NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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Submitted Electronically to:
http://www.regulations.gov (IRS REG–102648–15)

Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC

Re: Comments on Temporary and Proposed Regulations Implementing the Suspension of Benefits Provisions Under the Multiemployer Pension Reform Act of 2014

Dear Ladies and Gentlemen:

The National Coordinating Committee for Multiemployer Plans (NCCMP) appreciates the opportunity to provide comments in response to above-referenced temporary and proposed regulations issued by the Department of the Treasury ("Treasury" or the "Department") as published in the Federal Register on June 19, 2015.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the over 10 million active and retired American workers and their families who rely on multiemployer defined benefit plans for retirement 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 non-partisan, nonprofit, tax-exempt social welfare organization established under IRC Section 501(c)(4), 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, office employee, retail food, service, steel and trucking industries.

We welcome the opportunity to comment on the temporary and proposed regulations designed to implement the statutory provisions of the Multiemployer Pension Reform Act of 2014 ("MPRA"). To paraphrase our comments on the proposed Requests for Information on these matters issued by the PBGC and Treasury in April, we wish to emphasize that wherever possible, regulations to implement the statute should be consistent with the central focus of the MPRA legislation: to enable those plans which, despite having taken all reasonable measures to avoid insolvency would otherwise become insolvent, to take timely remedial action to avoid such insolvency, provided such actions meet the law's clear requirements that will enable them to provide participants and beneficiaries with the highest benefits possible while still remaining solvent. Not only will this result in higher benefit payments than are available under the PBGC multiemployer guaranty program, but it will have the corollary benefit of decreasing the number of plans that become insolvent and must fully rely on PBGC.

We believe that creating a process that is unduly complex, expensive or lengthy for failing plans is contrary to the fundamental purpose of MPRA. We are also concerned that such a process will both divert resources that would otherwise be paid to participants in the form of higher benefits and will likely contribute to the failure of some number of plans that might have been saved. We recognize that MPRA includes protections for participants and beneficiaries of failing plans and that these interests must be balanced with the interest of saving plans. Wherever possible, however, these statutory provisions should be implemented with the least possible burden, expense, complexity and delay. Our comments today are intended to offer constructive suggestions that will enable the proposed regulations to meet these objectives.

COMMENTS:

Timing:

The timing of plan applications and action to implement the temporary regulations are dealt with in several areas in the temporary and proposed regulations. We note that a distinction has been made between the two in order to "*balance the interest in considering public comments on rules before they apply with the evident statutory intent, reflected in MPRA, to implement the statutory provisions without undue delay.*" Yet the content of the guidance appears to directly contradict that stated intent where it further states…

> *"Although the Department of the Treasury is issuing proposed and temporary regulations under section 432(e)(9), it is expected that no application proposing a benefit suspension will be approved prior to the issuance of final regulations. If a plan sponsor chooses to submit an application for approval of a proposed benefit suspension in accordance with the proposed and temporary regulations before the issuance of final regulations, then the plan sponsor may need to revise the proposed suspension (and potentially the related notices to plan participants) or supplement the application to take into account any differences in the requirements relating to suspensions of benefits that might be included in the final regulations."*

The statutory intent "*to implement the statutory provisions without undue delay"* as clearly stated above, reflects the recognition by Congress that a number of plans are in immediate jeopardy of missing the opportunity to qualify for the intended relief unless they can access the suspensions immediately. Imposing these additional, arbitrary restrictions and further chilling the desire of these deeply troubled plans' trustees to proceed with all speed by indicating that, should they do so they run the risk of having to incur the additional costs (thereby further eroding participants' benefits) by possibly requiring them to revise the proposed suspension calculations and notices and modify the work completed to date to take into account any possible new requirements. This defeats the purpose of having temporary regulations at all. It is clear that the majority of plans that will be able to take advantage of MPRA's relief will do so after the adoption of the final regulations. For those few plans whose needs are much more immediate, however, the regulations should more closely reflect the statutory intent by providing an immediate avenue for relief that provides for a good faith interpretation until such time as the normal regulatory process can be completed.

We have similar concerns regarding the requirement that for plans that are not also requesting PBGC partition assistance which states that an *"application for suspension generally will not be accepted unless the proposed effective date of the suspension is at least nine months after the date on which the application is submitted."* While the rationale cited notes that the deferral period would help avoid further modifications in the design of the suspensions, it appears inconsistent with the statutory requirement

> *"(iii) Required action; deemed approval. - The Secretary of the Treasury, in consultation with the Pension Benefit Guaranty Corporation and the Secretary of Labor, shall approve or deny any application for suspensions of benefits under this paragraph within 225 days after the submission of such application."*

The statutory requirement that the applications must be approved or denied within 225 days implies that is the outside time frame; whereas the requirement for a minimum of a nine month lead time for suspensions appears to encourage a less robust and consultative review and approval process than envisioned in the statute. We would encourage this standard be reconsidered in order to allow plans to maximize the benefits payable by facilitating the earliest possible effective date.

