NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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VIA EMAIL

The Honorable Steven Mnuchin
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: Department of the Treasury Request for Information (82 Fed. Reg. 27217, June 14, 2017) Implementing Executive Orders 13771 (January 30, 2017) and 13777 (February 24, 2017) (the "RFI")

Dear Secretary Mnuchin:

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") appreciates the opportunity to respond to the Department of Treasury's (the "Treasury" or the "Department") above referenced RFI. In furtherance of the President's above referenced Executive Orders, Treasury requested that commenters provide input on those Treasury regulations and guidance that should be eliminated, modified, or streamlined in order to reduce burdens.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the job creating employers of America and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role for employers in providing benefits to working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code (the "IRC" or the "Code") Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. Those segments include 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. Multiemployer plans are jointly trusteed by management and employee trustees.

NCCMP believes that all of the regulations identified below should be modified, because each imposes costs on plans and/or contributing employers that outweigh the benefit of the regulation. Our most important concerns relate to the regulations implementing the Multiemployer Pension Reform Act of 2014 ("MPRA"). Those regulations fail to fulfill the primary purpose of MPRA—

to provide a path to solvency for deeply troubled plans—and further jeopardize the employers and pensions of Americans participating in those plans.

Our comments are organized by topic. In particular, our comments address Treasury regulations, proposed regulations, or guidance regarding:

1. The implementation of the suspension of benefit provisions under the Multiemployer Pension Reform Act of 2014, Division O of the Consolidated and Further Continuing Appropriation Act, 2015, Public Law No. 113-235 (128 Stat. 2130 (2014 MPRA) contained in Treasury regulation 1.432(e)(9)-1 (TD 9765) (81 Fed. Reg. 25539, April 28, 2016); (TD 9767) (81 Fed. Reg. 27,011, May 5, 20160), and Rev. Proc. 2017-43 (July 12, 2017) (the "MPRA Regulations" or "Regulations");

2. Proposed revision of the Annual Information Return/Reports (Form 5500) and Proposed Rules Regarding Annual Reporting and Disclosures, issued jointly by the Treasury, Department of Labor ("DOL"), and Pension Benefit Guaranty Corporation ("PBGC") (collectively, the "Agencies") RIN 1210-AB63 (81 Fed. Reg. 47534, July 21, 2016) (the "Form 5500 Modernization Regulations");

3. The Employee Plans Compliance Resolution System ("EPCRS") as most recently set forth in Revenue Procedure 2016-51 (September 29, 2016) (the "EPCRS Program"); and

4. Implementation of the Affordable Care Act's provisions, including the High Cost Plan Excise Tax under Code Section 4980I as described in Notices 2015-6 and 2015-52; Employer Shared Responsibility under Code Section 4980H, including as set forth in Interim Guidance at 79 Fed. Reg. 8544, 8567, February 12, 2014; and Treasury regulations 1.6055-1 and 301.6056-1 regarding reporting on Forms 1095-B, 1095-C, 1094-B, and 1094-C.

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I. MPRA Regulations

The MPRA Regulations should be modified because, as they are currently written and enforced, they are inconsistent with MPRA's intent, which was to use suspension to permit multiemployer plans to take the actions necessary to restore solvency thereby reducing the PBGC's net deficit, and avoiding the need future Federal assistance to the multiemployer pension system.

Background

MPRA was passed in recognition that deeply troubled multiemployer defined benefit ("DB") plans needed to have the tools necessary restore their plans to solvency. The NCCMP was a leader in this effort.

NCCMP's Retirement Security Review Commission, consisting of representatives from employer and labor organizations, pension plans and large employers, considered the challenges and all potential solutions facing the multiemployer system over a period of 18 months. The Commission resulted in a comprehensive plan entitled *Solutions Not Bailouts*, in an effort to address the challenges facing the multiemployer community and to safeguard the security of multiemployer pension plans for their employers and participants. *Solutions Not Bailouts* recognized the need for Trustees to have the ability to design plan-specific strategies to restore solvency. MPRA reflects, in large part, the ideas put forth by the Commission.

The intent of MPRA was to enable those multiemployer defined benefit plans that would become insolvent—despite having taken all reasonable measures to avoid insolvency—to take timely remedial action to avoid such insolvency, provided such actions meet the law's clear requirements that will enable the plan to provide participants and beneficiaries with the highest benefits possible while still remaining solvent. MPRA was designed to result in higher benefit payments than are available under the PBGC multiemployer guaranty program for participants in insolvent multiemployer defined benefit plans, while decreasing the number of plans that become insolvent and must fully rely on the PBGC.

