

Attorneys at Law

Mark M. Trapp  
t 312.499.1425  
f 312.827.9525  
mtrapp@ebglaw.com

May 23, 2016

VIA EMAIL at [reg.comments@pbgc.gov](mailto: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: NGA Comments on AAA Application for Approval of Fee Schedule  
Fed. Reg. No. 2016-06565**

Dear Sir/Madam-

The National Grocers Association (“NGA”) welcomes the opportunity to provide comments on the American Arbitration Association’s (“AAA”) application for PBGC approval of its proposed 2013 Fee Schedule (“Application”). The Application should be rejected, and PBGC should make clear that any rules binding on employers must be approved by the PBGC in the manner required under the regulations *prior* to being put into effect.<sup>1</sup>

Introduction and Statement of Interest

NGA is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry. The economic impact of the independent grocery industry accounts for over \$130 billion in annual sales, provides over 944,000 jobs, and pays \$30 billion in wages and \$27 billion in federal and state taxes. NGA members include retail and wholesale grocers, as well as state grocer associations.

NGA has a direct interest in the PBGC’s resolution of the Application because a portion of its members’ employees are represented by unions and have collective bargaining agreements requiring contributions to multiemployer pension plans, subjecting them to potential withdrawal liability. Therefore, the laws surrounding the arbitration of multiemployer withdrawal liability disputes have a direct bearing on NGA and its members.

---

<sup>1</sup> The AAA implemented its fee schedule on February 1, 2013, and has rejected payments under its prior approved fee schedule since that time. *See Central States, Southeast and Southwest Areas Pension Fund v. Bulk Transport Corp.*, 2016 U.S. App. LEXIS 7790 (7th Cir. 2016)(noting the employer tendered the prior fee to the AAA, “which responded that the fee didn’t comply with the new fee schedule[.]”).

On behalf of its membership, NGA strongly urges the PBGC to reject the Application. Not only does the Application fail to justify the drastically-increased fees, it should be rejected for three independent legal reasons: (1) the 2013 Fee Schedule is not a stand-alone procedure governing arbitration, and no underlying rules have ever been promulgated as directed in the pertinent statute; (2) the PBGC cannot “approve” rules without public notice and comment, and (3) the 2013 Fee Schedule (and the underlying AAA rules) are not “fair and equitable,” as required under the statute.

Accordingly, the PBGC should reject the Application. Moreover, the PBGC should revoke its prior approval of all previous versions of the AAA rules, as none has undergone the public scrutiny and input intrinsic to federal rulemaking. The PBGC should make clear that it takes seriously the Congressional command that it *promulgate* (that is, put through notice and comment rulemaking) all rules governing arbitration.

### Background

Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (“MPPAA”) on September 26, 1980.<sup>2</sup> The MPPAA requires “any dispute” between an employer and a multiemployer pension plan concerning a withdrawal liability assessment to be “resolved through arbitration.”<sup>3</sup>

Because no arbitration procedures were then in place, Congress directed the PBGC to promulgate “fair and equitable procedures” governing arbitration proceedings.<sup>4</sup> “Congress also recognized that the PBGC would require time to develop the regulations[.]”<sup>5</sup> Accordingly, in the interim, the MPPAA permitted parties faced with arbitration to take “any reasonable action,” which would be treated as having complied with the regulations during that period.<sup>6</sup> However, once the PBGC issued regulations pursuant to this directive, those regulations were to control.<sup>7</sup>

In 1982, a dispute regarding the procedures to follow in arbitration was presented to the PBGC. PBGC noted that under the statute, arbitrations were “to be conducted in accordance with fair and equitable procedures to be promulgated by the PBGC,” and that it was “working on such a regulation[.]”<sup>8</sup> PBGC opined that “[i]n the interim, multiemployer plan sponsors and employers may use reasonable procedures, such as those established by the [AAA].”<sup>9</sup>

---

<sup>2</sup> 29 U.S.C. §1461(e)(1).

<sup>3</sup> 29 U.S.C. §1401(a)(1).

<sup>4</sup> 29 U.S.C. §1401(a)(2).

<sup>5</sup> PBGC Op. Ltr. 83-17 (August 1, 1983).

<sup>6</sup> P.L. 96-364, Title IV, §405(a), 94 Stat. 1303 (Sept. 26, 1980).