Phase-In of Suspensions:

The temporary regulations provide for the phase-in of benefit suspensions which is constructive and provides reasonable flexibility to plans to address their specific circumstances.

All Reasonable Measures:

The statute provides an illustrative list of factors that <u>may be taken into consideration</u> in determining whether all reasonable measures have been taken to avoid insolvency. *"The proposed regulations, like the statute, [*acknowledge that the statute does*] …not require the plan sponsor to take any particular measure or measures to avoid insolvency but do require, in the aggregate, that the plan sponsor take all reasonable measures to avoid insolvency."* Furthermore, they note that *"In accordance with section 432(e)(9)(G)(v), the proposed regulations provide that, in evaluating the plan sponsor's application, the Treasury Department will accept the plan sponsor's determinations under section 432(e)(9)(C)(ii) unless the Treasury Department concludes, in consultation with the PBGC and the Labor Department, that the determinations were clearly erroneous."*

In evaluating whether the plan sponsor has taken all reasonable measures, however, the regulations state that "…*the Treasury Department, in consultation with the PBGC and the Labor Department, will review the plan sponsor's consideration of <u>each of the factors</u> enumerated in section 432(e)(9)(C)(ii) and each other factor it took into account in making that determination."* This process is unnecessary and will consume resources of both the Department and the applicant plan in explaining and evaluating why certain factors that may have been irrelevant in any given situation were or were not considered, rather than requiring the plan to explain how the factors that were considered constitute a finding that all reasonable measures have been taken. We recommend that this standard be reconsidered in light of the statutory requirements so that both the plan and Treasury can focus on the relevant factors as determined by the boards of trustees.

We would also request that the standard for establishing the annual record of whether all reasonable measures have been taken be reviewed for clarity. It is unclear what form the record must take if the plan is no longer in critical or endangered status so that an amended rehabilitation or funding improvement plan would no longer be applicable. Furthermore, we would encourage that the result of a finding that the necessary record that demonstrates the sponsor had determined that all reasonable measures have been taken has not been maintained be reviewed to determine whether a more appropriate remedy than the termination of the suspension be imposed, given that such action could result in the plan becoming insolvent.

Avoidance of Insolvency:

The proposed regulations set forth a detailed set of criteria that must be set forth in an application for suspension. These include:

> *…disclosure of the total contributions, total contribution base units and average contribution rate, withdrawal liability payments, and the rate of return on plan assets for each of the 10 plan years preceding the plan year in which the application is submitted. In addition, the application must include deterministic projections of the plan's solvency ratio over the extended period using two alternative assumptions that the plan's future rate of return was lower than the assumed rate of return by (1) one percentage point and (2) two percentage points.*
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> *The application must include deterministic projections of the plan's solvency ratio over the extended period using two alternative assumptions for the future contribution base units. These alternatives are that the future contribution base units (1) continue under the same trend as the plan experienced over the past 10 years, and (2) continue under that 10-year trend reduced by one percentage point.*

While it is not unreasonable to demonstrate the recent contribution and earnings trends in order to justify a projection that the plan can remain solvent, it is unclear what a projection of the plan's likely solvency would be using alternative rates of return that are 1 and 2 percent lower than those determined by the actuary to be their best estimate, given the plan's asset allocation. Given that the standard for the benefit suspension is that it be sufficient to enable the plan to remain solvent, but no greater, these additional projections at the lower rates of return will simply demonstrate that the plan will not be able to meet the solvency standard, or that the projected suspensions will have to be significantly greater. As each of the requested data sets will have to be paid from plan assets otherwise available for benefit payments, we recommend that the list of required calculations be reviewed to determine which are not essential to the determination of plan solvency and those which are found to be unnecessary be removed.

Voluntary Appointment of Retiree Representatives:

Similar to the review of calculations to eliminate costs associated with those that may not be essential to the process, we would note that while the voluntary appointment of a retiree representative may be an appealing concept, the requirement that where such a representative is appointed they must be provided with professional support services is yet another area in which the potential costs must be weighed against the benefits. Especially for smaller plans, such professional fees may be sufficient to result in a material reduction to the benefits to be paid from the limited assets available to critical and declining status plans. Accordingly, while we do not oppose such voluntary measures, we believe that such appointments should be made only after the plan sponsor has carefully evaluated the potential cost implications to the ultimate benefits that can be paid.

Conclusion:

We commend the Department of the Treasury for its efforts in crafting temporary and proposed regulations that reflect the legislative intent of the Multiemployer Pension Reform Act of 2014. With the specific exceptions noted above, we believe that this objective was accomplished. The treatment of disability benefits; proposed rules for dealing with votes that are unable to be cast because certain participants cannot be located; attempts to reconcile the PBGC's partition rules with those governing suspensions; and limited deference to the plan sponsors in determining the appropriateness of certain factors to avoid insolvency are all reflective of the desire to provide regulatory guidance that is consistent with the statutory intent.

For those items we have enumerated, however, we are available to answer any questions that may arise as you consider our recommendations. We would also request the opportunity to publicly comment and expand upon these matters at the hearing to be held in September.

Respectfully submitted,

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