



TOPIC:

NCCMP 2021 YEAR IN REVIEW

**EXECUTIVE SUMMARY:** NCCMP'S 2021 FISCAL YEAR CONCLUDED ON MAY 31ST, AND WE ARE PLEASED TO PRESENT NCCMP'S YEAR-IN-REVIEW WHICH LOOKS BACK AT OUR ACCOMPLISHMENTS OVER THE PAST YEAR.

THE PAST YEAR HAS BEEN ONE OF ENORMOUS CHALLENGES AND HURDLES, OPPORTUNITIES AND SUCCESSES. THE MULTIEMPLOYER COMMUNITY HAS NAVIGATED INCREDIBLY DIFFICULT CHALLENGES AS A RESULT OF THE COVID-19 PANDEMIC. WHETHER THE LOSS OF HOURS AND CONTRIBUTIONS, THE NEED TO PROTECT PLAN ASSETS AND EXPAND COVERAGE TO MAINTAIN MEMBERS' ACCESS TO HEALTHCARE IN THE MIDDLE OF A GLOBAL PANDEMIC, OR THE PURE LOGISTICAL CHALLENGE OF MANAGING, OPERATING, AND OVERSEEING A FUND REMOTELY. WE HAVE ALSO COME TOGETHER TO PASS SOME OF THE MOST IMPORTANT LEGISLATION AFFECTING MULTIEMPLOYER PENSION AND HEALTH FUNDS IN HISTORY, THAT PROVIDES IMPORTANT RELIEF FROM THE IMPACTS OF THE COVID-19 PANDEMIC AND PROVIDES A LIFELINE TO THE MOST DEEPLY TROUBLED MULTIEMPLOYER PENSION PLANS—*THE AMERICAN RESCUE PLAN OF 2021* (AMERICAN RESCUE PLAN). WE HAVE NOW BEGUN THE EQUALLY IMPORTANT TASK OF ENSURING THAT THE LEGISLATION IS FULLY IMPLEMENTED THROUGH CLEAR AND HELPFUL REGULATIONS.

NCCMP HAS ALSO BEEN HARD AT WORK ON YOUR BEHALF TO MAKE SURE THAT THE MULTIEMPLOYER VOICE IS HEARD THROUGH COMMENTS ON PROPOSED REGULATORY CHANGES AND THROUGH AMICUS BRIEFS ON CASES THAT IMPACT ALL MULTIEMPLOYER FUNDS.

FINALLY, WE PIVOTED QUICKLY IN THE FACE OF THE COVID-19 PANDEMIC TO BRING YOU OUR SAME INSIGHTFUL EDUCATIONAL CONTENT IN A VIRTUAL FORMAT AND HOST THREE MAJOR ONLINE CONFERENCES OVER THE PAST YEAR.

PURPOSE: INFORMATIONAL  
CATEGORY: YEAR IN REVIEW  
ISSUER: NCCMP  
TARGET AUDIENCE: TRUSTEES OF AND PLAN ADVISORS TO MULTIEMPLOYER PENSION AND HEALTH PLANS  
SEND COMMENTS TO: [nccmp@nccmp.org](mailto:nccmp@nccmp.org)  
REFERENCE: VOL. XXI, ISSUE 4



# NCCMP YEAR IN REVIEW

## FY2021

*The National Coordinating Committee for Multiemployer Plans (“NCCMP”) is a non-partisan, non-profit membership organization founded in 1974 after the enactment of the Employee Retirement Income Security Act of 1974 (“ERISA”). The NCCMP is the only national organization that advocates before Congress, the Administration, the regulatory agencies, and the Courts on behalf of multiemployer retirement, health and training plans. Multiemployer defined benefit pension plans have over \$700 billion in assets.*

*The NCCMP represents multiemployer plans, their participants, employers and unions, as well as plan professionals. We are dedicated exclusively to the advocacy and strengthening of multiemployer plans. Together, we have achieved an unparalleled track record of results, and the NCCMP is widely respected and recognized as the voice of the multiemployer community.*

NCCMP began the 2021 fiscal year on June 1, 2020 in the midst of the global COVID-19 pandemic that had resulted in an unprecedented shutdown and collapse of the U.S. economy. The full impact of the economic collapse, the lost employer contributions on the assets of multiemployer benefit plans and the serious market impact on the fixed income allocation of our investment portfolios will not be known for some time. What we do know with certainty is that our pension and health plans, and their participants and employers were severely impacted and needed help.

