Littler Mendelson, PC
1300 IDS Center
80 South 8th Street
Minneapolis, MN 55402.2136

Michael G. Congiu
612.313.7656 direct
612.630.1000 main
312.372.7880 fax
mcongiu@littler.com

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VIA EMAIL TO: *reg.comments@pbgc.gov.*
& CERTIFIED MAIL

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

Re: Comments- Request for Approval of Alternative Arbitration Procedure; American Arbitration Association

Dear Regulatory Affairs Group:

Littler Mendelson, P.C. ("Littler") is grateful for the opportunity to comment on the American Arbitration Association's ("AAA") request for PBGC's approval of its 2013 Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes ("MPPAR"). Littler represents and counsels numerous employers that participate in multiemployer pension funds and numerous employers who have withdrawn from multiemployer pension funds and have disputed their withdrawal liability assessments. Many of those pension funds have selected AAA's rules for arbitration of their withdrawal liability disputes. Littler's clients have been, and will continue to be, negatively impacted by the 2013 MPPAR if the PBGC approves the application. For the following reasons, Littler respectfully requests that the PBGC reject the 2013 MPPAR as proposed, as inconsistent with the regulation applicable to alternative arbitration procedures for withdrawal liability disputes, and because they are unjustified under current circumstances.

I. The Fees Should be Split Evenly Between the Parties, As Required by the PBGC Regulation.

29 C.F.R. § 4221.10(a) provides that each party to a withdrawal liability arbitration must bear the costs of its own witnesses, and 29 C.F.R. § 4221.10(b) provides that "the parties shall bear the other costs of the arbitration proceeding equally[.]" 29 C.F.R. § 4221.14(b) further provides that the scope of any alternative procedure shall govern in all aspects of the arbitration, *except that the costs of arbitration must be allocated in*

accordance with section 4221.10. By including this cost-sharing requirement in two different places within the regulation, the PBGC made it clear that all arbitration costs (other than witness costs) must be split equally by the parties. Section 7(a)(i) of the 2013 MPPAR, however, requires only the initiating party to pay the administrative fee. This imposition of the administrative cost on the initiating party is in direct conflict with PBGC regulations. AAA, therefore, must revise its rules to make it clear that all parties (not just the initiating party), are equally responsible for paying all administrative fees. This could be accomplished by requiring a fund to pay half of the fee, within a specified time after the employer initiates arbitration and pays its half of the fee.

II. The Administrative Fees Are Excessive.

AAA is proposing a drastic increase in its administrative fees. For instance, under the 1986 Rules, an amount in dispute between $1 million and $5 million would cost anywhere between $1,000 and $1,450 in AAA administrative fees. Under the standard fee schedule in the MPPAR, however, the total administrative cost of arbitrating a dispute within this same range is $11,450, which is almost eight times the amount charged under the 1986 Rules. Under the so-called Flexible Fee Schedule, the total cost is $12,450.

AAA's application lacks sufficient explanation for the fee increase. AAA simply explains that the fee is necessary due to "substantial administrative costs" and "staffing needs." Yet, AAA fails to identify the "substantial administrative costs" and "staffing needs" that would warrant the significantly increased fees. If AAA's administrative costs have in fact dramatically increased over the years to warrant the fee increase, AAA should specify what these administrative functions are and how the cost of performing those functions has increased over the years.

From Littler's experience representing clients in numerous withdrawal liability cases under AAA's rules, the administrative functions that AAA performs appear to be limited to the following: (1) providing a list of arbitrators from which the parties can select; (2) receiving the parties' selections and determining if there is a match; (3) disseminating to the parties the name of the arbitrator selected; (4) setting up conference calls with the arbitrator; and (5) sending a follow-up letter setting forth the due dates for discovery and briefing established by the parties and arbitrator in those conference calls.

Indeed, the parties and the arbitrator independently handle the vast majority of the administrative aspects of AAA arbitrations. The administrative functions performed by the parties independently include establishment of discovery and briefing schedules, production of discovery, establishment of schedules for telephone conferences to resolve discovery disputes, arranging for court reporters to be present at the arbitration hearings, and providing a space for any hearing. AAA is not involved any of this process. In fact, AAA's explanation that the fees are necessary due to the voluminous discovery involved in such cases is curious. AAA does not receive copies of the "voluminous discovery" exchanged between the parties. And, when AAA does receive discovery, it is merely as a courtesy. AAA is neither required to nor does it perform any

task with respect to such discovery. Any disputes involving the scope of discovery are resolved by the arbitrator, not AAA.

While AAA's provision of a call-in number for conference calls might have a minor cost, the fact is that any law firm could provide a call-in number for such conference calls at no cost to the parties (as we do for those cases that use the PBGC procedures).

Further, even if the cases are "highly contentious," as AAA indicates, it is unclear how this results in increased administrative cost and staffing issues for AAA when the arbitrator, not AAA, is the party that conducts the hearings, reviews evidence admitted at the hearing, and makes a ruling. AAA does not attend the arbitration hearings, and does not review or make a decision on any of the filings by the parties. AAA does not pay the arbitrator's fees. The parties are responsible for this expense.

In those few cases where the fund has disputed an employer's right to arbitrate, AAA has refused to issue a ruling on the dispute – forcing the parties to go to court (at great expense). In one case, we timely initiated arbitration on behalf of the employer pursuant to the PBGC regulation. The fund's counsel suggested using AAA procedures to select the arbitrator, before the new rules increased the fees. We agreed, and the fund then objected that because our client had paid the AAA fee more than 60 days after the fund's response to the request for review, arbitration was untimely. Despite the obvious fact that arbitration had been timely initiated pursuant to the PBGC regulations (which were the applicable regulations), AAA refused to decide the timeliness issue. The fund filed suit in court, and the judge had to determine that the case should be arbitrated. We have no reason to think the process would be any different under the new, grossly-increased fee structure. Simply put, all of the reasons outlined by AAA as the reason for the fee increase are really administrative issues that the parties to the arbitration handle, not AAA.

