



May 16, 2008

Via e-mail (reg.comments@pbgc.gov)  
and facsimile (1-202-326-4224)

John H. Hanley, Director  
Legislative and Regulatory Department  
Pension Benefit Guaranty Corporation  
1200 K Street, NW  
Washington, D.C. 20005-4026

**Re: Proposed Regulations under 29 CFR 4001, 4211, and 4219  
RIN 1212-AB07**

Dear Mr. Hanley:

Thank you for accepting comments regarding the above-referenced proposed regulations. We have reviewed the proposed regulations and offer the following comments on behalf of Schnuck Markets, Inc. Although many of the changes in the proposed regulations could negatively impact employers that contribute to underfunded multiemployer plans, the following comments will focus on provisions of the proposed regulations addressing fresh start dates.

The proposed regulations would allow multiemployer plans using the presumptive or modified presumptive method to be amended to substitute a different "fresh start" date in lieu of the date currently prescribed in the statute and regulations (September 26, 1980). The purpose of the fresh start date is to define two liability "pools," each of which is to be allocated to withdrawing employers. Although ERISA (as amended by the Pension Protection Act of 2006) allows each plan to establish its own fresh start date, the ERISA provision effectively requires that the date selected be a date which would result in there being no liability to be allocated in the "pre-fresh start date" pool. Under the proposed regulations, many plans can choose any fresh start date — even if the date chosen would result in liability allocated in both pools.

The new fresh start date provision as set forth in the regulations is particularly troubling. It appears to grant to plans unfettered discretion to change this aspect of the withdrawal liability formula in a manner that would maximize employer withdrawal liability.



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It is unclear whether there are any limitations on a plan's ability to make repeated changes in an effort to continually maximize such liability. The likely effect of this provision will be to materially increase withdrawal liability for employers and, as a result, further erode employers' practical ability to withdraw from multiemployer plans. This could have a chilling effect on employers' willingness to begin contributing to such plans in the first place and thereby harm the very plans this regulation is intended to help.

Furthermore, we are concerned that the proposed regulations do not reflect Congressional intent with respect to fresh start dates. As noted above, in the Pension Protection Act of 2006, Congress enacted a provision (ERISA §4211(c)(5)(E)) that allows for alternative fresh start dates. In this provision, Congress imposed the very specific requirement that a plan may specify a different fresh start date by substituting a plan year "for which the plan has no unfunded vested benefits." In permitting plans to choose any fresh start date without regard to whether there are unfunded vested benefits in the plan year selected by the plan, the proposed regulations appear to have ignored this very specific rule enacted by Congress.

For the foregoing reasons, we respectfully suggest that the regulations be modified to eliminate the fresh start date provisions or to allow a plan to use a "custom" fresh start date only under the conditions described in ERISA §4211(c)(5)(E). If the PBGC decides not to modify the regulations in this manner, we alternatively suggest that the regulations be clarified as to whether there is any restriction on a plan's ability to repeatedly change the fresh start date. We respectfully suggest that the regulation be modified to provide that, once a plan has selected a custom fresh start date, the date selected must be used at all times in the future.

Finally, if the PBGC determines that none of the foregoing changes are appropriate in crafting the final regulations, we respectfully request that the PBGC consider modifying how the new rules are applied. We believe that there is a general perception among employers that it is grossly inequitable to allow an underfunded plan to unilaterally change the rules to which the employer has already agreed. In addition, and more importantly, the lack of predictability in the rules governing withdrawal liability will tend to discourage new employers from beginning to contribute to multiemployer plans. As the PBGC is undoubtedly aware, the ability to attract new employers and participants is key to the survival and future health of many multiemployer plans.

Accordingly, we respectfully suggest that the new withdrawal liability methodology (using the custom fresh start date) not apply to employers that contributed to the plan prior to the effective date of the final regulations. Withdrawal liability for these employers should be calculated under the pre-regulation rules regarding fresh start dates because these were the rules to which the employer agreed when it became a contributing employer. Alternatively, the new fresh start rules should apply only to contributions that are made by such employers after the date on which the fresh start date is determined or only to contributions by employers that begin to contribute after the fresh start date is determined.

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Thank you for taking the above comments into consideration as you develop the final regulations.

Very truly yours,

Schnuck Markets, Inc.

By: 

Mary H. Moorkamp  
General Counsel

MHM/tp



May 19, 2008

**Submitted Via E-Mail**

Legislative and Regulatory Department  
Pension Benefit Guaranty Corporation  
1200 K Street, NW.  
Washington, DC 20005-4026.

Re: RIN 1212-AB07 - Proposed Regulations on Methods for Computing  
Withdrawal Liability and Reallocation Liability on Mass Withdrawal

To Whom It May Concern:

I am writing on behalf of the Food Marketing Institute (FMI) to provide comments on the proposed regulations issued by the PBGC on March 19, 2008, under ERISA Sections 4211 and 4219.