NCCMP worked closely and diligently with Congressional leaders and the White House throughout the pandemic to ensure that multiemployer pension and health plan concerns were central to discussions on how to help Americans, and is pleased that substantial relief for all multiemployer pension and health plans was included in *The American Rescue Plan Act of 2021* (American Rescue Plan Act or ARPA), signed on March 11, 2021. The American Rescue Plan is a \$1.9 trillion package that was passed under the incredible leadership of U.S. House Speaker Nancy Pelosi and U.S. Senate Majority Leader Chuck Schumer, and their leadership teams of House Ways & Means Chairman Richard Neal, House Education and Labor Chairman Robert C.

“Bobby” Scott, Senate HELP Chairwoman Patty Murray and Senate Finance Chairman Ron Wyden. It contains a number of provisions that provide substantial relief to multiemployer pension and health plans from the impacts of the COVID-19 pandemic, including extended time to recover for all multiemployer pension plans and 100% COBRA subsidies from April 1 through September 2021.

In addition, prior to the COVID-19 pandemic, NCCMP had been working hard to solve the solvency crisis affecting a small but systemically important group of pension plans and to shore up the Pension Benefit Guaranty Corporation (“PBGC”). While these plans were troubled prior to the COVID-19 pandemic, the economic impacts of the pandemic increased the urgency for a solution, and we are incredibly pleased that the American Rescue Plan also includes unprecedented relief for deeply troubled multiemployer pension plans.

However, the NCCMP’s and the multiemployer community’s work is not done. As important as passing legislation to authorize relief is, it is critical that the implementing guidance and regulations developed by the PBGC and Treasury fully implement the relief in a clear and helpful manner. This would not be the first piece of landmark legislation that did not fulfill its intended purpose because agency regulations did not implement the law in the manner that Congress intended.

We have therefore turned our attention to the challenge of the regulatory implementation, and are focused on providing technical input and recommendations to PBGC and Treasury as they work to develop the guidance needed to clearly and fully implement the multiemployer relief provisions, as well as to the Departments of Labor and Treasury as they implement the COBRA subsidy provisions of the American Rescue Plan Act.

We also continue to be actively engaged with the regulatory agencies to address the major administrative burden that would be imposed on plans in the implementation of the No Surprises Act, including its interaction with the Rules on Transparency in Coverage, which were finalized in November 2020, barely a month before enactment of the No Surprises Act. While we support the overall goals that plan participants should be protected from unexpected and unmanageable healthcare costs, and have access to clear, understandable information regarding their health benefits, we have raised significant concerns about the timing, scope, and burden for multiemployer health plans. We have also stressed that the independent dispute resolution process for resolving surprise bills between health care providers and plans must be implemented so as to protect against medical cost inflation.

As a membership organization, NCCMP relies on you to enable us to continue our education and advocacy on your behalf. The NCCMP’s role is as important as it has ever been in our 47-year history. Below we outline our most significant efforts on your behalf over NCCMP’s last fiscal year.

## Legislative Efforts

- ***The American Rescue Plan Act (“ARPA”)***—NCCMP is pleased to report that on March 11, 2021, President Biden signed into law The American Rescue Plan Act of 2021. ARPA is a \$1.9

trillion package that was passed under the incredible leadership of U.S. House Speaker Nancy Pelosi and U.S. Senate Majority Leader Chuck Schumer, and their leadership teams of House Ways & Means Chairman Richard Neal, House Education and Labor Chairman Robert C. “Bobby” Scott, Senate HELP Chairwoman Patty Murray and Senate Finance Chairman Ron Wyden. It contains a number of provisions that provide substantial relief to multiemployer pension and health plans from the impacts of the COVID-19 pandemic.

The pension provisions of the American Rescue Plan Act provide two main forms of relief for multiemployer plans impacted by the COVID-19 pandemic.

First, the legislation creates a new program at the PBGC to provide special financial assistance to deeply troubled multiemployer plans in the amount needed to enable those plans to pay full, unreduced participant benefits through the 2051 plan year.

