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VIA EMAIL at reg.comments@pbgc.gov

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

Re: Comment on Methods for Computing Withdrawal Liability
RIN: 1212-AB36

Dear Sir/Madam-

On behalf of the National Grocers Association ("NGA"), the undersigned submits the following comments to the Pension Benefit Guaranty Corporation ("PBGC") in response to the above-referenced Proposal for Computing Withdrawal Liability Under Multiemployer Plans ("the Proposal").

About the National Grocers Association

NGA is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating in a variety of formats. Independents are the true "entrepreneurs" of the grocery industry and dedicated to their customers, associates, and communities. Much of NGA's membership is comprised of family-owned and family-operated small businesses. Nearly half of NGA's members are single-store operators, and another quarter operate less than five stores. Independent retail and wholesale grocers are an important part of America's economy. According to the NGA Economic Impact Study, independent grocers are responsible for over 1.5 million U.S. jobs, and independent retail and wholesale grocers and their employees generate almost $14 billion in state and local taxes and over $27 billion in federal taxes. Nearly $130 billion in sales are generated through our industry.

NGA is pleased to have the opportunity to provide thoughts on behalf of its members on the Proposal, which purports to implement several very important provisions of the 2014 Multiemployer Pension Reform Act ("MPRA"). NGA feels strongly that the Proposal ignores the

MPRA's command to disregard "any increase in the contribution rate" and would operate to the significant detriment of employers dealing with multiemployer pension funds.

The NGA feels strongly that the Proposal ignores the MPRA's command to disregard "any increase in the contribution rate" and would operate to the significant detriment of employers dealing with multiemployer pension funds. This comment encompasses Question 1, dealing with the examples provided in the Proposal, as well as Question 2, which would circumvent the MPRA by allowing a plan "to include in the determination of contribution amounts a 'benefit-bearing' contribution increase – a contribution increase that funds an increase in benefits or accruals as an integral part of the plan's benefit formula."[1]

The MPRA says nothing about so-called "benefit-bearing" increases, and the Proposal fails to account for the clear statutory language prohibiting such increases (after December 31, 2014) from being used to calculate withdrawal liability.

Discussion

1. *The MPRA Prohibits the Use of Post-2014 Rate Increases from Being Used to Calculate Withdrawal Liability.*

To begin with, the MPRA's clear and unambiguous language prohibits plans from using post-2014 rate increases (mandated by a funding improvement plan or a rehabilitation plan) in calculating withdrawal liability. It states:

> *Any increase* in the contribution rate … that is required or made in order to enable the plan to meet the requirement of the funding improvement plan or rehabilitation plan *shall be disregarded* … in determining the highest contribution rate[.]"[2]

The only pertinent exception is very narrow – it applies where "*additional contributions* are used to provide an increase in benefits, including an increase in future benefit accruals, permitted by subsection (d)(1)(B) or (f)(1)(B)."[3] The second comma in the quoted sentence makes clear that the referenced "increase in benefits" must be an increase "permitted by subsection (d)(1)(B) or (f)(1)(B)."[4]

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[1] 84 Fed. Reg. p. 2086-2087 (February 6, 2019).

[2] 29 U.S.C. § 1085(g)(3)(A). The MPRA provides that "The amendments made by this section shall apply to … increases in the contribution rate … that go into effect during plan years beginning after December 31, 2014[.]" *See* MPRA, Section 109(c).

[3] 29 U.S.C. § 1085(g)(3)(B)(emphasis added).

[4] *Id*.

Importantly, those subsections make clear that the "additional contributions" must be contributions above and beyond the contributions required by the rehabilitation plan.[5] For example, both sections are titled "Special rules for benefit increases," and state:

> A plan may not be amended after the date of the adoption of a rehabilitation plan under subsection (e) so as to increase benefits, including future benefit accruals, unless the plan actuary certifies that such increase is paid for out of *additional contributions not contemplated by the rehabilitation plan*, and, after taking into account the benefit increase, the multiemployer plan still is reasonably expected to emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the rehabilitation plan.[6]

Read together, the foregoing provisions establish that: (1) a plan may not use any portion of a post-2014 contribution increase required by the plan's rehabilitation plan against an employer for purposes of calculating withdrawal liability, and (2) only "additional contributions not contemplated by the rehabilitation plan" may increase the contribution rate used for calculating withdrawal liability. Accordingly, *an employer paying only what is required by the terms of a rehabilitation plan may not have any post-2014 contribution rate increase used against it for purposes of calculating withdrawal liability*.