<sup>7</sup> *Id.*

<sup>8</sup> PBGC Op. Ltr. 82-32 (October 28, 1982).

<sup>9</sup> *Id.* (emphasis added).

On July 7, 1983, the PBGC proposed a full set of regulations governing withdrawal liability arbitrations.<sup>10</sup> PBGC noted that the MPPAA “directs the [PBGC] to promulgate fair and equitable procedures for the conduct of the arbitration,” and its proposed regulation was designed to do just that.<sup>11</sup> Importantly, under the PBGC’s proposed rules, the initiation of arbitration was a simple matter of notice between the parties; no third party involvement was required or even suggested. Instead, “[a]rbitration is initiated by one of the parties to a dispute by service on the other party of a notice of initiation.”<sup>12</sup>

Two years later, a full five years after enactment of the MPPAA, the PBGC issued its final rules governing arbitration.<sup>13</sup> The PBGC received and evaluated twenty separate comments, and incorporated many suggestions into the final rule.<sup>14</sup> In several areas, the PBGC indicated a level of discomfort with pension funds – sure to be repeat players in the arbitration game – exerting too much control over procedures governing arbitration. For example, the PBGC rejected one suggestion “that plans be permitted to enforce any procedural rules that were not in ‘direct conflict’ with the regulation,” finding “there is too great a danger of unfairness if plans are allowed broad discretion to adopt procedural rules.”<sup>15</sup>

Similarly, the PBGC felt that “preselection of the arbitrator would jeopardize the fairness of the arbitration procedure and undermine the purposes of mandatory arbitration of withdrawal liability disputes.” To the contrary, the PBGC required an arbitrator to be selected by mutual agreement of the parties, stating this determination in strong language:

An arbitrator has wide latitude in conducting arbitration proceedings, and his award is subject to only limited judicial review. Fundamental fairness demands that the impartiality of one in whom such powers are vested be free from reasonable doubt, and *the best way to ensure that all parties will have confidence in his impartiality is to have him selected by mutual consent.*<sup>16</sup>

---

<sup>10</sup> See Arbitration of Disputes in Multiemployer Plans, 48 Fed. Reg. 31251 (July 7, 1983)(noting that PBGC has been “charged” by Congress “with establishing fair and equitable procedures for the conduct of an arbitration proceeding”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* See also 29 C.F.R. §4221.3, and *Cent. States, Se. & Sw. Areas Pension Fund v. Ditello*, 974 F.2d 887, 892 (7th Cir. 1992)(“Giving the other party notice of arbitration is the only requirement under the PBGC rules for initiating arbitration.”).

<sup>13</sup> See Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34679 (Aug. 27, 1985).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (emphasis added).

As part of its final regulations, the PBGC purported to grant itself the power to approve so-called “alternative” arbitration procedures to those it had promulgated.<sup>17</sup> Rather than *promulgate* arbitration procedures through notice and comment rulemaking, the PBGC assumed the authority to *approve* “alternative” arbitration procedures, either “on its own initiative,” or following an application from a sponsoring organization.<sup>18</sup> Under the latter method, rather than the “fair and equitable” standard under the statute, the PBGC declared it would “approve an application if it determines that the proposed procedures will be *substantially fair* to all parties involved[.]”<sup>19</sup>

Also, despite its misgivings about allowing funds to exercise too much control over procedures governing arbitration, the PBGC regulations allow a plan, through plan amendment, to unilaterally “require the use of a PBGC-approved procedure for all arbitrations of withdrawal liability disputes[.]”<sup>20</sup>

Even before expiration of the 30-day period required for a promulgated rule to become effective, the PBGC acted to utilize its self-granted power to “approve” alternative rules to those it had just promulgated.<sup>21</sup> On September 13, 1985 (published in the Federal Register September 19, 1985), the PBGC approved the 1981 AAA Rules “on its own initiative[.]”<sup>22</sup> The PBGC did not publish the 1981 AAA Rules in the Federal Register, and did not solicit or receive from the public any comments. Those rules required filing fees ranging from \$500.00 to \$1,300.00.

Less than a year later, acting on an application from the AAA seeking, among other things, an increase in the filing fees, the PBGC approved the 1986 AAA Rules.<sup>23</sup> Once again, the PBGC failed to publish the rules in the Federal Register, and never solicited or received any comments. The 1986 AAA Rules increased the filing fees by \$150.00; the fees required now ranged from \$650.00 to \$1,450.00.