Second, the legislation allows all multiemployer pension plans, except those that receive special financial assistance relief, extended time to recover from the COVID-19 pandemic. Similar to the relief provisions of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), plans may elect to smooth investment losses over an extended period of time in the development of the funding standard account and the actuarial value of assets. The American Rescue Plan adds a new option to smooth other losses related to COVID-19 over an extended period as well. Plans may also elect to freeze their zone status to allow plan trustees and bargaining parties an extended time to develop a plan to address the impact of COVID-19. Finally, plans’ funding improvement or rehabilitation plans may be extended by 5 years to allow plans an extended time to recover and reduce the need to negotiate substantial contribution increases or reductions in benefits.

Finally, the legislation increases PBGC premiums to \$52 in 2031 to improve the funding of the PBGC. It should be noted that the current premium is \$31 and includes an annual escalator based on the National Wage Index, which would be expected to result in a year-10 premium of between \$43 and \$45, so the actual net increase is likely to be between \$7 and \$9.

On the healthcare side, similar to the assistance provided under the American Recovery and Reinvestment Act (ARRA) passed in 2009 following the 2008 Great Recession, the American Rescue Plan provides for COBRA premium subsidies so that participants who would have otherwise lost coverage because of the pandemic due to layoff, involuntary termination of employment, or reduction in hours may remain covered by their health plans. In a significant expansion from ARRA, however, the American Recovery Plan Act provides full COBRA subsidies at 100% of the cost of COBRA premiums for the period April 1, 2021 through Sept. 30, 2021.

The multiemployer provisions included in the American Rescue Plan Act became possible because the two U.S. Senate seats in Georgia were won by the Democratic candidates in the January 5<sup>th</sup> runoff races. Senator Ossoff and Senator Warnock along with Vice President Harris provided control of the U.S. Senate to Majority Leader Schumer. This allowed the Democrats to restructure the pension relief portion to fit within a reconciliation bill that only requires a simple majority to pass. NCCMP worked closely with House and Senate leadership

and staff in January and February to ensure that the legislative language, properly implemented, would provide the full rescue for which we have worked years to achieve.

Absent this change of control in the Senate, it seemed unlikely that multiemployer relief and reform would advance, as Republicans had walked away from a broad package of reforms and relief on December 12<sup>th</sup> over the amount of money that the U.S. Government would be responsible for.

In early March, NCCMP began the next necessary and equally important work of coordinating with the PBGC, Treasury and other regulatory agencies to ensure that the implementing guidance is clear, helpful, and true to Congressional intent. Our recommendations<sup>1</sup> for their guidance or regulations were submitted to the PBGC, DOL, Treasury and Commerce on March 30<sup>th</sup>. We have subsequently had meetings with the agencies to discuss our recommendations.

We are continuing to work with Congress to enact the reforms needed to protect and improve the funding of the multiemployer system but that were not permitted under the reconciliation process. We are thankful to Congress and President Biden for this enormous step toward protecting the pensions and health care of all multiemployer participants.

- ***The HEROES Act***—The HEROES Act was passed in the House of Representatives on May 15, 2020 and again on October 1, 2020, but was never taken up in the Senate. In addition to addressing a number of other COVID-19 priorities, the bill provided substantial relief through a special partition structure, and reform through a new plan design option for multiemployer pensions. NCCMP worked closely with House Democrats to ensure that the legislative relief would be sufficient to solve the multiemployer pension crisis.

While the final version of this bill passed in October did not include federal support for COBRA health insurance premiums, NCCMP worked successfully with the AFL-CIO and NCCMP member organizations to ensure that full federal COBRA subsidies were included in the final version of relief contained in the American Rescue Plan Act. NCCMP also filed formal comments for the record supporting 100% COBRA subsidies in connection with the Ways and Means Select Revenue Measures Subcommittee hearing on The Consequences of Inaction on COVID Tax Legislation (Sept. 11, 2020) and joined a broad ad hoc coalition of stakeholders supporting COBRA subsidies in letters to members of Congress and Congressional committees.

