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Regulatory Affairs Group  
Office of the General Counsel  
Pension Benefit Guaranty Corporation  
1200 K Street, NW  
Washington, DC 20005-4026  
Email: [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov)

Re: Regulation Identifier Number 1212-AB31

Ladies and Gentlemen:

Bimbo Bakeries USA ("BBU") hereby submits this letter in response to the Pension Benefit Guaranty Corporation's ("PBGC") June 6, 2016 proposed regulations amending the PBGC's existing regulations addressing Mergers and Transfers between Multiemployer Plans.

BBU is a leader in the baking industry and known for its iconic brands, innovative products, freshness and quality. BBU currently operates 59 bakeries and over 900 sales centers across the United States, many of which have a contractual obligation to contribute to a multiemployer pension plan covering certain employees at these sites. BBU has worked diligently to ensure the solvency of the multiemployer pension plans it participates in, and has tried to work within the existing statutory and regulatory environment in its efforts to ensure its employees receive the pension benefits they have already earned. Given this experience, BBU believes that certain features of the proposed regulations addressing mergers and transfers between such plans will make it virtually impossible for BBU and similar employers to protect the accrued benefits many of its employees and retirees already have earned through their BBU employment. Indeed, the targeted use of the current merger and transfer regulations already impose a significant financial burden on employers like BBU that seek to use these regulations as part of their efforts to ensure that employees receive the benefits they were promised and expect. Application of the new proposed regulations addressing transfers between such plans will, as a practical matter, foreclose one of the few viable options available to protect a plan participant's accrued benefits.

The PBGC's proposed regulations seek in part to modify the PBGC's previous effort to implement the requirements of Section 4231 of the Employee Retirement Income Security Act of

1974 (as amended) (“ERISA”). 29 U.S.C. §1411.<sup>1</sup> That provision permits the transfer of assets between two multiemployer plans if:

- No participant’s or beneficiaries’ accrued benefits will be lower immediately after the effective date of the transfer than the benefit immediately before the date;
- a proper actuarial valuation is performed;
- benefits will not be suspended due to insolvency; and
- the PBGC is properly notified at least 120 days before the effective date of the transfer.

29 U.S.C. §1411(b). *See also* 29 C.F.R. §4231.3. The statute, however, authorizes the PBGC to vary these requirements if it sees fit, 29 U.S.C. § 1411(a), and the PBGC has done so in its existing regulations addressing plan mergers and transfers. Those regulations in part allow a merger or a transfer if the transaction complies with the requirements imposed under 29 C.F.R. §4231 *et seq.*, including the plan solvency tests found under Section 4231.6.

The proposed regulations purport to do the same. Indeed, the PBGC has promulgated the new regulations to try to implement changes required by the Multiemployer Pension Reform Act of 2014 (“MPRA”), as well as other changes in intervening law since the PBGC issued its first set of merger and transfer regulations. Some of the PBGC’s proposed changes indeed stem directly from requirements imposed by changes in the law. However, the proposed regulations also expand the definition of a “significantly affected plan” to include plans in endangered or critical status within the meaning of the Pension Protection Act of 2006. 29 C.F.R. § 4211.2. This change erects a virtually insurmountable barrier for certain transfers which are in the best interest of our employees and retirees and the PBGC.

Specifically, BBU contributes to a number of critical and declining funds in which a “spinoff,” transferring the liabilities associated with BBU current and former employees into a “new fund,” is in the best interest of all constituents, including the PBGC. Realistically, defining the “old or existing fund” in this scenario as a “significantly affected plan” precludes this approach because it cannot meet the requirements of Section 4231.6(b) of the proposed regulations. It is respectfully submitted that this avenue must not be foreclosed and therefore, the existing regulations should be retained in which the “old or existing fund” would not be considered to be a “significantly affected plan” unless greater than 15% of its assets were scheduled to be transferred.

In addition, through its proposed regulations, the PBGC will also make it more expensive for multiemployer pension plans to seek a merger or a transfer of assets and/or liabilities. As a result, it risks taking this tool away from plans seeking to establish a firm financial footing due to the prohibitive costs involved. Specifically, under the proposed solvency test for significantly affected plans, a multiemployer pension plan must meet the following four tests before it can carry out a merger or transfer:

- The PBGC has proposed doubling the number of plan years (from five to ten) that a plan’s expected contributions must equal or exceed the estimated amount necessary to satisfy ERISA’s minimum funding requirements.

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<sup>1</sup> The proposed rules in new Subpart B also introduce additional rules addressing “facilitated mergers.” BBU is limiting its comments here to the PBGC’s proposed modification of the existing Merger and Transfer rules now set forth in new Subpart A of the proposed rules.

- The PBGC has proposed that the expected fair market value of plan assets immediately after the transaction equal or exceed the total amount of expected benefit payments for the first ten plan years after the transaction, as opposed to the current five year requirement.
- Expected contributions for the first plan year beginning on or after the effective date of the transaction equal or exceed expected benefits for the same plan year.
- When ensuring that expected contributions for the amortization period equal or exceed unfunded accrued benefits plus expected normal costs, the plan's actuary must use a 15 year amortization period (or the amortization period for the resulting base when the combined charge base and the combined credit base or offset under Section 431(b)(5) of the Internal Revenue Code), as opposed to 25 years under the current regulations.

The PBGC claims that these more stringent requirements stem from its experience administering the current regulations, and that the proposed changes will provide a "better determination" that benefits are not reasonably expected to be subject to suspension as a result of plan insolvency. BBU disagrees with this assessment, for fewer plans will be able to take advantage of these regulations, given the doubling of the costs involved. As a result, the proposed regulations may actually increase the chances that benefits may be subject to suspension, for fewer plans will be able to afford the doubling of transaction costs required to comply.

Accordingly, BBU requests that the PBGC retain its current definition of a "significantly affected plan" and the current solvency tests set forth under 29 C.F.R. § 4231.6. In the alternative, BBU requests that, if the proposed regulations are enacted, that the PBGC allow plans that cannot meet the requirements of the proposed regulations to nonetheless seek authorization from the PBGC to go forward with the transaction if the plan's actuary can demonstrate that the plan's benefits under review would:

- not be subject to suspension as a result of plan insolvency because of the transaction;
- the proposed transfer would delay the date of benefit suspensions and/or plan insolvency;  
and
- the proposed transfer is not adverse to any participant or beneficiary.

We appreciate this opportunity to comment on the proposed regulations and your consideration of these comments. If you have any questions about these comments, please do not hesitate to contact me.

Very truly yours,



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