These rules remained in place nearly twenty-seven years until, on February 1, 2013, the AAA, without ever seeking or obtaining PBGC permission, unilaterally amended its rules and drastically increased its filing fees. For example, the 2013 AAA Rules require filing fees of \$8,700.00 (more than thirteen times the prior rate) for claims involving one million dollars, and \$11,450.00 (almost eight times the prior rate) for claims involving five million dollars. The 2013

---

<sup>17</sup> 29 C.F.R. §4221.14(a) (“*In lieu of the procedures prescribed by this part*, an arbitration may be conducted in accordance with an alternative arbitration procedure approved by the PBGC in accordance with paragraph (c) of this section.”)(emphasis added).

<sup>18</sup> 29 C.F.R. §4221.14(c).

<sup>19</sup> 29 C.F.R. §4221.14(d)(emphasis added).

<sup>20</sup> 29 C.F.R. §4221.14(a).

<sup>21</sup> See 5 U.S.C. §559(d) (requiring publication 30 days before rule becomes effective).

<sup>22</sup> See Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 38046 (Sept. 19, 1985).

<sup>23</sup> See Arbitration of Disputes in Multiemployer Plans, 51 Fed. Reg. 22585 (June 20, 1986).

AAA Rules cap a total filing fee for any claim at \$71,000.00, without any justification for such an astronomical amount.

The 2013 AAA Rules removed language under which the AAA could “defer or reduce the administrative fee” in “the event of extreme hardship,” and also eliminated language from both prior versions stating the AAA would prescribe a fee schedule, and the “schedule in effect at the time of filing ... shall be applicable.”

Finally, the 2013 AAA Rules not only drastically increase the filing fees, they also remove language under which the filing party “advanced” the fee “subject to final apportionment by the Arbitrator in the award,” and replace it with language making the fee “payable *in full by a filing party* when a claim ... is filed.”

Surprisingly, the AAA did not initially present the 2013 AAA Rules to the PBGC, so the PBGC has never approved them. Instead, more than two and a half years after their unilateral issuance, the AAA presented to the PBGC only its amended fee schedule, which as noted above, not only substantially increases the fees, but makes several significant language changes.

### Discussion

#### *1. The PBGC Cannot Approve a Stand-Alone Aspect of an Arbitration Procedure*

Even assuming the PBGC can approve “alternative” rules to those it promulgated, a point refuted below (*see* point 4), the regulation only allows the approval of a full-blown all-encompassing procedure that governs “all aspects” of the arbitration.<sup>24</sup> That is, the PBGC cannot approve piecemeal arbitration procedures, but must view an entire set of procedures to determine whether those procedures *as a whole* it will be “fair and equitable” to the parties going through arbitration.

Thus, in order properly to consider the 2013 Fee Schedule, the PBGC must consider the rules as well. As noted below, no version of the AAA rules has ever been promulgated within the meaning of the MPPAA or the Administrative Procedures Act (“APA”), and thus cannot govern an arbitration proceeding under the MPPAA.

---

<sup>24</sup> 29 C.F.R. §4221.14(b).

2. *The AAA Provides No Justification for the Huge Increases Sought*

Even if the AAA could carve out the 2013 Fee Schedule for PBGC consideration in the manner attempted here, the requested fee increases should not be approved, for the simple reason that there is a complete failure of justification for the huge increases sought.

For example, the AAA asserts that “as a not-for-profit organization,” it must “ensure that the costs associated with the administration of a particular caseload do not vastly exceed the fees earned.” (App. at 2) The AAA nowhere backs up (with data, or otherwise) the representation that it is losing money by administering the withdrawal liability caseload, much less that its costs “vastly exceed the fees earned.”

The AAA asserts the “fee increase implemented by the AAA was necessary because of the substantial administrative costs and staffing associated with these complex arbitrations.”<sup>25</sup> (App. at 2) Once again, there is no data to back up the claim made. The AAA nowhere points to what the “administrative costs” include, or its “staffing” requirements. In counsel’s experience, the AAA provides a list of arbitrators from which the parties select an arbitrator, and thereafter sets up conference calls for the parties. But while the AAA staff are generally pleasant and polite, there is no necessity for the “middle man” role they play. They make no decisions or rulings, and serve strictly in an administrative role, setting up conference calls, serving as an exchange mechanism for briefs and so on.

