NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, D.C. 20006 • PHONE 202-737-5315 • FAX 202-737-1308

MICHAEL D. SCOTT
EXECUTIVE DIRECTOR
E-MAIL: MSCOTT@NCCMP.ORG

August 25, 2017

The Honorable W. Thomas Reeder
Director
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington DC, 20005-4026

Submitted online at: http://www.regulations.gov

RE: Pension Benefit Guaranty Corporation, Regulatory Planning and Review of Existing Regulations, Request for Information (82 Fed. Reg. 34619, July 26, 2017) Implementing Executive Order No. 13771 (January 30, 2017) and No. 13777 (February 24, 2017) ("RFI")

Dear Mr. Reeder:

The National Coordinating Committee for Multiemployer Plans ("NCCMP") appreciates the opportunity to respond to the RFI issued by the Pension Benefit Guaranty Corporation ("PBGC"). With a view to the PBGC's fall iteration of its semi-annual regulatory agenda and in furtherance of Executive Orders No. 13771 and No. 13777, the RFI seeks comments on regulatory and deregulatory actions the PBGC should take.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the job creating employers of America and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role for employers in providing benefits to working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code ("IRC" or "Code") Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. Those segments include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking industries. Multiemployer plans are jointly trusteed by management and employee trustees.

SUMMARY OF COMMENTS

NCCMP believes that each of the proposed regulations, final regulations, and items of guidance identified below should be modified because each imposes costs on plans and/or contributing employers that outweigh the benefit of the regulation. Our most important concerns relate to the regulations implementing the remedial tools provided under the Multiemployer Pension Reform Act of 2014 ("MPRA"). Those regulations fail to fulfill the primary purpose of MPRA—to provide

a path to solvency for deeply troubled plans—and further jeopardize the employers and the pensions of Americans participating in those plans.

In addition to regulatory issues, the NCCMP also has significant concerns regarding the proposal in the President's Fiscal Year 2018 Budget relating to PBGC premiums with respect to multiemployer plans. While this proposal is characterized as "Protecting Multiemployer Plan Participants" it would have the opposite result. Increasing PBGC premiums is not a viable approach to the financial problems faced by specific multiemployer plans or the multiemployer plan system as a whole based on current projections. NCCMP opposes premium increases beyond the current statutory provisions. Rather, the most effective approach is to properly implement MPRA and to pursue legislative solutions that provide a realistic means of protecting the interests of financially troubled plans, all multiemployer plans and the multiemployer system, plan participants, contributing employers, the PBGC and all levels of government.

Our comments are organized by topic, as follows:

Regulatory Issues

I. The implementation of provisions under MPRA, Division O of the Consolidated and Further Continuing Appropriation Act, 2015, Public Law No. 113-235 (128 Stat. 2130) in conjunction with PBGC's proposed rule to amend PBGC's regulation on mergers and transfers between multiemployer plans (81 Fed. Reg. 36229, June 6, 2016), regarding proposed 29 C.F.R. §4231.2, 4231.3, 4231.6, 4231.11, and 4231.12, as well as PBGC's final rule on partitions (80 Fed. Reg. 79687, Dec. 23, 2015) regarding 29 C.F.R. §4233.7 ("MPRA Regulations" or "Regulations").

II. The implementation of certain provisions regarding withdrawal liability as discussed in PBGC's request for information (82 Fed. Reg. 1376, January 5, 2017), regarding 29 C.F.R. §4211.11 and 4211.23 ("Withdrawal Liability Regulations").

III. Proposed revision of the Annual Information Return/Reports (Form 5500) and Proposed Rules Regarding Annual Reporting and Disclosures, issued jointly by the Department of the Treasury ("Treasury"), Department of Labor ("DOL"), and PBGC (collectively, the "Agencies") RIN 1210-AB63 (81 Fed. Reg. 47534 July 21, 2016,) ("Proposed Form 5500 Modernization Regulations").

IV. Provisions regarding the content of certain notices and the penalty for failure to provide notices as provided under 29 C.F.R §4245.4, 4245.5 and 4245.6, §4281.45 and §4302.2 ("Notice and Penalty Regulations").

