THE Kroger CO.

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Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
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Re: Proposed Regulations Regarding Additional Limitations on Suspension of Benefits Applicable to Certain Pension Plans under the Multiemployer Pension Reform Act of 2014 ("MPRA")

To Whom It May Concern:

On behalf of The Kroger Co. ("Kroger"), I am writing to provide comments on the proposed regulations issued by the Pension Benefit Guaranty Corp. ("PBGC") on June 6, 2016, under section 4231 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and as further amended by section 201 of MPRA (the "Proposed Regulations"). As discussed in more detail below, Kroger believes that the Proposed Regulations, as applied to plans in endangered, critical or critical and declining status, ***will prevent mergers and transfers that are in the best interests of plan participants and that lessen the risk to the PBGC for guaranteed benefits***. As such, absent modifications, the Proposed Regulations could effectively increase the risk of plan insolvency and increase the risk to the PBGC for guaranteed benefits. The Proposed Regulations should be modified to permit mergers and transfers involving endangered, critical or critical and declining status plans that (1) preserve benefits for plan participants (or a class of plan participants), (2) lessen the risk of plan insolvency (or postpone plan insolvency), (3) are not adverse to the overall interests of the participants and beneficiaries of any plan involved in the transaction, and (4) reduce the PBGC's expected long-term loss with respect to these troubled plans.

Kroger is one of the largest retailers in the world and employs over 430,000 associates. Approximately two-thirds of our associates are covered by roughly 300 collective bargaining agreements, making Kroger one of the largest unionized employers in the United States.

We participate in more than 30 multiemployer defined benefit pension plans and contribute approximately $250 million per year to these plans. We have made all required contributions on behalf of our associates participating in these multiemployer pension plans.

Kroger has a demonstrated history of acting to preserve the pension benefits of our associates. In 2011, Kroger and the United Food and Commercial Workers International Union ("UFCW") negotiated an agreement that resulted in the merger of four multiemployer plans, two of which were in critical status. This agreement resulted in the creation of a fully funded "consolidated" multiemployer plan. In 2014, Kroger, again working with the UFCW, arranged for the transfer of Kroger related benefits from a pension plan in critical status that was projected to be insolvent. The Kroger related benefits (active employees, terminated vested employees, retirees, beneficiaries and alternate payees) were transferred to the fully funded consolidated plan, which preserved the benefits of Kroger employees and retirees and allowed the remaining plan to merge into another plan, avoid insolvency, and protect the benefits of all plan participants. The 2014 transfer was cited by the PBGC in its annual report as an example of an innovative transaction that preserved benefits for plan participants.

More recently, Kroger and the UFCW negotiated agreements involving a 2016 transfer from a critical plan (the "first transfer') and another transfer from a critical and declining plan (the "second transfer"). The first transfer (from a critical plan to the consolidated plan) had the effect of improving plan funding and lessening any risk of insolvency for the plan in critical status. The second transfer involved approximately $160 million of Kroger related benefit liabilities (for active employees, terminated vested employees with 15 or more years of service, retirees, beneficiaries and alternate payees). This transfer (from a critical and declining plan to the consolidated plan) preserved the benefits of the Kroger participants and extended the insolvency date of the critical and declining plan by improving the plan's cash flow and eliminating almost $100 million of underfunding in the critical and declining plan. In addition, the transfer relieved the PBGC of substantial future liability upon the insolvency of the critical and declining plan. In the case of both transfers, Kroger agreed to fully fund the transferred labilities over a short period (3 years). Overall, this transfer was a win-win-win for everyone involved. However, the second transfer (and possibly the first transfer as well) would not have been permitted under the Proposed Regulations.

While the Proposed Regulations do provide a needed update to the current regulations under section 4231, they need a provision permitting mergers and transfers involving endangered, critical or critical and declining status plans that (1) preserve benefits for plan participants (or a class of plan participants), (2) lessen the risk of plan insolvency (or postpone plan insolvency), (3) are not adverse to the overall interests of the participants and beneficiaries of any plan involved in the transaction, and (4) reduce the PBGC's expected long-term loss with respect to the plans. Without such a provision, the Proposed Regulations would actually make multiemployer retirement benefits less secure and increase the overall risk to the PBGC.

Under PBGC's multiemployer program, when a plan becomes insolvent, the PBGC provides financial assistance to the insolvent plan in an amount that is sufficient to pay guaranteed benefits to participants and beneficiaries, along with the reasonable and necessary administrative expenses of the insolvent plan. The PBGC guarantees benefits up to a maximum monthly benefit of $35.75 ($429 per year). Thus, for a 30-year participant, the maximum guaranteed annual benefit is $12,870.

Section 4231 governs mergers and transfers between multiemployer plans. Among other requirements, section 4231(b)(1) requires that the PBGC be notified of a merger or transfer at least 120 days in advance and section 4231(b)(3) provides that a merger or transfer is only permitted if "the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 4245." However, Section 4231(a) gives the PBGC broad authority to modify the statutory requirements of Section 4231(b) by regulation.