- ***Chris Allen Multiemployer Pension Recapitalization and Reform Act***—Then Senate Finance Committee Chairman Chuck Grassley and Senate HELP Committee Chairman Lamar Alexander introduced the Chris Allen Multiemployer Pension Recapitalization and Reform Act on December 17, 2020. The Chris Allen Act was based on Senators Grassley and Alexanders' previously released White Paper outlining their plan. As discussed in depth in our

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<sup>1</sup> National Coordinating Committee for Multiemployer Plans, Letter to PBGC Director Gordon Hartogensis, March 30, 2021, available at <https://nccmp.org/wp-content/uploads/2021/04/NCCMP-Recommendations-to-PBGC-and-Treasury-for-Implementing-ARPA.pdf>.

December 6, 2019 letter (Multi-Elert Vol. XIX, No. 10) to Chairman Grassley and Chairman Alexander, while the proposal advanced a number of constructive ideas to achieve bipartisan reform, the proposal as drafted suffered from a number of serious issues that, if not resolved, would represent serious impediments to bipartisan reform and an existential threat to the job creating employers of America and their labor partners, to the jobs of hard-working Americans, and to the multiemployer system itself. Ultimately, the bill was unsuccessful and did not progress when the control of the Senate shifted to the Democrats.

- ***No Surprises Act***—The No Surprises Act was enacted in December 2020 as part of the Consolidated Appropriations Act, 2021 (CAA). Various iterations of the Act had been under consideration by Congress since 2019. NCCMP provided formal comments on prior proposals, including comments to the House Ways and Means and Energy and Commerce Committees, and the Senate HELP Committee. Our comments focused on the need to control medical cost inflation by having an appropriate method for resolving surprise medical bills between plans and providers and avoiding burdensome administrative requirements, as well as comments on details of the particular proposals. NCCMP also joined others in and beyond the multiemployer community in contacting Congress and stressing these same concerns. The legislation seemed at a standstill for some time, but a compromise between the House and Senate Committees was hastily reached so that the legislation could be included in the year-end bill, to some extent as a legacy for out-going HELP Committee Chairman Lamar Alexander. The pressure of certain powerful provider groups, many with private equity backing, pushed some provisions, including the dispute resolution process, away from what NCCMP, employer groups, and patient groups thought was ideal, but the final bill does contain some provisions that should help, if implemented properly, to control costs. NCCMP has already been working with the federal agencies providing input on the regulatory process.
- ***NCCMP actively communicates with the press, and our views have been included in more than 70 news articles*** on a variety of multiemployer pension topics and expressed in numerous OpEd's since March 2017.
- ***Met with hundreds of stakeholders*** during FY 2021 either virtually or through calls representing trustees, union leaders, employers and employer associations, administrators, plan professionals, government officials, and others to ensure that NCCMP's positions and priorities reflect the concerns of the multiemployer community. Stakeholder meetings are a continuous effort.

## Judicial and Regulatory Input

- ***The American Rescue Plan Act***—Once passage of the American Rescue Plan Act became clear, NCCMP reached out well beyond its constituent organizations to develop a comprehensive document identifying areas where clear and helpful guidance is needed to implement the multiemployer special financial assistance program. Our March 30<sup>th</sup> recommendations are the product of extensive consultation with numerous stakeholders and professionals throughout the multiemployer plan community, including plans, employers,

labor organizations, asset managers, investment consultants, actuaries, and attorneys. Together, these individuals, and the entities with which they are associated, are affiliated with or advise multiemployer plans covering well over 80% of all participants in the multiemployer pension plan universe.

