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

Re: Response to PBGC's request for information, 82 *Fed. Reg.* 1376 (Jan. 5, 2017), regarding Requests for Approving Certain Alternative Methods for Computing Withdrawal Liability; Settlement of Withdrawal Liability and Mass Withdrawal Liability

Dear Ladies and Gentlemen:

The National Coordinating Committee for Multiemployer Plans (NCCMP) appreciates the opportunity to provide comments in response to the above-referenced request.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the over 10 million active and retired American workers and their families who rely on multiemployer plans for retirement 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 non-partisan, nonprofit, tax-exempt social welfare organization under IRC Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer plan universe, including in the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel and trucking industries.

Introduction

The NCCMP frames its response to the information request (IR) of the Pension Benefit Guaranty Corporation (PBGC) within our organization's understanding that PBGC's regulatory criteria for approving an alternative method for allocating unfunded vested benefits (UVBs)¹ for purposes of

¹ NCCMP's use of terminology is consistent with the IR. The IR describes two aspects of withdrawal liability as relevant to the IR and NCCMP's comments: (1) the method for determining a withdrawing employer's allocable share of unfunded vested benefits (UVBs) as provided under ERISA § 4211 (referred to in NCCMP's comments as "statutory allocation methods" and the IR as "withdrawal liability allocation," and "alternative withdrawal liability

determining withdrawal liability are narrowly prescribed whereas the information PBGC seeks through this IR seems fairly sweeping. The PBGC states it is particularly interested in “learning about the terms and conditions that apply to new and existing contributing employers that enter into arrangements, including: Alternative benefit schedules, special allocation and payment terms for withdrawal liability and mass withdrawal liability, the various forms alternative withdrawal liability arrangements may take, and the benefits and risks these arrangements may present to participants and the multiemployer insurance program.” In addition, PBGC seeks information in response to a total of 24 questions on a wide range of topics.

We note the conflict between PBGC’s stated goal of encouraging innovative withdrawal liability arrangements, including two-pool alternative withdrawal liability arrangements,² and its opaque and lengthy approval process. As articulated in the IR, PBGC “encourages the innovative use of existing statutory and regulatory tools to reduce risk to employers . . . while protecting promised benefits.”³ Since 2011, PBGC has received 20 requests to approve two-pool alternative withdrawal liability arrangements, and while the IR notes that “PBGC approved some early requests for two-pool alternative allocation methods,” it is the NCCMP’s understanding that very few requests for two-pool alternative withdrawal liability arrangements have been approved. While this low probability of approval makes trustees contemplating submission of a request think twice about using plan resources to prepare a submission, it also would appear from the IR’s preamble, that PBGC may believe its prior approvals, in retrospect, may not have been in the best interest of the plans’ participants or PBGC:

allocation” as used in NCCMP’s comments and the IR to refer to an allocation method that is subject to PBGC approval under ERISA Section 4211(c)(5)); and (2) the amount and payment of an employer’s withdrawal liability under ERISA Section 4219 (referred to in NCCMP’s comments and the IR as “withdrawal liability payment”). The combination of a plan’s determining withdrawal liability allocation using an alternative withdrawal liability allocation method and the establishment of terms and conditions of withdrawal liability payment are referred to in NCCMP’s comments and the IR as “alternative withdrawal liability arrangements.”

² NCCMP’s use of “two-pool alternative withdrawal liability arrangements” is consistent with the IR in referring to a specific type of an alternative withdrawal liability arrangement. Generally, a two-pool alternative withdrawal liability arrangement provides, for the purposes of withdrawal liability, an alternative allocation method consisting of two pools of assets and liabilities—the old pool and the new pool (referred to in NCCMP’s comments and the IR as the “two-pool alternative allocation method”). The old pool consists of total plan assets and liabilities less assets and liabilities in the new pool. The new pool generally consists of assets and liabilities associated with employers that had not previously contributed to the plan and/or existing contributing employers that have withdrawn from the plan and have paid or are paying withdrawal liability to leave the old pool, subject to the terms of a settlement agreement and plan rules. In the event there are no employers remaining in a pool, or in the event of mass withdrawal, the pools collapse and the statutory allocation method is as specified under the plan. The details and features of two-pool alternative withdrawal liability arrangements vary. Additionally, as discussed further in NCCMP’s comments, NCCMP uses the term “two-pool allocation method” to refer to an allocation method that provides for the co-existence in a plan of two pools that use the same statutory allocation method.

³ 82 Fed. Reg. 1376, 1379.