Given the AAA’s limited and extraneous role, there is no reason employers should be compelled to pay AAA for any services provided. In arbitrations conducted pursuant to the properly promulgated PBGC regulations, the parties handle such tasks themselves, with no extra costs. Anyone with an email calendaring program and a telephone can set up a conference call, and email allows easy and instantaneous communications directly with the arbitrator and opposing counsel, as well as for filing documents. Moreover, while in 1986 the AAA may have had a monopoly on lists of arbitrators for withdrawal liability disputes, today anyone with a computer or smartphone can run a Google search and locate numerous qualified arbitrators, or find someone who can. Many arbitrators opinions can also be located on the internet. At any rate, there is no indication that parties proceeding for free under the PBGC regulations have any difficulty handling themselves any of the tasks carried out by the AAA. Nor has the AAA even attempted to show why any particular task it performs cannot be as easily performed by the parties themselves, as currently happens under the PBGC regulations. And even if AAA had made such a showing, it has not established why the costs would have increased so drastically. Indeed, given the minor role played by AAA and the exponential increase in technology facilitating such issues in the ensuing three decades, the administrative costs should have come down since 1986.

---

<sup>25</sup> This statement makes clear that the AAA unilaterally implemented the increases prior to seeking PBGC approval.

The AAA next suggests the fee increase is warranted because MPPAA withdrawal liability arbitrations “tend to be highly contentious, involve large dollar amounts, the parties engage in voluminous discovery, and there can be multiple preliminary calls as well as multiple days of evidentiary hearings, can be pending for long periods of time, involve bifurcated issues and extensive briefing.” (App. at 2)

Each of these things may or may not be true, but none necessarily increases the costs of administration by the AAA. These issues are overseen by the arbitrator directly, with no involvement or input from the AAA. Indeed, the AAA is not and need not be involved in any of these issues – it does not review discovery or decide discovery disputes, it does not itself hold hearings or decide evidentiary or legal issues, and it has nothing to do with the briefs, except as a “middle man” delivery mechanism to the arbitrator, who is charging his or her own fees. In short, the AAA does not have any role in deciding the issues in dispute between the parties. The AAA may set up and facilitate conference calls regarding these items, but it has no direct or necessary involvement in any of them. Nor has the AAA shown any way in which these items have changed or grown worse since 1986. And once again, these are the same issues faced by parties utilizing the PBGC’s properly promulgated regulations, which do not require exorbitant fees or involve unnecessary third parties.

Finally, the fact that the fee schedule “is the same schedule the AAA has applied to other arbitrations caseloads that are similarly complex,” is irrelevant, as in those cases the parties have *voluntarily* elected to arbitrate their dispute. By sharp contrast, withdrawn employers are required by statute to proceed through arbitration, and there is no rational reason why they should be compelled to pay huge fees to an unnecessary third party when they can accomplish the same result for free under the properly-promulgated regulations of the PBGC.

The PBGC should not approve the Application unless the AAA can establish benefits worthy of the costs. On this record, that showing cannot be made. Many arbitrations have been carried out, and are currently being carried out under the promulgated PBGC regulations. Under these regulations, there is no fee charged simply to initiate arbitration, and the parties are able to select an arbitrator and proceed through administration of the case without additional fees or the involvement of any third party. An arbitration administered directly between the arbitrator and the parties under the PBGC regulations faces the same issues without added costs or complications.

The AAA provides no reason why parties should be forced to utilize its services. If the parties feel the benefits provided by the AAA are worthwhile, they can voluntarily choose to involve the AAA. But it is indisputable that there is no administrative or legal difference between arbitrations handled under the AAA rules versus the PBGC regulations, except the PBGC regulations do not impose this arbitrary additional cost. That being true, the AAA should not be allowed to insert itself (or, as happens, have funds insert them) into the dispute and charge huge fees to employers already faced with substantial amounts of withdrawal liability.