A successful MPRA application would also reduce the net deficit in the PBGC multiemployer guaranty program by removing that plan from the calculation. The PBGC's net deficit is the principal driver of calls to increase premiums in the multiemployer program. Treasury's failure to implement MPRA as intended is resulting in more plans becoming insolvent and the increased likelihood of the PBGC being responsible for minimum guaranteed benefits for those plans without the ability to meet that guaranty.

Discussion

Instead of providing guidance that would enable eligible plans to restore solvency, Treasury did the exact opposite—it provided regulations that made it almost impossible for all but a very few plans to do so. This is clearly reflected in the fact that, to date, the Department has approved only two applications (out of the 18 original or revised applications submitted by 15 plans) under the MPRA Regulations.

The devastating impact of Treasury's failure to implement MPRA as intended will be far reaching, and one of the early casualties likely will be PBGC. PBGC provides financial assistance to insolvent plans from the money it receives from multiemployer DB plan premium payments and investment earnings. PBGC has stated that its multiemployer program will be insolvent in 2024 or 2025. Once that occurs, and in the absence of Congressional action, PBGC's guarantee level will be reduced to an amount payable from incoming premium payments only.

Treasury's MPRA Regulations have already precluded the use of suspension by the Central States Pension Fund. The inability of the Central States Fund to use MPRA to restore solvency will set in motion a series of catastrophic consequences for both PBGC as well as plan participants and beneficiaries when the plan becomes insolvent. Central States retirees who would have seen a 34% reduction in benefits under a MPRA suspension, will instead see a 98% reduction. To put this in dollar terms, Central States retirees who would have received a total of $2.9 billion in benefit payments, would instead receive $66.5 million. Retirees in currently insolvent plans will see a 95% reduction in the benefits paid by the PBGC. With the Central States Fund's insolvency, the level of PBGC premium payments needed to maintain the current guarantee level would cause the collapse of the entire multiemployer system.

There is a significant economic risk to the employers and their employees, both in the Central States Fund as well as in other multiemployer plans. This is particularly true where those plans share multiple employers with the Central States Fund. When the Central States Fund becomes insolvent, the financial condition of the shared employers will weaken, which will in turn negatively impact the security of the other multiemployer plans. While the precise scope of the economic risk is difficult to quantify today, it is likely to be significant, including reduced revenues and employment levels, reduced access to bank credit and the capital markets, and the potential for a significant number of Chapter 11 and Chapter 7 filings.

The U.S. Government, as well as state and local governments, will directly see reduced tax revenues on retiree pension income, lower corporate revenues, and lower wage income. The U.S. economy and the economies of the individual states and local areas will also see reduced economic activity as a result of the reductions in pension spending and active employee wage spending.

Suggested Modifications

To help avoid these consequences, there are a number of modifications that should be made to the MPRA Regulations.[1]

The Regulations Should be Modified to Require Treasury to Accept the Plan Actuary's Actuarial Assumptions and Methodologies and Plan Sponsor Determinations

Under MPRA, Treasury, in consultation with the DOL and PBGC, is responsible for approving or denying applications for benefit suspensions. Treasury has interpreted MPRA as not specifying a standard of review with regard to actuarial assumptions and methods selected by the plan actuary. In implementing MPRA through Regulations, Treasury has deemed this perceived statutory silence as authorization to select any standard Treasury deems appropriate. As a result, Treasury has determined that any actuarial assumptions that are not developed in precise accord with the opinions of Treasury staff are unreasonable and provide a basis for denying a suspension application. This unlimited discretion to ask for supplemental and additional information to develop the assumptions preferred by Treasury causes the cost of suspension applications to be far greater than it otherwise would have been had Treasury applied the "clearly erroneous" standard to the plan actuary's reasonable assumptions and methods, as the statute intended.

In addition, while MPRA specifies that Treasury must accept the plan sponsor's initial determination that the plan is projected to become insolvent without benefits suspensions unless it is clearly erroneous, it does not require Treasury to accept subsequent determinations under the same standard.

[1] These modifications are in addition to the changes set forth in our August 18, 2015 comment letter on the temporary and proposed MPRA regulations.