The one service that AAA does provide to the parties is that it supplies the parties with an initial list of arbitrators, and then if there is no selection from the initial list, AAA provides a second list of five arbitrators from which the parties can order their preferences but not exclude any arbitrators. Since the AAA does not apparently examine the arbitrators on its list to determine if (a) they are currently employed or retained by pension funds or employers or (b) they have actual experience with withdrawal liability disputes, the quality of the arbitration lists varies greatly. Our experience is that it is far easier to find a qualified arbitrator under the PBGC regulation process (because counsel on both sides have significant experience with many of the arbitrators) than it is under the AAA procedures. Even if the parties do not have prior experience with these types of cases, it is now quite easy to locate published decisions on-line to determine if an arbitrator has the necessary skills and experience, making AAA even less relevant or necessary to the process.

As further evidence of the inadequacy of the AAA procedures, we suggest that the PBGC review the new "form" that AAA now requires in order to initiate arbitration. Even though we have attempted to work with AAA to revise the form it still reflects a

misunderstanding of the substance of withdrawal liability disputes. The form is simply a modification of a form used for labor contract disputes or commercial disputes. Withdrawal liability disputes are statutory.

III. The Fee Structure is Onerous to Apply and Does Not Reflect the Cost of AAA Services.

The MPPAR fee structure also reflects a misunderstanding of the substance of withdrawal liability disputes. The fee structure varies depending on the size of the claim, even though the size of the claim may be totally unrelated to the size of the employer. In addition, it is often difficult to determine the size of the claim in any particular case.

First, the PBGC must recognize that since the market declines in 2000 and 2008, the amount of withdrawal liability imposed by pension funds has markedly increased. Of the nearly 50 withdrawal liability cases we have handled in recent years, almost all involved assessments in excess of $1 million, and some in excess of $100 million. But it is a rare case where the employer is arguing that there should be no withdrawal liability imposed at all. More typically, the parties are litigating the amount of the assessment or the size of the annual payment schedule (where the liability is limited by the 20-year payment cap contained in ERISA § 4219(c)(1)(B)). In these circumstances, is the AAA fee determined by:

- The difference between the employer's minimum calculation of the unfunded vested benefits ("UVB") and the assessed UVB?
- The difference between the employer's calculation of the annual payment (times 20 or the number of years assessed) and the fund's?
- The present value of the employer's proposed payment schedule and the present value of the assessed payment schedule? And if so, using what interest assumption?
- The UVBs assessed by the fund?

Since an employer can potentially lose its opportunity to arbitrate if it guesses wrong, the fee should be easily determinable. It is not. And when we have asked AAA for a ruling on this issue, we have not received a clear answer.

Second, since the AAA's administrative duties (minimal as they are) are identical regardless of the size of the dispute, the extraordinary range between the lowest and highest fees are unjustified.
Third, because many withdrawal liability disputes settle after arbitration is initiated but before a final decision is reached (often before a hearing or even before discovery), we recommend that any revised fee structure be segmented (as in the "flexible" option proposed by AAA, but with more segments), but not in a fashion that penalizes the employer who goes through to a hearing (as the "flexible" option currently does).

IV. AAA's Rules Must Provide the Parties Adequate Opportunity to Select an Arbitrator Before an Appointment by AAA.

The PBGC regulation requires that the parties mutually select the arbitrator. Specifically, section 4221.4(a) protects the parties' right to select a mutually agreeable arbitrator by requiring that the parties select the arbitrator after the initiation of the arbitration and giving the parties 45 days (or within such other time agreed upon by the parties) to make the selection. The PBGC emphasized the importance of this right when it stated that:

> 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.

Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34,679, 34,680 (Aug. 27, 1985). The MPPAR limits the parties' ability to mutually select an arbitrator because it provides the parties only one round of selection from a list of arbitrators provided by AAA, and if the parties fail to agree on an arbitrator, AAA unilaterally appoints an arbitrator for the parties. Many of the available AAA arbitrators, however, have little experience with and/or knowledge of withdrawal liability issues. As a result, it is becoming increasingly difficult for the parties to agree on an arbitrator from AAA's list. In order to comply with PBGC regulations, and to ensure that the parties are given full opportunity to exercise their right to select an arbitrator, AAA must revise its rules to provide the parties more than one round of selection. Alternatively, the parties should be allowed to propose an arbitrator, just as they would if they were arbitrating under PBGC's procedures.

V. AAA Failed to Show why PBGC's Approval of the Application will be Substantially Fair to all Parties.

Under section 4221.14(d), the PBGC will approve an application if it determines that the proposed procedures will be substantially fair to <u>all</u> parties involved in the arbitration. Section 4221.14(c) further provides that the applicant must demonstrate to the PBGC that the criteria for approval have been satisfied. AAA has not made a showing as to how the 2013 MPPAR is substantially fair to all parties. Indeed, the 2013 MPPAR does not, respectfully, meet this standard. As currently drafted, the MPPAR requires employers to shoulder all of the substantially higher administrative fees or lose their statutory right to arbitrate. This increase in fees will have a deterrent effect because employers would be less likely to arbitrate withdrawal liability cases, even where they have valid defenses, due to the high administrative cost of such cases. This type of

result is unfair to employers and impedes on employers' statutory right to arbitrate a liability assessment.

Sincerely,

Littler Mendelson, P.C.