### 3. *The PBGC Should Cease Allowing Funds to Force Fees on Withdrawn Employers*

This brings us to the fundamental problem at the heart of these filing fees – while the AAA is a private entity and should be allowed to charge consenting parties who *voluntarily* elect to utilize its services whatever the AAA wishes, huge problems arise when funds are allowed to dictate that withdrawn employers use such services – and pay such fees – in order to initiate arbitration.

If an employer fails to initiate arbitration, the assessment becomes due and owing, and the pension fund may bring an action to collect the assessment.<sup>26</sup> Because a multiemployer pension fund “wins” if no arbitration is initiated, such funds are unlikely ever to initiate arbitration.<sup>27</sup> Indeed, it is in a fund’s interest to place as many obstacles as possible between an employer and arbitration.

And that is the primary problem with the AAA involvement compelled by many fund rules. If an employer can choose whether to utilize the services of the AAA, and weigh out the added benefit versus the costs charged, that would be one thing. But it is quite another when a PBGC regulation allows multiemployer funds unilaterally to set forth rules compelling employers to utilize the AAA, and to pay the accompanying fees just to initiate arbitration. Case law demonstrates that the failure to pay these fees can be catastrophic for employers.<sup>28</sup>

Beginning shortly after the PBGC promulgated the default regulations, funds began requiring employers to utilize the AAA and pay its filing fees to initiate arbitration. This rapidly evolved into an extra-statutory payment to initiate arbitration, enforced on penalty of employers losing their right to contest an assessment. Funds continue to utilize this leverage to avoid the merits of withdrawal liability disputes.<sup>29</sup>

Funds gain a tremendous advantage by being allowed unilaterally to compel withdrawn employers to utilize the AAA, and pay the unapproved fees for services which generally cost nothing and are absorbed in the fees parties pay counsel and the selected arbitrator. Accordingly, should the PBGC allow these huge increases, it should revoke its regulation which allows multiemployer funds to mandate their payment, and thereby force the filing fees on a withdrawn employer.<sup>30</sup>

---

<sup>26</sup> 29 U.S.C. §1401(b)(1).

<sup>27</sup> See *Nat’l Shopmen Pension Fund v. DISA Indus., Inc.*, 653 F.3d 573, 579 (7th Cir. 2011)(“either party may seek arbitration, but only the employer suffers a consequence for failing to do so.”).

<sup>28</sup> See *Robbins v. B and B Lines, Inc.*, 830 F.2d 648 (7th Cir. 1987)(failure to pay AAA filing fee rendered initiation of arbitration untimely); *Board of Trustees v. F.C. Parsons, Inc.*, 5 Empl. Benefits Cas. (BNA) 2277 (D. Wash. 1984)(same).

<sup>29</sup> See *Central States, Southeast and Southwest Areas Pension Fund v. Allega Concrete Corporation*, 772 F.3d 499 (7th Cir. 2014); and *Divane v. Paldo Sign & Display Co.*, 2015 U.S. Dist. LEXIS (N.D. Ill. 2015).

<sup>30</sup> 29 C.F.R. §4221.14(a). If a fund thinks the fees are worth the cost, it should foot the bill.



As shown above, over the years this rule has provided funds with a substantial weapon to use against withdrawn employers. The drastic increase in filing fees already implemented by the AAA has made things worse. As noted by one district court judge recently, “[t]he higher the fee, the more likely it is that employers will be dissuaded from asserting their statutory right to challenge withdrawal liability.”<sup>31</sup> This is indisputable, and in the absence of corresponding benefits, there is no reason to allow the imposition of huge fee increases.

Many withdrawn employers are “mom and pop” operations, and many have triggered a withdrawal only by being forced due to economic necessity to close down their business, or for other reasons beyond their control. In most cases, the employer has made all payments to the fund, and the withdrawal liability has arisen solely as a result of factors again out of that employer’s control. Employers in such situations may not have the funds to initiate arbitration, and thus must forego any chance to contest the fund’s assessment. In certain circumstances, the huge fees necessary to initiate arbitration may be very material, and in counsel’s experience, they have been. This situation should not be given sanction in the law; it certainly does not comply with the statutory standard requiring procedures to be “fair and equitable.”

That a self-interested party is allowed via PBGC regulation to force a withdrawn employer to pay an exorbitant and unjustified fee to a third-party simply to exercise the employer’s statutory right to contest the fund’s assessment works something like a “poll tax,” and surely violates due process.<sup>32</sup> Accordingly, whatever its decision on the merits of the fee increases, the PBGC should revoke its regulation purporting to allow funds unilaterally to require the use of so-called “alternative” rules to those properly promulgated by the PBGC.