Since 2011, PBGC has received about twenty requests to approve two-pool alternative withdrawal liability arrangements. PBGC approved some early requests for two-pool alternative allocation methods, finding that they satisfied the regulatory requirements under 29 CFR 4211.23. However, those requests did not seek approval of the specific terms and conditions the plans were separately arranging with existing employers and such information was not included in the documentation submitted to PBGC under section 4211(c) of ERISA and the regulations thereunder. (In other, later cases, PBGC has been asked to approve the special plan rules on payment and settlement terms.) With respect to the early cases PBGC approved, information regarding the terms of the settlements could have affected PBGC’s analysis of whether the statutory criteria had been satisfied⁴

This conflict between innovation and approval highlights concern in the multiemployer community that PBGC’s approval process, as it evolves,⁵ will become more cumbersome and too unpredictable for plan trustees to risk resources to submit alternative withdrawal liability arrangements, including two-pool alternative withdrawal liability arrangements, and thus *discourage* rather than encourage innovative arrangements.

NCCMP believes that in some circumstances withdrawal liability may protect multiemployer plans by stabilizing plans with a high potential for insolvency, but also believes that withdrawal liability cannot act to deter employer participation. To harmonize these interests, NCCMP believes well-designed alternative withdrawal liability arrangements, including two-pool alternative withdrawal liability arrangements, alone or in strategic combination with other tools available under ERISA and as introduced under the Multiemployer Pension Reform Act of 2014 (MPRA), may enhance the financial security of all multiemployer plans. Such arrangements offer the possibility of bolstering the financial security of plans by attracting new employers to plans with growth potential, and may be beneficial to all plans in providing potentially significant and near-term cash infusions in the form of continued contributions and withdrawal liability payments that may extend plan solvency and preserve plan benefits longer term.

PBGC’s Approval Process

The NCCMP recognizes that while ERISA §4211(c)(5) directs PBGC to “prescribe by regulation a procedure by which a plan may, by amendment, adopt” an alternative withdrawal liability allocation, and while PBGC has exercised that authority and established criteria for approving an alternative withdrawal liability allocation as set forth in 29 CFR §4211.23, the fact of the matter

⁴ 82 *Fed. Reg.* 1376,1379.

⁵ See *Id.* (“While PBGC has gained considerable experience in analyzing several complicated two-pool alternative withdrawal liability requests over the last three years, the practice of adopting two-pool alternative withdrawal liability allocation methods and accompanying withdrawal liability payment arrangements is still evolving as plan sponsors become more aware of the sensitive balance of risks and benefits among stakeholders implicated by two-pool alternative allocation methods.”)

is: When the trustees of a multiemployer plan determine withdrawal liability payments, their actions are subject to Title I, Part 4 of ERISA, and approval by the PBGC has very little bearing on whether the trustees' actions comply with their fiduciary responsibilities under ERISA.⁶ Accordingly, NCCMP respectfully observes that PBGC's current approval process, which includes review and approval of the terms and conditions of withdrawal liability payments, expands the agency's authority beyond what is provided under applicable statutory and regulatory provisions when, instead, PBGC should continue to recognize the Employee Benefit Security Administration's role and remain focused on the criteria PBGC set forth for itself in 29 CFR §4211.23.

Withdrawal Liability Allocations

Under ERISA §4211(c)(5)(A), a plan may adopt an alternative withdrawal liability allocation provided the allocation would not significantly increase the risk of loss to the plan's participants and beneficiaries or to PBGC. This provides flexibility to plans in designing an alternative withdrawal liability allocation. But perhaps recognizing the burden on PBGC in reviewing detailed financial inquiries required to evaluate whether an alternative withdrawal liability allocation poses risk of loss by shifting liability to financially weaker employers, PBGC tempered that flexibility with specific, formulaic criteria under 29 CFR §4211.23(b) for determining that risk.⁷

⁶ See e.g. PBGC Op. Ltr. 91-6 (Aug. 19, 1991) ("The decision to modify and lower an employer's withdrawal liability schedule pursuant to plan rules adopted in accordance with Section 4219(c)(7) and 4224 of ERISA is subject to the fiduciary standards prescribed by Title I of ERISA. The trustees must look to what is best for the plan and its participants in adopting rules allowing modification of withdrawal liability payment schedules and in determining what terms and conditions should be imposed on a specific employer seeking to have its payment schedule modified. . . . The United States Department of Labor is responsible for enforcing the fiduciary standards prescribed by Title I of ERISA. Any questions concerning the application of the fiduciary standards in a specific case should be referred to them.")