FMI conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 member companies - food retailers and wholesalers - in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores with a combined annual sales volume of \$680 billion - three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets, including both unionized and non-union companies. Its international membership includes 200 companies from more than 50 countries.

**Proposed Regulations Relating to Reallocation Liability on Mass Withdrawal**

Existing Regulations

These comments deal primarily with the proposed change to the method used to determine an employer's reallocation liability under Section 4219 of ERISA when a multiemployer plan terminates because of mass withdrawal or when substantially all employers withdraw pursuant to an agreement or arrangement to withdraw. Under existing regulations, an employer's share of reallocation liability is determined by multiplying the total reallocation liability amount by a fraction, the numerator of which is the sum of the employer's initial withdrawal liability and any redetermination liability, and the denominator of which is the sum of the initial withdrawal liabilities and redetermination liabilities of all employers liable for reallocation liability.

### Proposed Regulations

The preamble to the proposed regulations discusses PBGC concern about situations in which employers that would otherwise be liable for reallocation liability have little or no initial withdrawal liability or redetermination liability and, therefore, have little or no reallocation liability.

Under the proposed regulations, the fraction used to determine an employer's reallocation liability would be based on contribution base units for the three plan years preceding the withdrawal from the plan, i.e., the numerator would be the employer's average contribution base units during the three years, and the denominator would be the average of the total contribution base units during the three years for all employers liable for reallocation liability. The change in the fraction under the proposed regulations would apply to plan terminations by mass withdrawal or withdrawals of substantially all employers pursuant to an agreement or arrangement to withdraw that occur on or after the effective date of final regulations.

### Issues

The contribution rate per contribution base unit applicable to an employer is determined by the terms of the collective bargaining agreement under which the contributions are made and is not necessarily the same for all employers contributing to the plan. Different contribution rates generally also correlate to different benefit rates under the plan. The fraction in the proposed regulations can therefore lead to inappropriate results because it does not take into account potential variations in contribution rates per contribution base unit and in benefit rates.

We suggest that the fraction instead be based on the product of contribution base units and contribution rates for the three plan years preceding the withdrawal from the plan. Specifically, the numerator would be the product of the employer's average contribution base units during the three years times the highest contribution rate at which the employer had an obligation to contribute under the plan during the three years, and the denominator would be the sum of the numerators for all employers liable for reallocation liability.<sup>1</sup> We also suggest that the regulations provide for situations in which an employer's contribution rate varies for different groups of employees, for example, if the employer contributes under different collective bargaining agreements with different contribution rates<sup>2</sup> or if different contribution rates apply with respect to contribution base units of full-time and part-time employees. In such cases, the product in the numerator of the fraction could be calculated separately with respect to different

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<sup>1</sup> The calculation in the numerator is similar to the method used to calculate annual withdrawal liability payments under ERISA Sec. 4219(c)(1)(C)(i).

<sup>2</sup> This situation is addressed in PBGC Opinion Letter 90-2 (April 20, 1990) in the context of ERISA Sec. 4219(c)(1)(C)(i).

groups of employees, with the employer's total numerator being the sum of the separate products. Another issue arises if an employer's contributions were zero for the entire three-year period. In that case, it may be appropriate to lengthen the three-year period for purposes of determining the employer's highest contribution rate.

Existing regulations provide that the fraction is to be applied in accordance with a special rule for certain employers with no or reduced initial withdrawal liability. Clarification is needed as to the continued applicability of the special rule in light of the change to the fraction under the proposed regulations.

In addition, existing regulations permit plans to adopt rules that calculate an employer's share of reallocation liability using a method different from the prescribed method, provided that the plan's rules allocate the plan's unfunded vested benefits to substantially the same extent that the prescribed method would. Clarification is needed as to the effect of the change made by the proposed regulations on plans that have adopted their own methods.

#### **Cross Reference in Proposed Regulations Relating to Computing Withdrawal Liability**

Finally, we note a correction needed to the proposed regulations under Section 4211 of ERISA relating to the denominator of the fractions used to allocate unfunded vested benefits to a withdrawing employer. The proposed regulations refer to "the amounts considered contributed to the plan for purposes of section 412(b)(3)(A) of the Code" for a specified period. For years in the specified period after 2007, it appears the regulations should refer to section 431(b)(3)(A) of the Code.

We appreciate your consideration of these comments and would be happy to discuss them with you.

Sincerely,

A handwritten signature in black ink that reads "Deborah R. White". The signature is written in a cursive, slightly slanted style.

Deborah R. White  
Senior Vice President &  
Chief Legal Officer