NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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September 14, 2018

Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Proposed Rule Regarding Terminated and Insolvent Multiemployer Plans and Duties of Plan Sponsors, RIN 1212-AB38

Filed via Federal eRulmaking Portal: http://www.regulations.gov

Dear Sir or Madam:

This is in response to the Pension Benefit Guaranty Corporation's ("PBGC") Proposed Rule regarding Terminated and Insolvent Multiemployer Plans and Duties of Plan Sponsors ("Proposed Rule"), published in the Federal Register on July 16, 2018 (83 FR 32815). We appreciate PBGC's efforts to make the reporting and disclosure of certain multiemployer information to PBGC and interested parties more efficient and cost-effective. However, as explained below, we urge modification to and clarification of the Proposed Rule.

Specifically, we are concerned that the Proposed Rule may create unnecessary and additional administrative expenses for certain plans receiving PBGC financial assistance. We are also concerned that the Proposed Rule requires information, broadly described, that may raise disclosure concerns for employers regarding the release of proprietary information. In addition, we are concerned that information required regarding certain plan sponsor decisions on the assessment of withdrawal liability may be subject to review by PBGC, and that such review may exceed PBGC's authority granted under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The National Coordinating Committee for Multiemployer Plans ("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 in providing retirement, health, training, and other benefits to America's working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue 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 employer and employee trustees.

SUMMARY OF COMMENTS

Under the current PBGC termination regulation, plans receiving financial assistance are excluded from the annual actuarial valuation requirement but, as stated in the Proposed Rule, such plans voluntarily and routinely provide that information to PBGC. The Proposed Rule seeks to add the annual actuarial valuation requirement to plans receiving financial assistance (whether terminated or not) but does not allege anticipated future non-voluntary compliance. As such, this added requirement may be unnecessary.

The new actuarial valuation requirement also may create additional administrative expense for certain plans receiving financial assistance (whether terminated or not). Under the Proposed Rule, a plan with the present value of nonforfeitable benefits of $50 million or less may comply with the actuarial valuation requirement by filing "alternative information" as specified in the Proposed Terminated and Insolvent Regulation Instructions ("Instructions") on PBGC's website. The Proposed Rule also provides that a plan meeting the $50 million or less threshold may file such information with PBGC every five years rather than annually. Allowing all plans receiving financial assistance to comply with the actuarial valuation requirement by filing alternative information less frequently may decrease administrative expenses to the plans and ultimately to PBGC.

The Proposed Rule also provides new requirements for certain plans regarding the reporting of withdrawal liability information to PBGC. However, the information required to be provided under the Proposed Rule and the Instructions and may raise disclosure concerns for employers regarding the release of proprietary information. Such disclosure may, among other things, interfere with employers' ability to conduct business and may compromise plan sponsors' ability to negotiate and settle withdrawal liability amounts with employers. Further, the information required to be provided by plan sponsors as to employers that have withdrawn but have not yet been assessed withdrawal liability may subject plan sponsor decisions regarding those employers to review by PBGC that extends beyond the authority granted under Title IV of ERISA.

I. New Requirement Regarding Actuarial Valuation

The Proposed Rule imposes a new actuarial valuation requirement for certain plans and states that such valuations will allow PBGC to better estimate its multiemployer plan liabilities. With regard to insolvent plans receiving financial assistance (whether terminated or not), the Proposed Rule adds a new requirement for the completion of an annual actuarial valuation. The Proposed Rule also provides that for such plans, if the present value of a plan's nonforfeitable benefits is $50 million or less, plans may comply with the requirement by filing alternative information, as specified in the Instructions, every five years rather than annually.

Voluntary Compliance by Plans Receiving Financial Assistance Suggests Requirement is Unnecessary

The Proposed Rule states that "PBGC currently obtains actuarial valuations for plans receiving financial assistance by contacting the plan sponsors." The Proposed Rule, however, does not allege or provide any evidence that, despite not being required under current regulations, plans receiving financial assistance do not voluntarily, timely and fully comply with PBGC's requests for information. Accordingly, requiring actuarial valuations be provided to PBGC appears unnecessary.

If the Actuarial Valuation Requirement is Retained, Permitting all Plans Receiving Financial Assistance to File Alternative Information less Frequently may be More Cost-Effective

Under the Proposed Rule, plans receiving financial assistance that meet the $50 million or less threshold are permitted to comply with the actuarial valuation requirement by filing alternative information, as specified in the Instructions, every five years rather than annually. The Proposed Rule, however, does not provide information or otherwise explain why the threshold of $50 million or less was set.