⁷ NCCMP's observation appears to be supported by PBGC's discussion of the risk posed by a change from one of the four statutory allocations methods to another, and the risk posed by an alternative withdrawal liability allocation as described in PBGC's Notice of class approval granting approval to classes of plan amendments requiring approval under ERISA §4220. Although appearing in a different context, PBGC's discussion of risk as relevant here is as follows:

The four statutory methods result in the same overall degree of allocation of a plan's [UVBs], notwithstanding the fact that different amounts may be allocated to individual employers under each method. Adoption of any of the three alternatives methods [meaning modified presumptive, rolling-5 or direct attribution] could create risk of loss only if the effect of changing methods were to shift liabilities to employers who were unable to pay the increase in withdrawal liability. However, because each method apportions liability based on the withdrawing employer's participation in the plan, measured either by that employer's contributions relative to the total contributions to the plan or by the [UVBs] directly earned by employees of that employer, there is no reason to believe that changes in the allocation method shift liabilities in any substantial or systematic way toward weaker employers. Moreover, assessing this potential risk would require detailed inquiries into the financial situations of various employers, which would place a heavy burden on plan sponsors, employers, and the PBGC. Such a burden cannot be justified in light of the minimal possibility that an increased risk might be determined to exist.

If the criteria under 29 CFR §4211.23(b) are met, PBGC must approve the alternative withdrawal liability allocation. The criteria require that any alternative withdrawal liability allocation must operate like the statutory allocation methods in apportioning liability based on the withdrawing employer's participation in the plan, measured either by that employer's contributions relative to the total contributions to the plan or by the UVBs directly earned by employees of that employer. Alternative withdrawal liability allocations, therefore, must result in the same overall degree of allocation of UVBs as any statutory allocation. Different amounts may be allocated to individual employers depending on a plan's choice of allocation, but as with statutory withdrawal liability allocations, an alternative withdrawal liability allocation, including the two-pool alternative allocation method, by itself does not shift liabilities in any substantial or systematic way towards weaker employers.

Withdrawal Liability Payments

A shift in liabilities to other employers may occur where an employer's liability is discounted for purposes of the settlement of withdrawal liability. Under ERISA §4219 (c)(7) and §4224, such settlements are squarely in the purview of the plan's trustees, provided the terms of such settlements are consistent with ERISA and not inconsistent with PBGC's regulations, subject to fiduciary considerations under Title I of ERISA to facilitate and maximize recovery for the plan. Similarly, a plan's trustees may adopt plan rules for calculating withdrawal liability amounts in the event of mass withdrawal that may shift liabilities amongst employers, provided such plan rules allocate the plan's UVBs to substantially the same extent as the regulatory rules.⁸

Withdrawal liability payment settlement terms and plan rules are not required under ERISA or applicable regulations to be reviewed or approved by PBGC, whether occurring independently or as part of alternative withdrawal liability arrangements. Regardless of the context, trustees are required under Title I of ERISA to make that decision in the best interests of plan participants and beneficiaries. The complexities of that decision include a fundamental determination as to the effect, in the aggregate, the withdrawal liability payments or alternative withdrawal liability arrangements have on the short-term and long-term prospects of participants' benefits.

NCCMP acknowledges that the lack of homogenous risk-levels across multiemployer plans makes it difficult for PBGC to estimate, without detailed inquiry, the risk presented by alternative withdrawal liability arrangements, including two-pool alternative withdrawal liability arrangements to any particular plan, and the risk presented by any particular plan with such arrangements to the insurance system. In the absence of new regulations or technical guidance issued by PBGC, when presented with the challenge of determining, under its current approach, whether an alternative withdrawal liability arrangement creates a significant risk of loss, PBGC

49 *Fed. Reg.* 37686, 37687 (Sept. 25, 1984).

⁸ *See, e.g.* 29 CFR §4219.15(d).

should accept an increase to its risk of loss if there is a reasonable probability of benefit to participants.⁹ Accompanying that approach to risk analysis, NCCMP requests that PBGC improve the transparency of its review process.

Improving PBGC's Approval Process

The PBGC requests information and comment regarding whether there is a need for PBGC to more widely communicate its process for considering alternative withdrawal liability arrangement approval requests. The PBGC also asks what information it should require to be submitted in a request for PBGC approval of such arrangements, including two-pool alternative withdrawal liability arrangements. The NCCMP responds to both requests by observing that the number of submissions, the number of PBGC approvals and what appears to be a very lengthy review process indicate that PBGC should consider several actions to encourage the sponsors of multiemployer plans that have sound reasons to consider amendments to implement alternative withdrawal liability arrangements, including two-pool alternative withdrawal liability arrangements, to avail themselves of PBGC's review process.

As PBGC's experience evaluating such arrangements grows, PBGC should consider promulgating and posting a list of information successful applicants must typically provide in order for PBGC to approve an alternative withdrawal liability arrangement. Such a list need not be characterized as mandatory or binding on PBGC, but it should provide plan sponsors with enough information to: (1) understand the scope of PBGC's review process; and (2) better determine the likelihood of approval..

