under PTE 2003-39. Since the obligation to fund an ERISA plan is a fiduciary function, the trustees of multiemployer 401(k) plans have the duty to pursue delinquent contributions using the standard of care required of fiduciaries under ERISA § 404(a)⁹. Accordingly, trustees of multiemployer 401(k) plans generally maintain collection procedures that are reasonable, diligent and systematic. Where, after the exertion of reasonable efforts sufficient to meet the requirements of ERISA 404(a)(1)(B), fiduciaries to multiemployer plans may reasonably determine that prudence requires a cessation of collection efforts because the amount involved does not justify the expenditure of additional plan assets or, where an employer cannot be located, after the exercise of reasonable due diligence attempting to locate the delinquent employer.

Since the failure to remit participant contributions to a multiemployer plan beyond the time frame provided by 29 CFR 2510.3-102 constitutes a prohibited transaction and the provisions of PTE 76-1 do not apply to employee contributions to a multiemployer plan, multiemployer plans are obliged to report all late and/or delinquent contributions on the Form 5500. However, the obligation to correct the prohibited transaction and pay the IRC § 4975 excise taxes remains with the delinquent employer and not the multiemployer plans' trustees under PTE 2003-39. Given the potential range of scenarios involving late or delinquent participant contributions to a multiemployer plan, the current Forms 5500 of multiemployer 401(k) plans often report many unresolved delinquent participant contributions that are too small to justify the expenditure of

⁹ Under ERISA 404(a) (1) (B), a fiduciary is obliged to carry out his or her duties with the “care, skill, prudence and diligence under the circumstance then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

additional plan resources or involve late contributions that were subsequently received by the multiemployer plan but cannot be deemed “fully corrected” as the multiemployer plan has not received lost earnings as provided through the VFCP program and the current Form 5500 Instructions.

While the wording of proposed Schedule H, Line 4a may lead to the initial conclusion that the Agencies propose to extend the ability of fiduciaries to multiemployer 401(k) plans to consider delinquent participant contributions uncollectable under a similar standard to that provided under PTE 76-1, we have been advised in our informal discussions with the Department that it is not the case and that the Agencies simply wish to identify a reasonable period of time that multiemployer plans must report prohibited transactions involving late or delinquent participant contributions.

ERISA § 413 provides that a plaintiff must bring an action under ERISA within three years of the plaintiff having actual knowledge of a breach or violation. A requirement that multiemployer plans must report prohibited transactions involving unresolved late or delinquent participant contributions for a period of three years would reduce unnecessary administrative burdens for multiemployer funds while providing sufficient information and time for the Agencies to initiate appropriate enforcement actions. Absent such relief, multiemployer plans must continue to report unresolved late or delinquent participant contributions into infinity with no real discernable benefit to plan participants, beneficiaries or the Agencies.

We understand the requirement in the proposed Schedule H, Line 4a (i)(2) that multiemployer plans must “explain what steps were taken to collect overdue amounts” to require that multiemployer plans demonstrate what reasonable, diligent and systematic efforts that the plan took in general to collect overdue amounts rather than require individualized narratives regarding each separate instance of delinquency, which would add a significant administrative burden to a multiemployer plan and for large plans, likely many hundreds of pages of narrative to the Form 5500 with no discernable benefit.

Conclusion

NCCMP greatly appreciates the opportunity to comment on the Proposed Rule. We are more than happy to discuss any questions you may have regarding these comments and related issues.

Respectfully submitted,

A handwritten signature in black ink, reading "Randy G. DeFrehn". The signature is written in a cursive, flowing style.

Randy G. DeFrehn
Executive Director