The Regulations should be modified to provide that Treasury must accept the plan actuary's assumptions and methodologies used to project solvency, taking into account the proposed suspension, unless such assumptions and methodologies do not meet the applicable Actuarial Standards of Practice as specified by the Actuarial Standards Board. This would be consistent with the clear intent of the statute.

The Regulations should also be modified to require Treasury to accept all determinations and decisions of the plan sponsor with regard to the application unless they are clearly erroneous.

The Regulations Should be Modified to Liberalize the Demonstration that Suspension is Sufficient but Not in Excess of the Level Needed

MPRA requires that suspensions be projected to be sufficient to allow a plan to avoid insolvency, but to not materially exceed the level that is necessary to avoid insolvency. The MPRA Regulations provide that this condition is satisfied only if the plan can demonstrate that reducing the amount of the suspension by the greater of: (a) 5% of the suspension amounts or (b) 2% of the benefit amounts determined without regard to the suspension would cause the plan to be projected to be insolvent. This is a very narrow corridor, particularly given Treasury's Regulations that significantly narrowed the range of actuarial assumptions that would be deemed to be acceptable for solvency projection.

The Regulations should be modified to allow more plans to have access to MPRA's remedial tools by either eliminating this mathematical test in favor of deferring to the reasonable judgement of the plan sponsor or actuary; or providing a significantly wider corridor.

The Regulations Should be Modified to Allow Flexible Suspension Designs that Align Participants' Expectations with Future Events

The MPRA Regulations prohibit a suspension application from taking into account contingent events influencing benefit levels. For example, a plan sponsor cannot propose a suspension in which benefit amounts payable to participants and beneficiaries automatically adjust with the funding level of the plan. The Regulations also provide that large plans for which stochastic projections are required must have at least a 50% probability of avoiding insolvency. The combined effect of these requirements is that plans only have one opportunity to make changes to restore the plan to solvency, and are required to do so by implementing a rigid suspension, with a fixed benefit level over an extended period, that has a nearly 50% chance of being beyond the plan's means. Should unforeseen events, such as the 2008 economic free fall, occur over the extended period, plans have no recourse to adjust their suspension design other than by submitting a new suspension application, a very costly and time-consuming process.

The Regulations should be modified to permit suspensions to include conditional changes in future benefit levels, provided in no event would such contingent benefit levels be below 110% of the current PBGC guarantee. Such revision would align participant expectations with economic reality far better than is currently permissible and would let more plans avoid insolvency for a longer period.

The Regulations Should be Modified to Allow Suspension of Benefits to Continue After Merger

For a small "critical and declining" plan contemplating merging into a larger healthy plan, it may be necessary for the "critical and declining" plan to implement benefit suspensions in order to make the merger transaction economically feasible. However, Treasury takes the position that the suspension must end, and pre-MPRA benefit levels be restored prospectively, if the suspension is not necessary to forestall insolvency of the merged plan. Treasury's position effectively precludes a troubled plan from extending its solvency by merging into a healthier plan.

The Regulations should be modified to allow the plan sponsor of the merged plan to use separate accounting with respect to the merged-in plan when making the annual determination that the suspension of the merged-in plan benefits remains necessary. Such a modification would encourage more plans to remediate their financial condition with a combination of suspension and merger. Under such separate accounting, no increase in past service for the merged-in plan participants would be permitted, but future benefit improvements for the participants in the merged-in plan would not be precluded.

In summary, there are several areas in which the regulations and guidance of MPRA need to be revised for the statute to be implemented with the intent of Congress and in the interests of the nation.

II. Form 5500 Modernization Regulations

The Modernization Regulations should be withdrawn and re-proposed before being finalized. While the NCCMP recognizes that this is a three-agency regulation—PBGC, the Department of Labor (DOL) and the Internal Revenue Service (IRS) (collectively Agencies)—we believe that Treasury should be conscious of the burdens and costs the Agencies are imposing on pension plans.

The NCCMP gave specific suggestions regarding the Form 5500 Modernization Regulations in its December 5, 2016 comment letter. This response is to emphasize our overall concern that the Form 5500 Modernization Regulations fail to strike an appropriate balance between the burden and significant administrative costs imposed on plans and the benefits the plans themselves might receive. The Form 5500 Modernization Regulations require plans to incur the cost of complying with enhanced disclosure requirements that benefit the Agencies' enforcement efforts and third-party research needs, but do not provide a corresponding benefit to the plans.

