Segal Consulting

1800 M Street NW Suite 900 S Washington, DC 20036
T 202.833.6400 www.segalco.com

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Sent by email to: reg.comments@pbgc.gov

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

Re: Methods for Computing Withdrawal Liability, Multiemployer Pension Reform Act of 2014 (RIN 1212-AB36)

Dear Sir or Madam:

Thank you for the opportunity to comment on your recently published notice of proposed rulemaking: "Methods for Computing Withdrawal Liability, Multiemployer Pension Reform Act of 2014" (RIN 1212-AB36). The rulemaking relates to a matter of great importance to Segal Consulting (Segal) and our approximately 400 multiemployer pension plan clients covering 3.8 million participants. Segal is a major provider of actuarial, employee benefits, and human capital consulting services to employers and employee benefit plans throughout the United States, servicing more multiemployer pension plans than any other consulting firm.

General Comments

The proposed regulation and simplified methods proffered by PBGC implement statutory changes, as required under the Pension Protection Act of 2006 (PPA) and the Multiemployer Pension Reform Act of 2014 (MPRA), affecting the determination of an employer's withdrawal liability and annual payment amount when an employer withdraws from a multiemployer plan. Before turning to Segal's detailed comments, it is important to emphasize our overall concern that the proposed applicability dates of the regulation, including the simplified methods, should not impose on plans undue complications and increased administrative costs.

Effective Date Should be as of a Specified Prospective Plan Year

The proposed regulation provides that the changes relating to simplified methods for determining an employer's share of unfunded vested benefits (UVB) and annual withdrawal liability payment would apply to employer withdrawals after the effective date of the final regulation. Changes relating to MPRA benefit suspensions and contribution increases for determining withdrawal liability would apply to plan years beginning after December 31, 2014, and employer surcharges, the obligation for which accrue on or after December 31, 2014.

We are concerned that this approach may require plans to implement changes to withdrawal liability calculations at some time other than the beginning or end of a specified plan year (i.e., mid-plan year) and would require retroactive application. Given that employers have withdrawn from plans since December 31, 2014, any rule that would imply retroactive application to the amount of employers' assessed withdrawal liability and installment payment amounts is highly problematic and would impose on plans undue complication and added expense in the calculation, legal defense and collection of liability.

To address these concerns, the final regulation should apply prospectively to withdrawals occurring in or after a specified, prospective plan year (e.g., first effective for withdrawals occurring in the plan year that next follows the plan year in which the final regulation becomes effective), with transitional rules to allow plans time to adopt changes in practice to account for the final regulation. Such transitional rules could provide that good-faith compliance with existing rules is required until the effective date of the final regulation and that in the event the next plan year begins within six months following the issuance of the final regulation, the final regulation would provide that it is effective for employer withdrawals in the subsequent plan year.

Scaled Requirement for Actuarially-Determining Contribution Increases and Safe Harbor for Good Faith Compliance Should be Provided

MPRA requires that contribution increases required or made to enable a plan to meet the funding requirements of a funding improvement plan (FIP) or rehabilitation plan (RP) are to be excluded in the calculation of an employer's allocable share of UVB and annual payment amount. Certain contribution increases, however, are required to be included. The proposed regulation requires that *actuarially-determined* contribution increases (applicable to plan years beginning after December 31, 2014) recognized for benefit accrual purposes must be included in such calculations for critical and endangered status plans, even where those increases are required under a FIP or RP.

Because plans have been operating in the absence of comprehensive guidance for some time, many plans have adopted, in good faith, other calculation methods. One such example involves plans that have a percentage of contributions benefit formula. For such plans, in the absence of a specific designation of contributions that provide for increased benefit accruals, plans may have adopted a calculation method that includes the entire required contribution increase (rather than actuarially-determined increases) since, under a plain reading of §305(g)(3)(B) of the Employee Retirement Income Security Act (ERISA), the entire required contribution increase is "used to provide" and available for the calculation of benefits under a percentage of calculations benefit formula (not just the actuarially-determined portion needed for funding the benefit increase).[1]

[1] Plans that have a tiered accrual benefit structure based on contribution rate or other variable basis linked to contributions or the contribution rates also may have adopted a similar approach.