- **Amount of special financial assistance.** ARPA provides for the appropriation of federal funds to the PBGC so that the PBGC may provide to eligible plans the special financial assistance necessary to pay all benefits due through the end of the 2051 plan year. The language in the statute, however, may be subject to several different interpretations with regard to how plans are to determine the amount of special financial assistance. NCCMP provided three possible interpretations but recommends that the PBGC consider interpretations that are designed to stabilize these plans and help ensure that they remain viable indefinitely, rather than merely postponing their eventual insolvencies. From the recommendation document (*see* fn. 1 above) these are Interpretation 1 (including Interpretation 1A) or Interpretation 2. Both Interpretations reflect Congressional intent to provide a long-term solution for troubled plans.
- **Bifurcation of interest/discount rate assumptions.** The interest rate limit used to determine the required amount of special financial assistance is separate from and inconsistent with the investment rate return available to be earned by the special financial assistance amounts. Special financial assistance amounts must be invested in investment-grade bonds or other permitted investments as allowed by the PBGC. The investment-return rate on investment-grade bonds is significantly below the interest rate limit. These requirements create a mismatch of interest rates that is likely to create a significant funding shortfall. To avoid this, PBGC's guidance should clarify that the interest rate limit does not apply to the discount rate used to determine the amount of financial assistance.
- **Investments and asset allocation.** ARPA requires that the special financial assistance be segregated and authorizes the PBGC to regulate how a plan that has received special financial assistance should invest its assets. Given the current low yields on fixed-income securities, NCCMP recommended that the PBGC issue guidance that allows trustees to consider the segregated special financial assistance as an allocation to the fixed-income asset class as part of the plan's total assets. This approach would allow trustees to reduce their fixed-income allocation in the plan's non-segregated assets, allow more return-seeking investments consistent with a long-time horizon, and avoid the otherwise likely scenario of plans running out of money well before 2051. The document also included a detailed listing of recommended investments that fit within the "investment-grade bond" category for the special financial assistance as well as a list of recommended "other permitted investments" subject to maximum allocations to provide return and inflation protection.
- **Recommendations regarding various technical issues.** NCCMP also offered a number of additional recommendations regarding technical issues related to eligibility, post-assistance issues, and issues regarding coordination of efforts with Treasury.



NCCMP also has identified technical issues specifically within Treasury’s purview and offered recommendations regarding such issues.

➤ **No Surprises Act**—While NCCMP supports the objectives of the No Surprises Act to protect plan participants from surprise medical bills, there are a number of areas of concern with some of the details. NCCMP has raised with the Departments of Labor, Treasury, and Health and Human Services a number of considerations for implementing the legislation for multiemployer health plans. In general, we recommended the following guidelines as well as a number of more specific proposals for implementation.

- **Control medical cost inflation.** The details of the new law, including the determination of the initial amount to be paid by the plan as well as the independent dispute resolution (IDR) process that determines the final payment, should be implemented so as to prevent medical cost inflation and control health care costs. In the long run, this will provide the greatest protection to plan participants.
- **Avoid imposing unnecessary costs, including administrative costs, on plans.** The No Surprises Act contains many new notice and disclosure requirements for group health plans, some of which overlap with the Transparency in Coverage Rule, finalized in November of 2020. Burdensome costs can undermine the goal of providing high quality health care. Multiemployer health plans are essentially pools of workers’ earnings held in trust under federal law for the exclusive purpose of providing benefits to plan participants and beneficiaries. The trust funds are funded entirely by collectively bargained employer contributions for which covered workers explicitly trade off wages through the bargaining process, and in many instances, employee contributions as well. In a very direct sense, workers pay for their health coverage. If a trust fund’s costs increase, despite the trustees’ best efforts at cost containment, the burden falls directly on the workers, as trustees may be faced with the need to reduce benefits or adjust eligibility rules to address new costs. The benefits of any new benefit mandates or administrative requirements (e.g., additional notices) must be carefully weighed against the costs to ensure that workers continue to receive real value for their health care dollars.
- **The details matter: consider the unique structure of multiemployer plans as technical details are developed.** Multiemployer group health plans are generally subject to the same requirements as other large group health plans (e.g., the Affordable Care Act market reforms). However, the structure of multiemployer plans differs significantly from that of single-employer plans. Among the key differences are the Taft-Hartley Act requirement for a joint labor-management board of trustees and the more limited role of contributing employers. Because of this different structure, rules designed for single employer plans do not always work in the multiemployer plan structure. It is essential that any technical operational details be workable and accommodate the multiemployer plan structure.



In addition, NCCMP *provided 5 sets of comments* overall in response to requests for input from the Agencies with jurisdiction over multiemployer plans.

- ***Proposed Regulation on Financial Factors in Selecting Plan Investments (DOL)***—NCCMP provided substantial comments on this hugely impactful proposed change to how multiemployer trustees must consider plan investments. NCCMP agreed with certain aspects of the proposal, made specific recommendations to clarify and strengthen the proposal but disagreed with significant aspects of the Department’s positions, and raised concerns about the proposal as a significant and costly deviation from the deregulatory agenda of then President Trump’s Administration while presenting the plaintiffs’ bar with a significant new class action litigation bonanza.

