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Office of Regulations and Interpretations
Employee Benefits Security Administration
US Department of Labor
Submitted electronically, to e-ORI@dol.gov

Re: Proposed Regulation under ERISA section 101(k), as added by the Pension Protection Act

Dear Friends,

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to provide these comments on the Labor Department's proposed regulation to implement section 101(k) of ERISA, which was added by section 502 of the Pension Protection Act of 2006 (the PPA). The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, 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 organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

General Observations

On the whole, we believe DOL has done a commendable job addressing these new disclosure requirements. On some points, however, the proposed regulations expand the required disclosures beyond what the text of the law actually mandates. The NCCMP and its affiliates do not necessarily object to these additional disclosures on the merits. However, it is essential that the added pressure on plan administrative burdens and costs be kept to a minimum; the regulation should not expand plans' administrative obligations without a clear statutory basis for doing so.

An interpretation of what plans have to do under section 101(k) that strikes a reasonable balance between disclosure and the administrative burden on plans is warranted here, as plans will not be able to recover their set-up compliance costs (e.g., keeping track of document requests and responses, retrieving documents from storage, researching and redacting individually identifiable and proprietary information) through usage fees. Also, most of the information in these documents will be provided to stakeholders through the expanded annual funding notice, the guaranteed availability (including through the Internet) of the expanded Form 5500 and the plans' annual automatic distribution of pertinent data from those annual reports.

Accordingly, although these comments point out those instances where we believe the proposal overreaches the law, these objections are based on principle rather than any reluctance to disclose relevant information to collective bargaining communities that the plans serve.

Our specific comments are provided in detail below:

1. **Affected plans.** The NCCMP applauds the proposal for clarifying that section 101(k) only applies to retirement plans.

2. **Annual limit on requests.** Section 101(k)(3) says that it does not give a requester the right "to receive more than one copy of any report or application described in paragraph (1) during any one 12-month period." The proposal reads as allowing individuals to request one copy of each such document during any 12-month period, even though that could amount to any number of actuarial and financial reports in a year. Read literally, this could require plans to track the timing of each individual request. To make it easier for plans to track their compliance, they should be authorized to apply this limit on the basis of a standard 12-month period, such as the calendar year or plan year.

3. **Temporal limit on requests**. For this process to be workable, it is essential that some limit be put on the extent to which parties can request that plans retrieve reports from prior years. Plans should not have to search more than one or two years back for documents that may fall within the description of requested materials (e.g., "Please send me all of your financial reports" or "Please send me the quarterly reports for every one of your 20 investment managers for the last 30 years), or track down long-terminated service providers to determine whether any of the information is proprietary, or have their counsel spend time negotiating with the person making the request to get it focused and more manageable. At the most, the 6-year ERISA document-retention limit should apply as well to this document-production requirement. We note that the DOL assumed that plans would not be required to delve any further back in their documentary history when it estimated the cost to plans of complying with the proposal (see footnote 5 to the Preamble of the proposed regulation).

4. **Non-disclosable information**. The proposed regulation appropriately leaves to the plan trustees' reasonable judgment implementation of the statutory prohibition on disclosing individually identifiable or proprietary information. It also correctly points out that the disclosure restrictions in section 101(k) do not limit any other rights that parties may have to that information. As the requirements for, and limits on, redaction could be a breeding ground for interpretive controversy, we recommend that the regulation provide the following additional guidance on this point:

> a) Proprietary information. To avoid the plans' attorneys' having to research analogous laws, standards and precedents, we recommend that the regulations create a safe harbor with respect to service-provider information. This would provide that a plan is deemed to comply if it asks its service providers to identify any proprietary information in their

materials that needs to be redacted, gives them a reasonable period to respond (e.g., 60 days, if the plan solicits input before receiving a document request, or by 10 days before the deadline for responding to a request for a particular document) and modifies its documents accordingly before releasing them. Anything not highlighted by the service provider would remain in the documents. Deletion requests would also be honored, unless clearly unreasonable.

In lieu of creating their own explanatory cover sheets, the plans would furnish to inquiring employers and participants the service providers' redaction requests and explanations.

b) b) Individually identifiable information. The NCCMP strongly supports the law's protection for individually identifiable information. However, there is one place where failure to disclose that information would be inconsistent with other provisions of section 101(k). That is, a literal reading of the law might prohibit identification of the very investment managers and advisors that prepared the financial reports being provided or whose performance is under review in the investment consultant's report. With that information deleted, the disclosed reports would be useless and almost unintelligible.

This is likely to be addressed by the pending PPA Technical Corrections bills. We suggest the regulation state that the Department will not treat a plan as violating section 101(k) if it fails to delete information identifying the author of a financial report that is being disclosed, or identifying an investment manager, investment advisor or other fiduciary whose performance on behalf of the plan is reviewed or evaluated in the report.

5. **Reports from investment managers and advisors**. The law calls for production of quarterly, semiannual or annual financial reports prepared by "any investment manager or adviser or other fiduciary." The proposed regulation requires disclosure if the report was prepared by an investment manager or adviser, whether or not the person is technically a fiduciary, or by any other fiduciary.

On the one hand, it makes sense to avoid debates about the fiduciary status of an investment consultant, for instance, by requiring the production of their reports regardless. On the other hand, the proposal might be read as requiring production of financial reports from any individual who is a plan "adviser". Unless the concept of a "financial report" is clearly delineated (see below), this could cover virtually every document provided on a quarterly, semiannual or annual basis by outside professionals ("advisers") or internal fiduciaries. The NCCMP recommends that the disclosability of reports be limited to those produced by investment managers, investment advisors, investment consultants, fund auditors or parties performing comparable roles, whether or not fiduciaries.

6. **Contributing employers**. The law includes in the list of those entitled to these documents "any employer that has an obligation to contribute to the plan …" The proposed regulation redefines this, to include any employer that is party to the CBAs under which the plan is maintained, or who may be subject to withdrawal liability. DOL adopted this same expanded definition of contributing employer in the regulation governing the PFEA annual funding notice.

The NCCMP filed comments objecting to that expanded definition, as not authorized by the law. We remain convinced that the law does not support treating employers whose obligation to contribute to the plan has ceased, either because they have withdrawn or, in the construction industry, may have withdrawn, as sharing the rights of "any employer that has an obligation to contribute …"

7. **More detail on disclosable documents.** The proposed regulation invites comments on whether the final rule should elaborate on the statute's description of the type of documents that should be disclosed. While in general the NCCMP believes that the Department should not attempt to micromanage the process by trying to come up with descriptive details, we do believe that some more specificity here will help plans avoid confusion and added costs. Accordingly, we recommend the following:

> a) "Periodic actuarial report" means a report that the actuary produces at regularly scheduled recurring intervals, such as the annual valuation. Special studies covering specific questions raised by the trustees – perhaps in response to the annual valuation – are not included unless provided at regularly scheduled milestones, even if the trustees raise similar questions from time to time.
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> b) "Sensitivity testing" means a report, which may be part of the regular actuarial report, reviewing the impact of future experience that deviates from the actuarial assumptions used by the plan's actuary.
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> c) "Financial report" means a report (other than an actuarial report) addressing investment-related or issues regarding development of the plan's assets and/or liabilities. A "quarterly, semiannual or annual financial report" is one submitted at those intervals, in contrast to, for example, a monthly cash-flow report that describes the plan's experience on a trailing 3-month or 6-month basis.

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We appreciate the care and attention that the Department is giving to this matter, and will be happy to provide any additional information or further explanation that may be helpful. If a hearing is scheduled on the proposed regulation, the NCCMP hereby requests the opportunity to testify.

Sincerely,

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