While section 4231 does not require that the PBGC approve a merger or transfer prior to its implementation, section 4231(c) does provide for voluntary review of a proposed merger or transfer. It further provides that if the PBGC determinates that the proposed merger or transfer satisfies the requirements of section 4231, then the merger or transfer will not be deemed to constitute a violation of section 406(a) or 406(b)(2) of ERISA.

This compliance determination is particularly important in the case of mergers or transfers involving plans in endangered, critical or critical and declining status in light of the plan solvency requirement of section 4231(b)(3). The plan solvency requirement is designed to ensure that benefit payments are not likely to be suspended because of a transaction.[1]

Kroger recognizes that mergers and transfers between plans need to be carefully reviewed to ensure that the merger or transfer does not place either plan at greater risk. A transfer of benefit liabilities and possibly assets between multiemployer plans by definition involves only a portion of a plan, and, as such, it is possible that a significant transfer could harm one plan while benefitting the other plan. For example, if both plans involved in a transfer are in critical status, a transfer of benefits from one of the plans without a proportionate share of plan assets could have a negative impact on the receiving plan (but would benefit the transferor plan), unless there is some agreement in place for rapid funding of the transferred benefits. For this reason, standards that are more stringent are appropriate for any endangered, critical or critical and declining status plans involved in a significant transfer.

While Kroger believes that non-de minimis mergers and transfers involving endangered or critical status (and especially critical and declining plans) should be subject to greater scrutiny, the regulations <u>should not</u> (as the Proposed Regulations currently do) operate to

[1] The test should be whether the *transaction* has an adverse effect on plan solvency (or improves plan solvency), not merely whether the plan is projected to be insolvent.

effectively prohibit mergers and transfers that are in the best interests of plan participants and that lessen the PBGC's risk for guaranteed benefits.

Under the Proposed Regulations, a merger or transfer is permitted only if each plan that exists after the transaction is not reasonably expected to be insolvent. This requirement can be met by the general test or the plan solvency test. The application of the plan solvency test depends on whether one of the plans is a significantly affected plan. Under the current regulations, a plan that has not terminated by mass withdrawal is significantly affected only if (1) it transfers 15% or more of its assets to another plan, (2) it receives unfunded accrued benefits that equal or exceed 15% of its pre-transfer assets, or (3) it is created by a spinoff from another plan. Thus, a plan that transfers benefit liabilities (and no assets) or benefit liabilities accompanied by less than 15% of its pre-transfer assets would not be significantly affected. Similarly, if the unfunded liabilities were less than 15% of the transferee plans' assets, the transferee plan would not be significantly affected (assuming it was not created by a spinoff from another plan). In the case of a merger, as long as one of the plans involved in the merger has terminated by mass withdrawal, neither plan would be significantly affected. However, under the Proposed Regulations, a plan that is in endangered or critical status is automatically deemed a significantly affected plan.

Under the plan solvency tests, as modified by the Proposed Regulations, a merger or transfer involving a significantly affected plan is permitted only if:

(1) Contributions are expected to meet minimum funding under section 431 of the Internal Revenue Code for the next ten plan years.

(2) The expected fair market value of plan assets immediately after the transaction exceeds 10 years of expected benefit payments.

(3) Expected contributions for the first plan year following the transaction exceed expected benefits payments for that first year.

(4) Expected contributions during the next 15 years (or the alternative period selected by the plan actuary) are expected to equal or exceed the plan's unfunded accrued benefits plus expected normal costs (i.e., plan liabilities are expected to be fully funded in 15 years (or the amortization period under (b)(4)(ii)).

The Proposed Regulations seem to suggest that an endangered or critical plan that is involved in a proposed transfer could meet the plan solvency test. However, because of the requirements of the plan solvency tests, a critical plan or an endangered plan with a projected funding deficiency cannot meet the plan solvency test as a practical matter.[2] For example, by

[2] An endangered plan that is projected to have a funding deficiency in the next 7 years would fail the test.

definition, a critical plan has or is projected to have an accumulated funding deficiency and would not meet the projected minimum funding test contained in section (b)(1) of the Proposed Regulations.[3] Thus, the plan solvency test could not apply to a transfer involving a critical plan or an endangered plan with a projected funding deficiency; instead, a critical plan or an endangered plan with a projected funding deficiency would need to meet the general test.[4] This point should be clarified in the final regulations.[5]

Historically, the PBGC's response to criticism over the strictness of the plan solvency test has been to note that the plan actuary can always certify that the plan meets the general test. Under the general test, a merger or transfer is permitted if the plan actuary certifies that plan benefits are not reasonably expected to be subject to reduction due to plan insolvency. The general test works well for a plan that is not projected to be insolvent, but cannot be used by a plan facing insolvency. By definition, a critical and declining plan is expected to become insolvent and cannot meet this test, even if the merger or transfer would otherwise postpone the date of insolvency.[6] Thus, the Proposed Regulations would effectively prohibit a non-de minimis

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[3] Section 412(a)(1) provides that a plan must satisfy the minimum funding standards applicable to the plan.