Multiemployer pension funds have a multi-decades’ track record of successfully investing in what is often referred to as “Economically Targeted Investments” that provide competitive risk adjusted returns through investments that contribute to a well-diversified portfolio. We noted that prior to the issuance of IB-94-1, the Department issued a number of letters that granted a variety of prohibited transaction exemptions to both individual plans and pooled investment vehicles involving investments that produce pecuniary and non-pecuniary benefits. We also documented the pecuniary nature of plan contributions and the unique ability for multiemployer pension plans to make investments that generate plan contributions that are pecuniary, for the exclusive purpose of providing benefits and solely in the interest of the plan, participants and beneficiaries.

We supported the Department’s decision to “retain the all things being equal test” under the Department’s previous guidance, but we viewed the Proposed Regulation as rejecting that test in favor of a more narrow, restrictive and ultimately unworkable standard that did not reflect a prudent approach to considering investment alternatives. We also provided a more complete description of the financial markets and explained that “ties” between investment alternatives occur more often than understood by the Department.

Finally, we provided a reasoned discussion of the Department’s position on socially responsible investing, sustainable and responsible investing, environmental, social, and corporate governance (ESG) investing, and impact investing, and why the Department’s views are not generally reflective of today’s financial markets, its participants, or generally accepted investment or portfolio theory.

While the Trump Administration’s Final Rule issued on November 13, 2020, represented a significant retreat from its original proposal in response to our comments and the comments of other stakeholders, we worked with the Biden Administration to provide plans, trustees, and the investment community with a statement of non-enforcement (issued March 10, 2021), which is effective until DOL issues new guidance on this topic.

- ***Proposed Rule on Grandfathered Group Health Plans and Grandfathered Group Health Insurance Coverage (DOL, HHS, Treasury)***—NCCMP supported the efforts of the Departments to provide additional flexibility to plans while retaining grandfather plan status. In particular, NCCMP supported the provision of the proposed rule that allows fixed cost-

sharing amounts to vary based on a premium adjustment index. Further, NCCMP recommended certain additional changes consistent with our prior comments on the Agencies' earlier request for information. We recommended that the Departments allow certain types of plan changes to encourage cost-effective quality care, such as greater ability to change cost sharing for brand drugs and out-of-network benefits. In addition, we recommended greater flexibility when plan sponsors acting in good faith make plan changes that may inadvertently cause a loss of grandfathered status. Specifically, these plans should be permitted to retain grandfathered status in limited situations. If grandfathered status must be surrendered, even in the case of inadvertent or minor errors, plan sponsors should be permitted to engage in a prospective corrections process and adopt required plan changes effective with the start of the next plan year. The final rule was very narrow, and did not adopt all our suggestions, but does provide additional flexibility for some grandfathered plans.

- ***Proposed Information Collection Request on Annual Certification Reporting Requirements for Multiemployer Defined Benefit Plans (IRS)***—NCCMP supported the IRS's efforts to standardize the format of the information filed with the IRS. Consistency in information provided to the IRS and other ERISA agencies is critical to them as well as to NCCMP and other multiemployer plan stakeholders (including participants, plans, unions and employers) in monitoring and evaluating the vitality of plans and the multiemployer system as a whole. We focused our comments on the four areas identified in the Comment Request and provide a number of suggestions for changes that would further enhance the utility of the Proposed Form and the Instructions.

The NCCMP applauded the Proposed Form's brief format but noted that it requires only basic zone status information, which may limit its utility to the IRS and the other government stakeholders, most notably the PBGC.

Actuaries must do projections and analysis in order to complete the annual certification, which, for a plan that is in endangered or critical status, must be disclosed as an attachment to Form 5500, Schedule MB, but only much later. The NCCMP suggested that the instructions require that this actuarial information, regardless of zone status, be attached to the Proposed Form.

Requiring available actuarial information be attached to the Proposed Form ensures that current data is used in evaluating the health of plans and the multiemployer system in a timely fashion. Although the same information will eventually become available to the interested agencies and the multiemployer plan stakeholders upon the filing of the Form 5500, Schedule MB, actuarial information provided with the Proposed Form would allow the IRS and the other ERISA agencies, as well as the NCCMP and other stakeholders, to better analyze the well-being of plans and the multiemployer system on a near real-time basis.

Because actuaries already prepare projections and analysis to complete the annual certification, attaching that documentation to the Proposed Form is not overly burdensome.