The statutory language is premised on the common-sense notion that a plan that cannot pay for existing benefits cannot be allowed free rein to willy-nilly increase benefits for its participants. Moreover, the rates mandated under a plan's rehabilitation plan were intended only to ensure the plan's then-existing benefits. Accordingly, in the MPRA, Congress made clear that plans in critical or endangered status cannot increase benefits unless they guarantee that the necessary "additional contributions" above and beyond the mandated amount required by the rehabilitation plan were voluntarily agreed to by the employers, and that the increase would not detrimentally affect the plan's emergence from critical or endangered status.

2. *The Proposal Would Allow Plans to Utilize Post-2014 Rate Increases to Calculate Withdrawal Liability Without Meeting the Requirements of the MPRA.*

In the face of this clear statutory language, the Proposal would allow a plan sponsor to include contribution increases that go into effect during plan years beginning after December 31, 2014, that do not meet the requirement of being "additional contributions not contemplated by the rehabilitation plan[.]" *Id*. The first example set forth in the Proposal makes this clear:

> *Example:* Assume that a plan has an hourly contribution rate of $3.25 in effect in the plan's 2014 plan year. The plan sponsor determines that after the plan's 2014 plan year it will disregard hourly contribution rate increases of $0.25 per year in

[5] To avoid undue repetition, any reference herein to "rehabilitation plan" should be presumed to include a funding improvement plan.

[6] 29 U.S.C. § 1085(f)(1)(B)(emphasis added).

> determining withdrawal liability *because such increases were made to meet the requirements of the plan's rehabilitation plan*. Beginning with the plan's 2018 plan year, the plan sponsor dedicates $0.20 of the $0.25 increase to an increase in benefits. The plan sponsor would use the employers' hourly contribution rate of $3.25 in effect in the 2014 plan year to determine contributions until the 2018 plan year. For the 2018 plan year and subsequent years, the plan sponsor would use a $3.45 hourly contribution rate to determine contribution amounts used for the allocation fraction and the highest contribution rate.[7]

The obvious problem with this Example is that it assumes the hypothetical $0.25 increase was "made to meet the requirements of the plan's rehabilitation plan," but would still allow the plan to use $0.20 of that increase "to determine … the highest contribution rate."[8] This blatantly ignores the fact that *no portion* (much less 80%) of the hypothetical increase was "paid for out of additional contributions not contemplated by the rehabilitation plan," as required by the MPRA.[9] Indeed, as the Example makes clear, the hypothetical increase was expressly "made to meet the requirements of the plan's rehabilitation plan."[10]

In allowing a plan to utilize for withdrawal liability purposes increases "made to meet the requirements of the plan's rehabilitation plan," the Proposal stands the MPRA on its head. Plainly, an increase cannot be at one and the same time "made to meet the requirements of the plan's rehabilitation plan" *and* "paid for out of additional contributions not contemplated by the rehabilitation plan."[11]

The problem with the Proposal is that it would allow a plan to utilize post-2014 contribution increases when calculating withdrawal liability without meeting the necessary criteria to fit within the narrow statutory exception to the general rule to disregard post-2014 contribution increases.

The second Example set forth in the Proposal violates the same rules, as it would allow a plan sponsor to include in the determination of contribution amounts taken into account for withdrawal liability purposes a so-called "benefit-bearing" contribution increase," that is, "a

[7] 84 Fed. Reg. p. 2082 (emphasis added).

[8] *Id*.

[9] 29 U.S.C. § 1085(f)(1)(B). *See also* 29 U.S.C. § 1085(g)(3)(B)(exception applies only where "additional contributions are used to provide an increase in benefits … permitted by subsection (d)(1)(B) or (f)(1)(B).").

[10] 84 Fed. Reg. p. 2082.