NGA will now turn to the many legal reasons why the PBGC cannot approve the Application without reference to rules governing arbitration, and why any rules governing arbitration must go through full notice and comment rulemaking.

4. *No Version of the AAA Rules Has Been Promulgated Within the Meaning of MPPAA and the APA*

Because the 2013 Fee Schedule cannot be viewed in isolation, PBGC must face the lack of underlying rules which have been properly promulgated. The fee schedule is inextricably bound up with the rules themselves. Under section 7 of the AAA rules, arbitration is not initiated unless and until the filing fee is paid, and now the schedule mandates the initiating party pay this

---

<sup>31</sup> *Central States, Southeast and Southwest Areas Pension Fund v. Bulk Transport Corp.*, 60 Empl. Benefits Cases (BNA) 1975 (N.D. Ill. 2015); *rev’d on other grounds by Central States, Southeast and Southwest Areas Pension Fund v. Bulk Transport Corp.*, 2016 U.S. App. LEXIS 7790 (7th Cir. 2016).

<sup>32</sup> *See Ass’n of Am. R.R. v. DOT*, 2016 U.S. App. LEXIS 7750 at \*16 (D.C. Cir. April 29, 2016) (“the Supreme Court has consistently concluded the delegation of coercive power to private parties can raise similar due process concerns.”) (citing *Eubank v. City of Richmond*, 33 S. Ct. 76 (1912); and *City of Eastlake v. Forest City Enters., Inc.*, 96 S. Ct. 2358 (1976)).

fee in full. Because this fee will always be paid by the employer, an employer doesn't get past square one until it pays this fee.

Although it failed to submit them, the AAA may believe that the 1986 AAA Rules are still in effect, and should be utilized with the 2013 Fee Schedule, if approved by the PBGC. This conflicts with Section 1 of the rules, which state the rules "shall apply in the form obtaining at the time the arbitration is filed[.]" At any rate, the AAA cannot shield its rules from public review simply by submitting only the increased fee schedule. Nor can the PBGC be complicit in this shielding.

To begin with, the MPPAA itself states clearly that arbitrations "shall be conducted in accordance with fair and equitable procedures ... promulgated by the [PBGC]."<sup>33</sup> Agencies must follow an open public process when they issue regulations. Numerous cases stand for the proposition that the command to "promulgate" regulations calls for notice and comment rulemaking under the APA.<sup>34</sup> The fact that it took five years doing that very thing shows beyond doubt that PBGC itself interpreted the Congressional command to "promulgate" regulations as using notice and comment rulemaking to establish procedures governing arbitrations.<sup>35</sup>

The MPPAA also made clear that any reasonable alternatives were to be utilized only "during the period before such regulations take effect[.]"<sup>36</sup> Accordingly, once the PBGC finalized its own regulations through notice and comment rulemaking and those regulations took effect, the statute no longer allowed for "reasonable action" to stand in the stead of the promulgated regulations.<sup>37</sup>

But even if, contrary to the law, the PBGC could allow additional rules to govern withdrawal liability arbitrations, by what authority do those rules evade public notice and comment? Why was notice and comment apparently mandated by the statute for the PBGC's own rules, but not for the alternative rules of a private entity? Because no version of the AAA rules has ever gone through the public and open process of notice and comment rulemaking, these rules cannot govern withdrawal liability arbitrations, with or without the fee schedule which, as shown above, is itself unfair.

---

<sup>33</sup> 29 U.S.C. §1401(a)(2).

<sup>34</sup> See *Exelon Generation Co. v. Local 15, IBEW*, 676 F.3d 566, 577 (7th Cir. 2012) ("To promulgate a legislative rule, an agency subject to the APA must comply with the notice-and-comment rulemaking procedures of 5 U.S.C. § 553."); *Public Citizen v. NRC*, 901 F.2d 147, 158 (D.C. Cir. 1990) ("promulgate" "immediately suggests rulemaking rather than adjudication"); and *Centra, Inc. v. Cent. States, Se. and Sw. Areas Pens. Fund*, 578 F.3d 592, 601 (7th Cir. 2009) (noting difference between mere opinion letters and "promulgated regulations"). See also PBGC Op. Ltr. 87-7 (July 21, 1987) (difference between opinion letters and "substantive rules promulgated in accordance with the notice and comment requirements of the [APA.]").