- ***Proposed Rulemaking on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (DOL)***—As discussed below, the NCCMP disagreed with the Department's proposal as it is premised on a series of incomplete, inaccurate, erroneous, or unsupported assertions. We were

disappointed that a rulemaking of such import would be pursued in such a haphazard manner. However, we appreciated the opportunity to provide the Department with real and verifiable data that supports the approach taken by the Department in its guidance from 1988 through 2018 and that requires reconsideration of the Department’s views underlying this proposal.

Over the past 30 years, the Department had consistently promulgated its position that the voting of proxies appurtenant to a plan’s investments is a fiduciary duty. While this does not necessarily require that a plan fiduciary vote every proxy, it does require that proxy votes be evaluated and documented in the same manner as any other fiduciary decision. The proposal abandoned this position. In its place, the Department proposed adopting a presumption against voting by abruptly changing its 30 years of prior guidance and making the voting process so burdensome that it would have been extremely difficult for plans to comply. DOL then presumed that because the cost and burden of voting was so great—a cost and burden that existed solely in the Notice of Proposed Rulemaking (“NPRM”) and not in reality—plans should generally not vote proxies. Under the proposal, this presumption would have become a self-fulfilling prophecy.

As with the Financial Factors proposed regulation, the Final Rule, which the Trump Administration released on December 16, 2020, substantially retreated from the proposal in response to our comments and the comments of other stakeholders. Subsequently, we worked with the Biden Administration to provide plans, trustees, and the investment community with a statement of non-enforcement (issued March 10, 2021) which is effective until DOL issues new guidance on this topic.

➤ ***Comments on Proposed Rule on Transparency in Coverage (HHS, DOL, Treasury)***—While supporting the overall view of the agencies that plan participants should have access to clear, understandable information regarding their health benefits, NCCMP raised significant concerns regarding the proposed rule, including concerns about the volume of information required to be disclosed, the unrealistic time frames for disclosure, and the unreasonable effective date. Moreover, in some cases, we pointed out that plans do not have access to the information required to be disclosed but nevertheless apparently could be unfairly subject to penalties.

➤ ***Amicus Briefs***

- *Sofco Erectors, Inc., v. Trustees of the Ohio Operating Engineers Pension Fund* Nos. 20-3639, 20-3671 (6<sup>th</sup> Cir.)—This case involved a multiemployer pension plan’s assessment of withdrawal liability in which the plan’s actuary used a different discount rate (the Segal Blend) for determining the plan’s liabilities for withdrawal liability purposes from the discount rate used for minimum funding purposes. After the arbitrator’s decision upholding the use of disparate discount rates in the assessment was reversed by the district court, the plan appealed. The NCCMP filed an *amicus curiae* brief in support of the plan, arguing that the use of disparate discount rates was permitted under both ERISA and Supreme Court precedent, as well as under the governing actuarial standards. Although the case was argued on January 29, 2021, no decision has been rendered.

- *The Retirees of the Goodyear Tire & Rubber Co. Employee Healthcare Trust Committee v. Steely* No. 5:19=CV-1893 (N.D. OH)—This case involved an attempt by a retiree health plan to enforce a subrogation lien against one of its participants. On a motion to dismiss, the court accepted the defendant’s argument that, despite the fact that the health plan provided collectively bargained retiree benefits, was funded solely by employer contributions, and had been established pursuant to a litigation settlement between the employer and the union representing its employees, because the majority of its trustees were not directly affiliated with either the union or the employer, it was not governed by ERISA. The court therefore dismissed the case for lack of subject matter jurisdiction. This decision was effectively a death sentence for the plan, and provided an avenue for collateral attacks on the very existence of a significant number of ERISA-covered plans, including multiemployer plans. Although it is highly unusual for the NCCMP to involve itself in litigation at the district court level, in view of the broader implications of the case, the NCCMP made a strategic decision to intervene quickly and file an *amicus* brief in support of the plan’s Motion to Amend the Judgment. Notwithstanding that it is rare for courts to grant such motions, the court did so here, vacated its earlier dismissal, and the judge withdrew from the case. On subsequent cross motions for summary judgment in which the NCCMP did not participate, the new judge ruled that the plan was in fact covered by ERISA, and the case was eventually settled.