While the NCCMP is mindful of the sensitive nature of information a plan sponsor may provide PBGC, PBGC should consider publishing common issues and concerns it has identified during its review of more and more submissions. Such information could be presented as a series of FAQs. This information would likely provide plan sponsors and plan professionals with enough information to determine the likelihood of approval and also promote a more expeditious review process.

PBGC can also serve the multiemployer plan community by sharing with the public innovative approaches PBGC has reviewed and approved—a “best practices” guide that can educate plan

⁹ The assumption of risk suggested is analogous to the level of risk deemed acceptable under the “free look” rules provided in ERISA §4210. Under those rules, the plan may incur liabilities associated with employees of employers that have withdrawn but are exempt from liability, provided the employers have satisfied the requirements under ERISA §4210. PBGC assumes the risk as to the timing of potential plan insolvency and as to the probability that those liabilities remain unpaid upon plan insolvency and request for financial assistance.

sponsors on how best to protect plan participants while addressing the concerns of current employers, new employers and other stakeholders.¹⁰

All participants, whether active or terminated vested, and retirees benefit from innovation, including use of a two-pool alternative withdrawal liability arrangement, that may help provide increased financial security to multiemployer plans. The cash infusion typically provided under such arrangements may allow fewer reductions in participants' benefits, a delay in reductions being implemented, or may result in less significant benefit reductions. But innovation is reliant on timeliness. PBGC should be mindful of the fact that plan sponsors submitting requests for approval of alternative withdrawal liability arrangements are administering a multiemployer plan that may be facing circumstances requiring prompt resolution of a submission. Accordingly, PBGC should consider offering expedited review similar to the expedited handling process the Internal Revenue Service offers taxpayers requesting Private Letter Rulings. In any event, it is the NCCMP's experience that in most cases a plan sponsor that submits a request for approval of a two-pool alternative withdrawal liability arrangement is doing so under exigent circumstances. Therefore, the PBGC should generally hold itself to a review period not to exceed 180 days.

Building and Construction Industry Plans

Finally, PBGC invites comment on any other issue relating to alternative withdrawal liability arrangements. In this regard, NCCMP wishes to discuss a two-pool allocation method for plans in the building and construction industry that NCCMP believes could be interpreted by PBGC to still fall within the statutory allocation method required for such plans. This would, in an appropriate case, make such allocation method available to plans in the building and construction industry either under specified circumstances or with PBGC approval.

In Opinion Letter 86-22, PBGC stated that an allocation method that is a combination of two or more of the statutory allocation methods is not itself a statutory allocation method.¹¹ However, that Opinion does not address whether an allocation method that uses a single statutory allocation method but creates separate liability pools would be considered a statutory allocation method. If the existing guidance was interpreted to permit a plan to use a single statutory allocation method with multiple liability pools and this method was itself considered to be a statutory method, such

¹⁰ We note that PBGC staff, along with Treasury staff, are scheduled to engage in outreach efforts with the American Academy of Actuaries Multiemployer Plans Subcommittee regarding the requirements and application process for suspension of benefits under MPRA. NCCMP strongly urges similar effort from PBGC regarding alternative withdrawal liability arrangements as well as continued access to PBGC for the purposes of informal consultation and technical advice.

¹¹ PBGC Op. Ltr. 86-22 (Oct. 14, 1986).

allocation method would be available to plans in the building and construction industry as well as plans in other industries.¹²

NCCMP urges PBGC to consider this issue and determine that a plan that creates separate liability pools using a single statutory allocation method still uses a statutory allocation method. If PBGC cannot find interpretive authority, NCCMP requests that PBGC pursue legislative change after gathering input from the multiemployer community to ensure the crafting of effective and meaningful legislation.

NCCMP would be happy to further discuss what procedures should apply to such arrangements.

Conclusion

Thank you for considering the NCCMP's view on this important matter. Please feel free to contact us with any questions.

Very truly yours,



Michael D. Scott
Executive Director

¹² Under 29 CFR §4211.21(b), a construction industry plan may adopt a statutory withdrawal liability allocation other than the presumptive method to apply to contributing non-construction industry employers. Similarly, ERISA §4220 and 29 CFR §4220.1(b) provide that a non-construction industry plan may be amended, subject to PBGC approval, to provide that the construction industry exemption to withdrawal liability rules as described under ERISA §4203(b)(1)(B)(ii) apply to contributing construction industry employers. Although these provisions apply to a plan's use of two different statutory withdrawal liability allocations, and not the same allocation as suggested in NCCMP's comments, PBGC's regulations suggest PBGC's acceptance of the possibility, after its review under the applicable standard, that two statutory withdrawal liability allocations can co-exist in one plan. PBGC should expand that interpretation to apply to the same withdrawal liability allocation co-existing in construction industry plans and plans in other industries.