The NCCMP believes that the Agencies significantly underestimated the cost of compliance when the regulations were proposed, especially for multiemployer plans given their unique structure. The Form 5500 Modernization Regulations require reporting of information that generally is not compiled or requires presentation of data in a way that is significantly different from the way in which it is compiled. Additionally, many of the proposed changes require "yes" or "no" answers to questions with undefined terms, procedures that are lacking in detail, and penalties or consequences for inaccurate but well-intentioned answers that are not specified.

We are aware that the comments of many other stakeholders in the employee benefit community mirror the concerns voiced by NCCMP. We recommend that the Form 5500 Modernization

Regulations be withdrawn, and that the Agencies develop new proposed regulations that are better crafted to achieve legitimate regulatory purposes without imposing undue burdens.

III. EPCRS Program

Background

The EPCRS Program, currently described in IRS Revenue Procedure 2016-51, consists of several correction programs to help retirement plans preserve their tax-qualified status. These correction programs are the Self-Correction Program ("SCP"), the Voluntary Correction Program ("VCP") and the Audit Closing Agreement Program ("Audit CAP"), and they are even more important now that the IRS has significantly curtailed its determination letter program.

The correction programs provide valuable assistance to plan sponsors who are ultimately responsible for maintaining compliance with ever-increasing complexities of the Code, with regard to both plan documents and actual plan operations. However under the current programs, for certain types of errors the correction is disproportionally burdensome, time consuming, and costly, including attorney fees and user fees, as well as the actual cost of correction. In addition, certain proposed corrections do not take into consideration the unique features of multiemployer plans (as compared to single-employer plans).

Discussion

The Revenue Procedure should be modified to expand the opportunities for self-correction, This would streamline the program and reduce the cost and burden, particularly for errors that cause no harm to participants and/or result in operational differences that are insignificant and do not jeopardize the delivery of benefits under the plan.

NCCMP believes that IRS could eliminate costly and time-consuming VCP submissions for certain types of errors. For example, the Revenue Procedure sets forth narrow correction guidelines for specified mistakes. Plans that follow these "safe-harbors" should not have to submit full VCP applications. Simple notification to the IRS of the correction, or maintenance in plan records of steps taken (as with current self-correction) should suffice. This approach would reduce the time and financial burden on plans, and would help conserve increasingly scarce IRS personnel resources for more important projects. The self-correction and maintenance of records could be monitored in subsequent audits. Plans also should be able to make retroactive plan amendments that favor participants without having to file an application or pay a fee, particularly where the "operational" inconsistencies are harmless or insignificant.

Accordingly, we urge Treasury to work with the IRS to expand the SCP to facilitate more self-corrections and to establish "safe harbor" actions that plans can take without having to submit a costly VCP submission.

The Revenue Procedure also should be modified to recognize and accommodate the differences between multiemployer plans and single-employer plans in terms of proposed corrections. Many of the existing corrections do not work for multiemployer plans because of the unique way in which multiemployer plans are structured and how they operate. For example, as an alternative to "recouping" the overpaid amount from the participant, the proposed correction for pension plan overpayments is to have the employer/plan sponsor repay the overpayment. In a multiemployer plan, however, the plan sponsor is the board of trustees. The board has no funds other than contributions and those are set by collective bargaining agreements. Modifications to accommodate such differences would encourage use of the program by multiemployer plans by reducing the cost and burden of doing so. Accordingly, we urge Treasury to work with the IRS to modify the EPCRS Program (including SCP, VCP and Audit CAP) to provide corrections that accommodate multiemployer plans. Health Care Regulations

Overview

The Affordable Care Act ("ACA") brought with it numerous new requirements for group health plans, including multiemployer plans. In many cases implementing guidance has added needless complexity and costs, and we appreciate the Department's interest in eliminating unnecessary rules and streamlining guidance. There are also situations where guidance has been helpful in providing clear and administrable rules with respect to how to apply the ACA's statutory requirements to group health plans.

Most of the issues faced by multiemployer plans are the same as those faced by other group health plans. In some cases, however, "square peg in a round hole" issues arise when there is an attempt to apply rules designed with single employer plans in mind to multiemployer plans. The differing legal structure for multiemployer plans sometimes necessitates rules specifically designed for such plans in order to avoid needless complexity for plan sponsors and contributing employers.