If PBGC does not withdraw this new interpretation, we request that, to insulate plans from increased actuarial, administrative and legal costs, the final regulation clearly provide that actuarially-determined portions of benefit-bearing contribution increases are to be determined prospectively and on a plan-wide basis, unless the plan sponsor elects to make that determination on an employer-by-employer basis.

Further, some plans may require both a supplemental non-benefit bearing contribution increase under either a FIP or RP and a contribution increase that is benefit bearing. For such plans, no actuarial determination regarding supplemental increases is necessary and such increases are excluded in the calculation of an employer's allocable share of UVB and annual payment amount. It also should be the case that no actuarial determination should be required under the final regulations for those contribution increases that are benefit bearing and such increases are always included for purposes of allocating UVB and determining annual payment amounts. Accordingly, plans with both required supplemental contributions and benefit-bearing contributions should not determine the actuarial costs of the combined benefit increases. Such determinations could result in supplemental contributions being required to be included in withdrawal liability calculations in cases where, for example, the assumed investment return assumption is low or the actuarial determination is made for a mature group of participants.

To reduce increased actuarial, administrative and legal costs in responding to withdrawn-employer challenges to plans' good-faith compliance methods in use prior to the final regulation, we request that the final regulation explicitly provide a safe harbor for plans' good faith compliance in interpreting the requirement to include contribution increases in calculations completed, and assessments issued, before the effective date of the final regulation (with extension as indicated above).

Specific Comments

1. Clarification of PBGC Technical Update 10-3

The proposed regulation generally incorporates the guidance provided in Technical Update 10-3 (Tech Update) and provides additional interpretive clarity regarding the simplified method, as described in the Tech Update, for applying §305(e)(8) of ERISA in disregarding reductions in adjustable benefits in withdrawal liability determinations. The Tech Update describes how to determine the amount of additional unfunded vested benefits (UVB) are allocable to employers that withdraw after a plan in which critical status (Red Zone) benefit reductions (adjustable benefit reductions) take effect. Under the Tech Update, special liability pools are created (Affected Benefits Pool or ABP) representing the value of adjustable benefits that were eliminated. A withdrawing employer's share of the ABP liability is determined and added to liabilities otherwise allocable to the employer (liability in the basic and reallocation pools) in order to determine the employer's withdrawal liability. The proposed regulation adopts this simplified method but clarifies that the UVB in the basic and reallocation pools and the ABP are first aggregated and only then adjusted under ERISA §4201 (reflecting the de minimis reduction and 20-year cap adjustment).

To the extent that the Tech Update was unclear, and to the extent plans relied on the guidance in the Tech Update as originally stated, we support the interpretation of the simplified method as described in the proposed regulation, provided that the final regulation applies this clarification on a prospective basis, and provided that the final regulation includes a safe harbor for plans that may have interpreted the Tech Update differently and applied that interpretation for benefit reductions under MPRA prior to the issuance of the final regulation.

Given the clarification in the proposed regulation that, for purposes of adjustments under ERISA §4201, liability in the ABP is not an add-on liability that is separate and apart from an employer's allocable share of the UVB in the basic and reallocation pools (except for the use of a 15-year amortization schedule and allocation of all ABP using only the most recent 5-year contribution history), the final regulation also should expressly allow plans to apply a good-faith interpretation to the issues described below.

a. *Permissible Offset of the Employer's Allocable Share of UVB in the Basic Pool*

Prior to aggregating the allocation of "normal" UVB with the ABP, if the summing of the other pools results in a negative value in the employer's share of liability in those pools, plans should be permitted to use that negative value to offset an employer's allocable share of the ABP, provided that the value of the plan's aggregate UVB is not less than zero.

b. *Permissible Fresh Start Election for Construction Plans With UVB Only in the ABP (but no UVB in the "Normal" Calculation)*