In the case of a multiemployer plan, section 412(a)(2)(C), provides that contributions to a multiemployer plan must be sufficient to ensure that the plan does not have an accumulated funding deficiency at the end of the plan year.

Section 412(b)(2) provides that the minimum funding standards do not apply to a plan in critical status that has adopted (and is complying with) a rehabilitation plan meeting the requirements of section 432. Thus, while a plan that is in critical status and that meets the requirements of section 432 of the Code is protected against excise taxes on the accumulated funding deficiency, it does not meet minimum funding.

[4] A merger involving a critical plan or an endangered plan with a projected funding deficiency could only meet the test if the merged plan no longer has a projected funding deficiency that would cause it to be in critical or endangered status.

[5] The plan solvency provisions also continue to provide that expected contributions for the first plan year following the transfer exceed expected benefits payments for that first year. This is a requirement that never made any sense and should be changed. Mature plans, no matter how well or poorly funded, usually have benefit payments that exceed contributions. If fact, the better funded the plan, the less likely it is to meet this test. For example, a mature plan that is 150% funded would almost certainly have benefit payments that exceed expected contributions for the first plan year following the transaction. Because of this provision, virtually no significantly affected plan can meet the solvency test. It would make more sense to modify this requirement to recognize the funded status of the plans in effect following the transaction. For example, in the case of a transfer, if the transferee plan has a market value funded ratio of 90% or more (based on the plan funding assumptions), the test could provide that the funded ratio of the plan cannot be projected to be less than 85% over the next five plan years and must be projected to be at least equal to the pre-transfer funded ratio at the year of the fifth plan year following the transfer.

[6] The Proposed Regulations should clarify how the "not reasonably expected to be subject to reduction due to plan insolvency" requirement is applied if the plan suspends benefits under section 305(e)(9) in connection with a transfer. For example, a transfer could have the effect of allowing a critical and declining plan that is currently

merger involving two critical and declining plans or a transfer involving a single critical and declining plan, even if such a merger or transfer was in the best interests of the participants in the critical and declining plan(s) and lessened the risk to the PBGC for guaranteed benefits.[7] It is important to note that the PBGC has issued compliance statements under the current regulations for transfers from a critical and declining plan and the Proposed Regulations thus represent a narrowing of the types of transfers permitted under section 4231. Similarly, a merger of two critical and declining plans would not be permitted, even if the effect of the merger was to extend the projected date of insolvency by lowering investment and administrative expenses of the combined plans.

Even though section 4231 allows the PBGC to modify the requirements of section 4231 (including section 4231(b)(3)), the Proposed Regulations do not modify the plan solvency requirement contained in section 4231(b)(3). In enacting section 4231, Congress recognized that "hard wiring" standards for mergers and transfers could present issues as times change and events unfold, so it gave the PBGC the discretion to modify the statutory standards. Furthermore, Congress recognized this changing environment when it enacted MPRA and gave the PBGC authority to facilitate mergers that would enable one or more of the plans to avoid or *postpone* solvency. The concept of postponing (rather than just avoiding) insolvency acknowledges the challenges currently facing multiemployer plans. The PBGC should revise the Proposed Regulations to permit mergers and transfers involving endangered, critical or critical and declining plans that cannot meet the general or plan solvency test, but which (1) preserve benefits for plan participants, (2) lessen the risk of plan insolvency (or postpone plan insolvency), (3) are not adverse to the overall interests of the participants and beneficiaries of any plan involved in the transaction, and (4) reduce the PBGC's expected long-term loss with respect to the plans involved. Such a provision should allow the PBGC, on a case-by-case basis, to determine that mergers and transfers which are in the best interests of all of the stakeholders are permitted under, and comply with, section 4231.

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ineligible to suspend benefits (because it cannot meet the post-suspension solvency requirement of section 305(e)(9)) to avoid insolvency through benefit suspensions (or it could lessen the amount of benefit suspensions needed in order for a critical and declining plan to avoid insolvency).

[7] De minimis mergers and transfers involving critical and declining plans are still permitted. A *de minimis* merger is one where the present value of accrued benefits of one plan is less than 3% of the other plan's fair market value of plan assets. A *de minimis* transfer is one where the transferred liabilities do not exceed 3% of the plan liabilities of the transferor plan and 3% of the assets of the transferee plan. Under these rules, a transfer from a critical and declining plan to a newly formed plan could never qualify as *de minimis,* even if the new plan were 120% funded on day one. This is because the transferred liabilities would always exceed 3% of the assets of the transferee plan (thus precluding the *de minimis* rule from applying).

Kroger appreciates the opportunity to comment on the Proposed Regulations. We support regulations that promote mergers and transfers between plans that reduce the long-term risk of loss to the PBGC and the American taxpayer.

If you have any questions concerning these comments or the views of Kroger regarding the Proposed Regulations, please contact the undersigned.

Respectfully,

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