[11] Given this contradiction, perhaps it is not surprising that the Example neglects to mention that in order to increase benefits under the statute, the plan actuary must certify two facts: (1) that the increase "is paid for out of additional contributions not contemplated by the rehabilitation plan," and (2) "after taking into account the benefit increase, the multiemployer plan still is reasonably expected to emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the rehabilitation plan." 29 U.S.C. § 1085(f)(1)(B).

contribution increase that funds an increase in benefits or accruals as an integral part of the plan's benefit formula":

> *Example:* Assume benefits are 1 percent of contributions per month under a percentage of contributions formula and the employer's hourly contribution rate increases from $4.00 to $4.50 effective in the 2018 plan year. Thus, under the plan formula, the $0.50 increase provides an increase in future benefit accruals. While the full $0.50 increase is credited as a benefit accrual under the plan formula, the plan sponsor obtains an actuarial determination that only $0.20 of that increase is actuarially necessary to fund the nominal increase in benefit accrual and that $0.30 of the increase will fund past service obligations. For purposes of withdrawal liability, 40 percent of the rehabilitation plan contribution increase is deemed to increase benefit accruals for withdrawal liability purposes ($0.50 × 40% = $0.20). Effective for the 2018 plan year, the plan sponsor would use a $4.20 hourly contribution rate to determine contribution amounts for the allocation fraction and the highest contribution rate.[12]

While the second Example does not say so expressly, it is apparent that its hypothetical $0.50 increase is required under the terms of a rehabilitation plan, as in footnote 11 the Proposal references the "Special rules for benefit increases" provisions dealing with plans in endangered or critical status.[13] Footnote 11, which the Proposal cites in support of the assertion that "the portion of the contribution increase … that is funding the increased future benefit accruals must be determined actuarially;" states:

> This is consistent with ERISA sections 305(d)(1)(B) and 305 (f)(1)(B) … which permit a plan that is subject to a … rehabilitation plan to be amended to increase benefits, including future benefit accruals, if the plan actuary certifies that such increase is paid for out of additional contributions.[14]

Although the end of the footnote properly references "additional contributions," it leaves off the rest of the statutory phrase, which states "additional contributions *not contemplated by the rehabilitation plan*[.]"[15] Even worse, nothing in the second Example shows that any portion of the hypothetical $0.50 increase is attributable to "additional contributions not contemplated by the rehabilitation plan[.]" Indeed, contrary to the statute, the second Example would allow a large portion of an increase *required by the rehabilitation plan* to be used in calculating the highest contribution rate for purposes of withdrawal liability.

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[12] 84 Fed. Reg. p. 2082.

[13] *See* 84 Fed. Reg. p. 2082 at fn. 11.

[14] 84 Fed. Reg. p. 2082 at fn. 11.

[15] *See* 29 U.S.C. § 1085(f)(1)(B)(emphasis added).

At the risk of repetition, ERISA sections 305(d)(1)(B) and 305 (f)(1)(B) "permit a plan that is subject to a funding improvement or rehabilitation plan to be amended to increase benefits," once the plan actuary certifies two things: (1) "that such increase is paid for out of additional contributions not contemplated by the rehabilitation plan, and," (2) "after taking into account the benefit increase, the multiemployer plan still is reasonably expected to emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the rehabilitation plan."[16]

But the second Example says nothing about any portion of the hypothetical $0.50 increase coming from "additional contributions not contemplated by the rehabilitation plan," nor does it state whether the plan actuary certified that the plan "still is reasonably expected to emerge from critical status" after taking into account the benefit increase.[17] Because, like the first, the second Example ignores the statutory requirements to increase benefits, it cannot be implemented as written.

As shown, neither of the Examples in the Proposal establishes or even addresses whether the amounts they count towards the highest contribution rate meet the two statutory requirements. Indeed, both Examples state, the first expressly and the second implicitly, that the increased contributions were "were made to meet the requirements of the plan's rehabilitation plan," which directly contradicts the statutory command that they be "paid for out of additional contributions not contemplated by the rehabilitation plan."[18]

In addition, both Examples fail to account for the requirement that the plan actuary certify that "after taking into account the benefit increase, the multiemployer plan still is reasonably expected to emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the rehabilitation plan."[19] By ignoring the statutory criteria, the Proposal falls fundamentally out of line with the statute.[20]

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[16] 29 U.S.C. § 1085(f)(1)(B). Footnote eleven acknowledges that the increases permitted by ERISA sections 305(d)(1)(B) and 305 (f)(1)(B) arise from amendments to the plan. *See* 84 Fed. Reg. p. 2082 at fn. 11 ("which permit a plan that is subject to a funding improvement plan or rehabilitation plan *to be amended* to increase benefits[.]")(emphasis added). Importantly, there is no mention in either Example of the plan being amended to permit increased benefits. This will be addressed further in Section 3.

[17] 29 U.S.C. § 1085(f)(1)(B).

[18] 29 U.S.C. § 1085(f)(1)(B).