PPA extended the election of a "fresh start" to construction industry plans, provided that, as stated in PBGC's current regulation §4211.12(c)(3) and §4211.12(d)(3) of the proposed regulation, the fresh start first applies to a year in which the plan as a whole had no UVB. Given that, prior to aggregation, liability from the ABP is determined separately from other liability pools, construction-industry plans that have no UVB in a plan year (assets greater than actual vested liabilities based on the "normal" calculation) should be permitted to elect a fresh start for that plan year, even if the plan has, and continues to have, an ABP.

c. *Permissible Elimination of UVB in the ABP Through Restoration of Reduced Adjustable Benefits*

If all or some reduced adjustable benefits are restored (e.g., through additional employer contributions for that purpose), plans should be allowed to treat the liability in the ABP as if it had been reduced or eliminated to the extent that the reduced adjustable benefits are restored, whether or not the plan has UVB in the basic calculation. Reduction or elimination of the liability in the ABP is appropriate in this circumstance given that the value of the restored adjustable benefits would be included in the UVB in the basic pools.

2. Additional Option and Clarification Needed Regarding the Simplified Method for Disregarding Adjustable Benefit Reductions and Suspensions (proposed new §4211.16)

a. Additional Option for Determining the Employer's Share of the Adjustable Benefit Reduction Under the Presumptive Method

The proposed regulation expressly allows allocation of the ABP based on the most recent five plan years ending before the employer's withdrawal, even for the presumptive method, which would otherwise require allocation of amounts to years in which the liability arises in the ABP based on the then-current year and prior four years. For plans using the presumptive method, the final regulation should provide an option for allocating the ABP to an employer based on the five years ending with the plan year for which the ABP is established (i.e., same five-year allocation fraction used to allocate an unamortized annual change in the UVB in basic pools and reallocated amounts).

This additional option would: 1) produce an allocation that is more consistent with the amount that would be allocated to an employer if the plan did not use a simplified allocation method; and 2) protect employers without a previous contribution obligation (new employers) from being allocated a portion of the ABP (the liability for which arose before such employers began contributing to the plan) thus eliminating a possible hindrance to new employers joining the plan and serving to bolster funding of the plan.

b. Clarification Needed That Calculation of Hypothetical Plan Assets is not Required if Plan Does not Adopt the Simplified Methods

The proposed rule provides that under the "simplified framework," a plan sponsor must include liabilities for benefits reduced or suspended in the value of vested benefits but that the plan sponsor is not required to calculate what plan assets would have been if the benefit payments had been higher. Given that our experience is that plans do not track hypothetical plan assets in this regard (and to do so would be burdensome and expensive), the final regulation should clarify that, regardless of whether plans adopt simplified methods for disregarding benefits reduced or suspended, plans are not required to track what plan assets would have been absent those reductions or suspensions.

3. Responses to PBGC's Specific Questions

Question 1: Examples of Simplified Methods

Partial Withdrawal Liability Examples Needed

The examples provided in the proposed regulation are generally useful. The proposed regulation, however, does not include examples of simplified methods as applied to partial withdrawals. Helpful clarification, with appropriate examples provided in the final regulation, would include whether, for purposes of adjustable benefit reductions, the plan would apply the partial withdrawal fraction (as provided under ERISA §4206(a)(2)) to the ABP. Further helpful clarification in the final regulation would indicate how a plan would determine the credit for the portion of a prior withdrawal that included an allocation of the ABP.

Question 2: III.A. Requirement to Disregard Certain Contribution Increases in Determining the Allocation of Unfunded Vested Benefits to an Employer and the Annual Withdrawal Liability Payment Amount (proposed revised §4211.4)

Plans Using the Direct Attribution Allocation Method Should not be Precluded from Adopting Simplified Methods for Disregarding Surcharges and Certain Contribution Increases

Section 4211.4 of the proposed regulation provides that, for plans using the presumptive, modified presumptive and rolling-5 methods, such plans may adopt the proposed simplified methods for disregarding surcharges and certain contribution increases as provided under proposed new §4211.14 and for determining the expiration date of a collective bargaining agreement under proposed new §4211.15. Although an employer's withdrawal liability under the direct attribution method is not based on the employer's percentage of total contributions as it is under the other statutory allocation methods, the final regulation should not preclude plans using the direct attribution method from using the simplified methods if use of such methods is otherwise reasonable, as determined by the plan sponsor.