<sup>35</sup> See *Arbitration of Disputes in Multiemployer Plans*, 48 Fed. Reg. 31251 (July 7, 1983).

<sup>36</sup> P.L. 96-364, Title IV, §405(a), 94 Stat. 1303 (Sept. 26, 1980).

<sup>37</sup> *Id.*

5. *As A Federal Agency, PBGC Cannot Through Its Own Regulation Circumvent or Water Down the Statutory Directive to Promulgate Fair and Equitable Regulations*

The PBGC cannot circumvent the command of Congress that all rules governing withdrawal liability arbitrations go through notice and comment scrutiny. As stated by one prominent court of appeals, a federal agency cannot “grant itself a valid exemption to the APA for all future regulations, and be free of the APA’s troublesome rulemaking procedures forever after, simply by announcing its independence in a general rule.”<sup>38</sup> That appears to be the end result of the PBGC regulation purporting to allow the PBGC to approve “on its own initiative” alternatives to those rules it promulgated through notice and comment rulemaking.<sup>39</sup> But the PBGC “cannot construct its own veto of Congressional directions.”<sup>40</sup>

Similarly, PBGC cannot undercut the MPPAA by altering the standard for rules governing arbitration from “promulgation” to mere “approval.”<sup>41</sup> Nor may it stand idly by while the AAA implements its own fees and rule changes, without approval. Congress said promulgated, and that’s what it meant.<sup>42</sup>

For the same reasons, the PBGC may not water down the statutory standard from “fair and equitable” to “substantially fair.”<sup>43</sup> “Substantially fair” is not the same as “fair and

---

<sup>38</sup> *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989).

<sup>39</sup> 29 C.F.R. §4221.14(c).

<sup>40</sup> *Picciotto*, 875 F.2d at 347. *See also Hocr v. United States Dep’t of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996) (“A rule promulgated by an agency that is subject to the [APA] is invalid unless the agency first issues a public notice of proposed rulemaking, describing the substance of the proposed rule, and gives the public an opportunity to submit written comments; and if after receiving the comments it decides to promulgate the rule it must set forth the basis and purpose of the rule in a public statement.”)(citing 5 U.S.C. §553(b) and (c)).

<sup>41</sup> It is axiomatic that a regulation cannot 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.”).

<sup>42</sup> 29 U.S.C. §1401(a)(2). In addition, the APA itself states that a “[s]ubsequent statute may not be held to supersede or modify [the APA’s requirements] except to the extent that it does so expressly.” 5 U.S.C. §559. Surely the PBGC will not take the position that it intended to allow the AAA to set its own fees without ever again seeking PBGC approval, especially when the AAA has simultaneously eliminated its waiver language, and the equitable allocation of the fees. Not only would this flatly contradict the regulation, but the only other time the AAA sought to increase its fees, it sought PBGC permission. At any rate, PBGC may not cede its regulatory authority to the AAA, or any private entity. *See DOT v. Ass’n of Am. R.R.*, 135 S.Ct. 1225, 1238 (2015)(Alito, J., concurring) (“By any measure, handing off regulatory power to a private entity is ‘legislative delegation in its most obnoxious form.’”) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). *See also Ass’n of Am. R.R. v. DOT*, 2016 U.S. App. LEXIS 7750 at \*16 (D.C. Cir. April 29, 2016) (“This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others[.]”) (emphasis by court); *City of Idaho Falls v. FERC*, 629 F.3d 222 (D.C. Cir. 2011); and *Exelon*, 676 F.3d at 578 (“Congress may delegate lawmaking authority to agencies ... [b]ut agency staffs certainly may not delegate responsibility to the parties they regulate.”).

<sup>43</sup> Compare 29 U.S.C. §1401(a)(2) and 29 C.F.R. §4221.14(d).

equitable,” and allowing one party to require the other party to pay a huge filing fee simply for the privilege of contesting the first party’s withdrawal liability assessment hardly seems “fair and equitable,” especially when the contesting party can accomplish the same result for free under the regulations properly issued by the PBGC.