## Educational Conferences

- **2020 NCCMP/AEIP/MEBCO Transatlantic Conference and Global Pension Day (in conjunction with the World Pension Alliance)**, postponed until 2021 due to COVID-19 pandemic.
- **2020 NCCMP Annual Conference**, held virtually October 13-14, 2020
- **2021 NCCMP Lawyers and Administrators Meeting**, held virtually April 7, 2021
- **[Upcoming] 2021 NCCMP/AEIP/MEBCO Transatlantic Conference**, will be held virtually June 2-3, 2021. Register online at [www.worldpensionalliance.org](http://www.worldpensionalliance.org)
- **[Upcoming] 2021 NCCMP Annual Conference**, to be held September 25-29 at the Diplomat Resort in Hollywood, FL. A virtual option will be available for those who prefer to continue participating in our educational content remotely. Registration, room block, and sponsorship information will be released shortly.
- **Planning Further Ahead**—NCCMP recognizes that Trustees of multiemployer plans are incredibly busy, and set education, meeting, and travel plans far in advance. NCCMP has therefore endeavored to finalize Annual Conference dates and locations a number of years out to enable Trustees to plan to attend our informative and essential events. Please note that we will not host an Annual Conference in the 2023 calendar year, but will instead shift to an early

spring conference in March 2024. During 2023, we will hold a combined meeting in early fall at the Fairmont Hotel in Chicago, IL.

- *[Upcoming] 2022 NCCMP Annual Conference*, to be held September 17-21 at The Diplomat Resort in Hollywood, FL
- *[Upcoming] 2023 Combined Lawyers and Administrators and Annual Meeting*, to be held in early fall at the Fairmont Hotel in Chicago, IL
- *[Upcoming] 2024 NCCMP Annual Conference*, to be held March 6-9 at the Diplomat Resort in Hollywood, FL
- *[Upcoming] 2025 NCCMP Annual Conference*, to be held March 5-8 at the Diplomat Resort in Hollywood, FL

## Global Benefits

- ***Representing U.S. multiemployer perspective in global benefits efforts***—As a founding member of the World Pension Alliance (WPA), NCCMP worked with other member organizations to provide the U.S. multiemployer perspective for a WPA paper entitled *2020 Global Regulatory Responses and Pension Fund Challenges Related to the COVID-19 Pandemic*. In this paper the WPA aims to provide an overview of the challenges that both pension funds and pension plan members faced during 2020 and to promote the adoption of policies with a long-term view toward retirement security. While not overlooking the current difficult economic situation of many workers around the world, this research underscores the damaging effects of specific policies such as pension withdrawals. The paper summarizes the challenges and global regulatory efforts in response to COVID-19 made in 2020 in different regions around the world in response to the COVID-19 pandemic and provides a brief analysis on sector developments since the beginning of the pandemic.

*It is important to note that this paper was developed prior to the signing of the American Rescue Plan Act, and as such doesn't reflect the current relief made available to U.S. multiemployer pension plans.*

## Administrative

- ***Virtual conferences are up and running!*** NCCMP pivoted quickly during the global COVID-19 pandemic in 2020 to hold both our Annual Conference and our Lawyers and Administrators Meetings virtually for the first time. We were pleased to be able to offer our attendees the same great program, speakers, and opportunity to interact with representatives from the government agencies with jurisdiction over our plans and with technical experts and plan professionals in a virtual format.
- ***CEBS Compliance credits granted!*** NCCMP worked with the IFEBP to provide CEBS Compliance credits to our conference and meeting attendees. We continue to work with the relevant governing bodies to provide actuarial and legal continuing education hours as well.

- *Up next...*A conference app for when we are able to meet together in person again, with hotel information, program, schedule, speaker photos and bios, sponsor information and more at your fingertips.

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*We strive to ensure that the information contained in this and every issue of Multi-Elert is correct to the extent information is available. Nevertheless, the NCCMP does not offer legal advice. Plan fiduciaries should rely on their own attorneys and other professional advisors for advice on the meaning and application of any Federal laws or regulations to their plans.*

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*If you have questions about the NCCMP, or about this or other issues of Multi-Elert, please contact the NCCMP, by phone at (202) 737-5315 or by e-mail at [nccmp@nccmp.org](mailto:nccmp@nccmp.org) .*

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