Question 3: III.B.3. Simplified Method for Determining the Denominator Using the Proxy Group Method (proposed new §4211.14(d))

a. *Additional Flexibility Needed for Determining Proxy Group*

The proxy group method, as described under the proposed regulation, recognizes the frequent occurrence of multiple contribution schedules under a FIP or RP with varying contribution rate increases. The proposed regulation also recognizes that accounting for each employer's contribution increase schedule each year to reflect the exact amount of the employer's contributions in the denominator of the allocation fraction could be administratively burdensome. To help resolve these complexities, the proposed proxy group method allows a plan sponsor to identify contribution rate schedule groups consisting of employers that have a similar history of both total rate increases and disregarded rate increases. The plan sponsor must select a group of employers that includes at least one employer from each rate schedule group (except the proxy group does not have to include an employer of a rate schedule group representing less than 5% of active participants).

Although the proxy group method is intended to accommodate multiple contribution schedules, the method fails to account for the tremendous variation that may occur within contribution schedules adopted as part of the FIP or RP regarding different contribution rate increases, and fails to consider that one or more bargaining groups of an employer may be covered under different contribution schedules. Rather than basing the proxy group solely on the plan's contribution rate schedule groups established by employer, the final regulations should provide for more flexibility in determining the proxy group, including the use of grouping by bargaining unit and/or collective bargaining agreement.

b. Permitted use of Reasonable Estimate of Adjusted Contributions

As described under the proposed regulation, the proxy group method allows a plan sponsor to determine "adjusted contributions" (the amount of contributions that would have been made excluding contribution rate increases that must be disregarded) based on the exclusion that would apply for the representative proxy group. In order to facilitate the use of the proxy method by plans, in addition to flexibility in determining the proxy group, the final regulation should provide that, to the extent sufficient data is not available,[2] the plan is permitted to reasonably estimate data required to determine adjusted contributions.

Question 4: III.C. Simplified Methods After Plan is no longer in Endangered or Critical Status in Determining the Allocation of Unfunded Vested Benefits

We have no comments regarding Question 4.

Question 5: VI. Compliance with Rulemaking Guidelines

Adoption of the simplified methods provided in the proposed regulation may generate some administrative cost savings. Significantly, however, any cost-saving measures associated with the simplified methods would be offset by the costs associated with actuarial determinations of the portion of required contribution increases that covers the cost of associated benefit increases (particularly actuarial calculations based on the demographics of each employer's own employees).

Plans may also experience increased costs associated with employer challenges to assessed withdrawal liability amounts and annual payments. Plans have been operating in good faith compliance with the existing rules to capture contribution increases required to be included in withdrawal liability calculations. To protect plans from increased actuarial, administrative and legal costs resulting from withdrawn-employer challenges to such good-faith compliance methods, the final regulation should clearly provide a safe harbor for such methods in use prior to the effective date and that actuarially-determined benefit-bearing contribution increases are to be determined prospectively and on a plan-wide basis, unless the plan sponsor elects to make that determination on an employer-by-employer basis.

As an additional cost saving measure, the final regulation should not require contribution increases to be actuarially determined for plans for which a FIP or RP requires contribution increases that are benefit bearing.

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[2] For example, all contributing entities within an employer's controlled group might not be known until an actual withdrawal occurs.

Thank you for the opportunity to provide comments on this very important subject. If you have any questions about these comments please contact me at 202-833-6472 or ssimons@segalco.com

Sincerely yours,

Serena G. Simons

Serena G. Simons
Senior Vice President, National Compliance Retirement Practice Leader