PBGC must not lose sight of the fact that payment of the drastically-increased filing fee is required to initiate arbitration, which is *the central component* of the process – an employer loses any ability to challenge an assessment if it does not initiate arbitration. If an employer is unable to initiate arbitration due to an unfair rule, the argument that the rest of the rules are fair does not mean much. But even that overstates the AAA case, for there are real differences between the AAA rules and the PBGC regulations.

#### 6. *The AAA Rules Are Not Fair and Equitable*

Forcing an employer to pay any fee simply to exercise a right it can exercise for free under the valid PBGC regulations is fundamentally unfair. Even if forcing a fee were allowed, due to the AAA’s alteration of the prior language, the current AAA rules do not comply with the PBGC regulation mandating that even for so-called alternative rules, the costs of arbitration must be shared equally.<sup>44</sup>

In addition, the AAA rules substantially reduce the time in which the employer may consider arbitrators, and purport to allow the AAA to force an arbitrator on the parties. For example, under the PBGC regulations, the parties are free to propose any arbitrator they choose to hear the dispute.<sup>45</sup> The other party may accept or reject the proposal, and propose any arbitrator it wishes. The parties have 45 days after arbitration is initiated to agree on a mutually acceptable arbitrator. If the parties cannot agree on an arbitrator within that time, either party or both may ask a district court to appoint an arbitrator.<sup>46</sup> This process is consistent with the PBGC view that the best way to ensure confidence in the arbitrator’s impartiality is to have him “selected by mutual consent.”<sup>47</sup>

In sharp contrast, the section 11 of the AAA rules limits the parties’ selection to only five arbitrators proposed by the AAA, and allows only seven days to rank the arbitrators. Moreover, if a party doesn’t return the list within seven days, “all persons named therein shall be deemed acceptable.” Worst of all, the AAA rules purport to allow the AAA to impose an arbitrator on the parties:

If the parties fail to agree upon any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be

---

<sup>44</sup> See 29 C.F.R. §4221.10(b).

<sup>45</sup> 29 C.F.R. § 4221.4(a).

<sup>46</sup> 29 C.F.R. § 4221.4(e).

<sup>47</sup> See Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34679 (Aug. 27, 1985).

made from the submitted list, *the AAA shall have the power to make the appointment* from among the other members of the Panel without the submission of additional lists. (emphasis added)

In addition, under the PBGC regulations, a selected arbitrator must disclose any circumstances likely to affect his impartiality to the parties.<sup>48</sup> Thereafter, each party has an absolute right to disqualify the arbitrator as a result of any disclosed information. In such a case, the arbitrator “shall then withdraw,” and a new arbitrator is selected by the parties.

The AAA rules do not provide the same protections to the parties. Instead, once disclosures have been made by the arbitrator, the AAA assumes the sole right to determine whether the disclosures merit disqualification:

[T]he *AAA shall determine* whether the Arbitrator should be disqualified and shall inform the parties of its decision, *which shall be conclusive*.<sup>49</sup>

These rules completely undermine the principle of mutual consent that lies at the foundation of a fair and equitable arbitration. The withdrawal liability standards are substantively slanted against employers as it is; the PBGC should ensure that the process is free from any bias.<sup>50</sup>

### Conclusion

For the foregoing reasons, NGA respectfully requests that PBGC deny the Application, and take all necessary steps to ensure that any rule binding on an employer has undergone the necessary notice and comment procedure in accordance with the MPPAA and the APA.

Respectfully submitted,

/s/ Mark M. Trapp  
Mark M. Trapp

---

<sup>48</sup> 29 C.F.R. § 4221.4(b).

<sup>49</sup> See Section 13 of the AAA rules.

<sup>50</sup> In *Central States, Southeast and Southwest Areas Pension Fund v. Bulk Transport Corp.*, 2016 U.S. App. LEXIS 7790 (7th Cir. 2016), the Seventh Circuit recently ruled that “the PBGC’s approval of a new fee schedule is not required for the new fees to be charged.” However, the opinion does not meaningfully address any of the foregoing issues, and its conclusion directly contradicts the statutory mandate that procedures governing arbitration be “promulgated by the [PBGC],” as well as the PBGC regulation requiring affirmative approval. Finally, the opinion does not address the argument that the PBGC may not delegate its regulatory authority to a private entity.