[19] 29 U.S.C. § 1085(f)(1)(B). Presumably a plan such as Central States, which has declared that it will be insolvent by the year 2025, could not make this necessary certification.

[20] A regulation may not ignore, much less change, the statute under which it was enacted. *See United States v. Larionoff*, 97 S.Ct. 2150, 2156 (1977)("regulations, in order to be valid must be consistent with the statute under which they are promulgated."); and *Public Lands Council v. Babbitt*, 120 S.Ct. 1815, 1825 (2000)("regulation cannot change the statute.").

3. *The Proposal Ignores the Fact that So-Called "Benefit-Bearing" Rate Increases Have Already Been Actuarially Taken Into Account, and that ERISA Does Not Consider a Participant's Additional Time Spent in a Plan a Benefit Increase.*

The Proposal defines a so-called "benefit-bearing" increase as "a contribution increase that funds an increase in benefits or accruals as an integral part of the plan's benefit formula[.]"[21] However, the Proposal's use of a loaded phrase like "benefit-bearing" is misleading, and makes one wonder – which contributions to a multiemployer plan are not "benefit-bearing"?

The answer is that all contributions to a typical plan are "benefit bearing," at least inasmuch as all contributions to the plan are made with an eye toward funding benefits. While there will obviously be some overhead in the administration of the fund, so far as we are aware, no fund earmarks contributions separately for such purposes. This illustrates that an increase (from a plan participant viewpoint) arising from continued participation in the plan *under the same exact terms* is not truly an "increase" at all. Presumably, the plan's actuary has already factored in the *existing benefit accrual rate* in determining the funded status of the plan.

That is, in determining the funded status of the plan, the actuary has made certain assumptions about the plan's participants, including their seniority, average lifespan, expected tenure with the plan and entitlement to future benefits. The very fact that actuaries make such projections belies the implication that a participant's continued participation in the fund results in a "benefit increase" within the meaning of MPRA. Thus, a plan that grants benefits under a formula such as the one in the second Example (1% of contributions) has already made assumptions as to what benefits will be payable under that formula. In such a case, the mere fact that an individual participant may continue in the plan does not result in a "benefit increase," any more than the fact that a different participant does not continue in the plan results in a "benefit decrease." The plan's terms, and the benefits payable at various levels under those terms, remain unchanged in both circumstances.

Moreover, the Proposal's benefit to the plan comes not just at the (substantial) expense of the employer, but quite possibly at very significant expense to the individual participants, inasmuch as classifying mere continued service as a "benefit increase" would have obvious and potentially huge implications for the PBGC's guarantee of benefits under multiemployer plans. Consider that under ERISA, "a benefit or benefit increase which has been in effect under a plan for less than 60 months is not eligible for the corporation's guarantee."[22]

Accordingly, construing continued service as a "benefit increase" would mean that, if a plan were to become insolvent (for example, as Central States is projected to do in the next several years), the PBGC guarantee of benefits would exclude for each plan participant the prior five years' worth of so-called "benefit increases." One wonders whether the plan participants who may see their benefit guarantee dissipated under the Proposal are aware of this draconian feature?

[21] 84 Fed. Reg. p. 2082.

[22] 29 U.S.C. § 1322a(b)(1)(A).

This potentially devastating blow to plan participants highlights that continued service under the unchanged terms of a plan cannot be construed as a "benefit increase." This is especially so when one considers that to apply the PBGC guarantee, one must know the effective date of the "benefit increase." In this regard, ERISA makes clear that to effectuate a "benefit increase" and establish its effective date, there must be an *actual change in the plan's terms*.[23]

In addition, the Proposal apparently contradicts current PBGC practice. In setting forth examples of its multiemployer guarantee on its website, nowhere does the PBGC indicate that so-called "benefit increases" attributable to continued service during the prior 60-month period are excluded from its guarantee. To the contrary, every example provided equates a participant's "years of service" with entitlement to a particular level of benefit, *even where the benefit is predicated on the number of years of service*.[24] Not only that, but the PBGC website elsewhere directly equates "years of service" with "How long [a participant] worked under the plan," with no indication that a year worked might not count as a year of service if it led to a supposed increase in benefits.[25]

In this regard, it is interesting that the Proposal fails to note that in a previously-promulgated regulation, the PBGC elected to define "benefit increase" in precisely the opposite way it is attempting here:

> *Benefit increase* means any benefit arising from the adoption of a new plan or an increase in the value of benefits payable arising from an amendment to an existing plan…. [I]n the case of a plan under which the amount of benefits depends on the participant's age or service, and the participant becomes entitled to increased benefits solely because of advancement in age or service, *the increased benefits to which the participant becomes entitled will not … be treated as a benefit increase*.[26]

The Proposal provides no explanation for why "benefit increase" should be construed to mean directly opposite things in two PBGC regulations. Little wonder, for there is no reasonable explanation for why the PBGC should guarantee for participants in single employer plans benefits

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[23] *See* 29 U.S.C. § 1322a(b)(2)(A)(i)(effective date is "the date on which the documents … increasing the benefit were executed[.]"). Under the Proposal, what is the effective date of each "benefit increase"? Does it vary by participant?

[24] *See* https://www.pbgc.gov/prac/multiemployer/multiemployer-benefit-guarantees (visited on April 8, 2019). This is true of the additional examples, as well.

[25] *See* https://www.pbgc.gov/about/factsheets/page/multi-facts (visited on April 8, 2019). The website states:
"PBGC's multiemployer guarantee is based mainly on two factors:
- How long you worked under the plan (years of service)
- Your plan's benefit rate"

[26] 29 C.F.R. § 4022.2 (emphasis added). Moreover, this regulation is consistent with the MPRA, which contemplates that benefit increases must come about through plan amendments. *See* 29 U.S.C. § 1085(f)(1)(B)("A plan *may not be amended* after the date of the adoption of a rehabilitation plan … so as to increase benefits[.]")(emphasis added).

increased "solely because of the advancement in age or service," yet refuse to guarantee the exact same benefits for participants in multiemployer plans.

Conclusion

The MPRA provides that no multiemployer plan in critical status may be allowed to increase benefits except in very specific and narrow circumstances.[27] This makes perfect sense, for why should a failing plan (which by definition cannot pay for the benefits it has already promised) be allowed to increase the benefits payable to its participants? Nowhere does the Proposal address or attempt to explain this seemingly nonsensical result.

In any event, the Proposal fails to follow the MPRA. Indeed, in this aspect, the Proposal contradicts the clear statutory language passed by Congress just four years ago in favor of a vague and unworkable system which would allow plans to significantly increase the amount of withdrawal liability payable by withdrawn employers while simultaneously putting at risk the PBGC's guarantee of the plan's own participants.

Respectfully, the NGA suggests that the PBGC should reconsider this aspect of the Proposal, and instead adopt something consistent with the statutory language. For convenience and as further illustration of the clear requirements, we have attached hereto a rewrite of the proposed regulation at section 4219.3 that tracks the statutory criteria and language.

Respectfully submitted,

/s/ Mark M. Trapp
Mark M. Trapp

[27] 29 U.S.C. § 1085(g)(3)(B).

Proposed statutorily-compliant language for section 4219.3:

§ 4219.3 Disregarding certain contributions.

(a) *General rule.* For purposes of determining the highest contribution rate under section 4219(c) of ERISA, a plan must disregard:

(1) *Surcharge*. Any surcharge under section 305(e)(7) of ERISA

(2) *Contribution increase.* Any contribution increase that goes into effect during a plan year beginning after December 31, 2014, so that a plan may meet the requirements of a funding improvement plan under section 305(c) of ERISA ~~or section 432(c) of the Code~~ or a rehabilitation plan under section 305(e) of ERISA ~~or section 432(e) of the Code~~, ~~except to the extent that~~ *unless* one of the following exceptions applies:

(i) The contribution increase is due to increased levels of work, employment, or periods for which compensation is provided.

(ii) ~~The contribution increase provides~~ *Additional contributions are used to provide* an increase in benefits, including an increase in future benefit accruals, permitted by sections 305(d)(1)(B) or 305(f)(1)(B) of ERISA ~~or sections 432(d)(1)(B) or section 432(f)(1)(B) of the Code, and an increase in benefit accruals as an integral part of the benefit formula. The portion of such contribution increase that is attributable to an increase in benefit accruals must be determined actuarially~~*, and at the time of the increase in benefits the plan actuary certifies:*

- *(a) Such increase is paid for out of additional contributions not contemplated by the funding improvement or rehabilitation plan, as the case may be, and*
- *(b) After taking into account the benefit increase, the multiemployer plan still is reasonably expected to*
  - *a. meet the applicable benchmark schedule contemplated in the funding improvement plan, or*
  - b. *emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the rehabilitation plan*.