We assume that the $50 million or less threshold was set merely as a demarcation point chosen by PBGC. If, instead, plans above the threshold raise specific issues for PBGC, those issues should be identified to better explain why such plans are required to be treated differently than plans that meet the $50 million or less threshold.

Furthermore, there are sound reasons why an ongoing plan funded by employer contributions should be required to perform an annual valuation, including providing information necessary for Trustees to review and, if necessary, adjust eligibility rules, benefit levels, required contribution rates, and the risk profile of the plan's investments. None of these reasons apply to a plan receiving financial assistance. Additionally, because these plans are receiving financial assistance, the cost of any valuations are necessarily paid out of the same limited PBGC guarantee funds that are used to pay benefits. This is not an effective use of the PBGC's limited resources.

If the actuarial valuation requirement is retained, we respectfully suggest that all plans receiving financial assistance be treated the same so that rather than requiring actuarial valuations from plans above the $50 million threshold, which may vary in cost and scope of information provided, all plans receiving financial assistance may comply with the actuarial valuation requirement by filing the alternative information specified in the Instructions every five years.

II. New Requirement Regarding Withdrawal Liability Information

The Proposed Rule provides that plans terminated by mass withdrawal, plans terminated by amendment that are expected to become insolvent, and insolvent plans receiving financial assistance (whether terminated or note) must file with PBGC information about withdrawal liability, as specified in the Instructions, in the aggregate and by employer, that the plan has or has not yet assessed withdrawal liability.

For each employer not yet assessed, the Proposed Rule and the Instructions generally describe information to be provided as including the name of the employer and the reasons the employer has not yet been assessed withdrawal liability. For each employer assessed withdrawal liability, the Proposed Rule and the Instructions generally require the name of the employer and payment information, including the schedule of payments and whether the employer is current on payments. In the event of a lump sum settlement, information is required as to amount and the date of payment.

The Proposed Rule and the Instructions require the plan sponsor to file the withdrawal liability information with PBGC within 180 days after the earlier of the end of the plan year in which the plan terminates or becomes insolvent and each plan year thereafter unless there is no updated information to file.

Requirement to Provide Withdrawal Liability Information Appears to be Overly Broad

Neither the Proposed Rule nor the Instructions appear to specify the time period for which withdrawal liability information is required other than for plan years after the plan year in which the plan terminates or becomes insolvent. As currently described, it is unclear whether, in a plan's initial submission, the plan sponsor is required to provide information as to the plan's entire historical experience with employers and withdrawal liability or information more limited in scope. Because of this ambiguity, the requirement under the Proposed Rule to provide withdrawal liability information, as described under the Proposed Rule and the Instructions, appears to be overly broad.

Required Withdrawal Liability Information may Raise Disclosure Concerns for Employers Regarding the Release of Proprietary Information

It is unclear whether, and the extent to which, the Freedom of Information Act and the Privacy Act, as well as the extent to which part 4901 of PBGC's regulations (29 C.F.R. Part 4901) may apply to the withdrawal liability information required to be provided under the Proposed Rule, as described under the Proposed Rule and the Instructions. Disclosure of such information may include proprietary information that may, among other things, interfere with employers' ability to conduct business and may also compromise a plan sponsor's ability to negotiate withdrawal liability settlements with employers.

Required Withdrawal Liability Information may Improperly Subject Plan Sponsor Decisions to PBGC Review

As has been reported by PBGC, absent Congressional action, PBGC's multiemployer program is projected to be insolvent in 2025. Against this backdrop, the Proposed Rule states, that "[I]t is particularly important for PBGC to identify all sources of available funding given the declining financial position of the multiemployer program."

PBGC's statement regarding the identification of "all available sources of funding" and the Proposed Rule's requirement that a plan sponsor provide details as to its reasons why employers may not have been assessed withdrawal liability suggests that PBGC may review such plan sponsor decisions for compliance with regard to fiduciary duties under Title I of ERISA. Although compliance with Title I fiduciary requirements is not specifically subject to PBGC review, and is not enforceable by PBGC, compliance with such requirements has and continues to provide guidance and incentive for plan sponsors to take appropriate action with regard to all withdrawn employers and thereby acts to provide significant protection for PBGC's interests.

CONCLUSION

In light of projected future events regarding PBGC's multiemployer program, we appreciate PBGC's efforts to revamp its reporting and disclosure requirements to be more efficient and cost-effective. However, for the reasons explained, we urge modification to and clarification of the Proposed Rule.

Respectfully submitted,

Michael D. Scott
Executive Director