Thus, as the Department undertakes this important regulatory review, we urge the Department to continue the dialog with all interested stakeholders, including through the normal notice and comment period as appropriate. A transparent process will best further the goals of the regulatory review by reducing the risk of unintentionally adding new complexities while trying to provide relief from current burdens.

§4980I – 40% High-Cost Plan Excise Tax (if the tax is not repealed)

The NCCMP supports repeal of this onerous tax (and opposes proposals to replace the tax with a cap on the exclusion for employer-sponsored health coverage). If either the excise tax or a cap on the exclusion were to go into effect, the result would be a significant burden on the 177 million American workers and their families who receive health care through employment-based health plans, as well as on the job creating employers of America who contribute to these plans to provide health care for their employees.

The IRS outlined possible approaches to implementing section 4980I and requested comments on these approaches and other issues in Notices 2015-16 and 2015-52. NCCMP submitted formal comments in response to both Notices, raising a variety of issues with the suggested approaches, including the fundamental question of how the cost of coverage should be determined. If Congress does not repeal the 40% excise tax, the Department should continue to work with all stakeholders, including multiemployer plans and contributing employers, to address the comments raised in response to the Notices and to develop administrable implementation rules that minimize burdens.

§4980H – Employer Shared Responsibility; Treas. Reg. §§4980H-0 et seq. (if this provision is not repealed)

The American Health Care Act ("AHCA") as passed by the House and drafts of the Better Care Reconciliation Act ("BCRA") and the Obamacare Repeal Reconciliation Act of 2017 ("Obamacare Repeal Act") released by the Senate Budget Committee would all effectively repeal the employer shared responsibility penalties effective as of January 1, 2016.

If the section 4980H penalties are not repealed, then Treasury should work to streamline and clarify the requirements, including making permanent the interim guidance with respect to employers who contribute to multiemployer plans (as described at 79 Fed. Reg. 8544, 8576, Feb. 12, 2014). This interim guidance was developed in response to concerns from employers seeking clarity as to how section 4980H applies in the context of multiemployer plans. Contributing employers to multiemployer plans have the same basic issue under section 4980H as employers who sponsor single-employer plans—under what circumstances will a penalty apply and what is the amount of any applicable penalty. The interim guidance is an administrable way for employers and multiemployer plans alike to understand how the 4980H penalty provisions are applied in this context. If section 4908H remains in the law, this clarifying provision should be made permanent.

§§6055/6056 Reporting – Treas. Reg. §§1.6055-1; 301.6056-1; Forms 1095-B, 1095-C, 1094-B, and 1094-C and related instructions

If the Employer and Individual Mandates are Repealed

The information reporting requirements under sections 6055 and 6056 are currently used by the IRS to aid in enforcing the ACA's individual mandate, the employer responsibility penalties, and eligibility for the premium tax credits. The AHCA, BCRA, and Obamacare Repeal Act would all effectively repeal the employer and individual mandates, thus reducing the need for much of this reporting, although this proposed legislation would not repeal the related statutory reporting provisions. If such legislation were enacted, some reporting may remain necessary to help enforce the ACA premium tax credits (at least for some period of time); however, much of the detail of current law could be reduced.

If ACA repeal/replace legislation is enacted, the Department should act quickly to eliminate unnecessary reporting requirements and related costs.

If Current Law Remains

If the employer or individual mandate remains in the law for any period of time, the Department should ease reporting burdens to the extent possible. NCCMP has previously submitted specific comments on the reporting requirements. The need for Social Security Numbers for dependents, for example, is an area where simplification could be achieved.

With respect to reporting requirements relating to the employer mandate, one provision that has been helpful is in the current instructions for Form 1095-C, relating to employers who qualify under the interim guidance described above under section 4980H (see e.g., instructions for line 14 for employers using the multiemployer interim guidance). These instructions should be continued if the employer mandate remains, as it has proven to be an administrable way for employers to fulfill their reporting requirements.

Conclusion

Given the unique complexities and administrative challenges facing multiemployer plans, the NCCMP requests to be included in the Treasury's ongoing efforts to comply with President Trump's Executive Orders. The NCCMP is best able to serve as a resource to the Department when considering the effects of Treasury regulations and guidance on multiemployer plans, contributing employers, and plan participants and beneficiaries.

Respectfully submitted,

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