President's Budget Proposal

The provisions of the President's Fiscal Year 2018 Budget Proposal (Office of Management and Budget, issued on May 23, 2017), proposing that PBGC be allowed to impose a variable-rate premium on employers contributing to multiemployer plans and an exit premium as assessed on employers withdrawing from multiemployer plans ("Proposed Budget Provisions on Premiums").

REGULATORY ISSUES

I. MPRA REGULATIONS

Overview

The MPRA Regulations should be modified because, as they are currently written and enforced, they are inconsistent with MPRA's intent. MPRA was intended to provide suspension and other tools to permit multiemployer plans to take the actions necessary to restore or extend solvency thereby reducing the PBGC's net deficit, and avoiding the need for future Federal assistance to the multiemployer pension system.

MPRA was passed in recognition that deeply troubled multiemployer defined benefit ("DB") plans needed to have the tools to meaningfully address plan solvency. The NCCMP was a leader in this effort.

NCCMP's Retirement Security Review Commission ("Commission"), consisting of representatives from employer and labor organizations, pension plans and large employers, considered the challenges and all potential solutions facing the multiemployer system over a period of 18 months. The Commission resulted in a comprehensive plan entitled *Solutions Not Bailouts*, in an effort to address the challenges facing the multiemployer community and to safeguard the security of multiemployer pension plans for their employers and participants. *Solutions Not Bailouts* recognized the need for Trustees to have the ability to design plan-specific strategies to restore solvency. MPRA reflects, in large part, the ideas put forth by the Commission, including the suspension of benefits.

In addition to allowing plans to suspend benefits, MPRA enhanced existing tools provided under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"),[1] including PBGC-facilitated mergers and transfers. The intent of MPRA was to enable troubled multiemployer plans to take timely remedial action to avoid insolvency, or extend solvency, provided such actions will enable the plan to provide participants and beneficiaries with the highest benefits possible while still remaining solvent. MPRA was designed to result in benefit payments that are higher than the benefit payments that are available under the PBGC multiemployer guaranty program for participants in insolvent multiemployer plans, and a decreased number of plans that become insolvent and therefore reliant on the PBGC.

There has, however, been a devastating failure to implement MPRA as intended. This failure to implement is reflected in the fact that, to date, Treasury has approved only three applications for suspension (out of 18 original or revised applications submitted by 15 plans) and PBGC has approved only one application for partition (out of four original or revised applications) under MPRA.

[1] Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001-1461. As used herein, statutory citations are to applicable ERISA sections. PBGC's regulations, 29 C.F.R. §§4000-4907, are cited herein by applicable section number.

Successful MPRA applications for either or both suspension and partition would reduce the net deficit in the PBGC multiemployer guaranty program by removing those plans from the calculation. The PBGC's net deficit is the principal driver of calls to increase premiums in the multiemployer program. Treasury's failure to implement MPRA as intended is resulting in more plans becoming insolvent, and contributing to the grim outlook for participants and beneficiaries in financially troubled multiemployer plans given PBGC's near-term challenges.

PBGC provides financial assistance to insolvent plans from the money it receives from multiemployer DB plan premium payments and investment earnings. PBGC has stated that its multiemployer program will be insolvent in 2025.[2] Once that occurs, and in the absence of Congressional action, PBGC's guarantee level will be reduced to an amount payable from incoming premium payments only.

To help minimize these costly consequences, there are a number of modifications that PBGC should make to the MPRA Regulations to make them more effective and useful.

Mergers and Transfers[3]

PBGC's Regulations Should Better Reflect PBGC's Enhanced Authority to Promote and Facilitate Mergers Involving Troubled Plans -- Prop. Reg. §4231.12 (responsive to RFI questions 5 and 13)

For a small "critical and declining" plan contemplating merging into a larger healthy plan, it may be necessary for the critical and declining plan to implement a MPRA benefit suspension in order to make the merger transaction economically feasible and prudent. However, Treasury takes the position that, after the merger, the suspension must end, and pre-MPRA benefit levels must be restored prospectively, if the suspension is not necessary to forestall the insolvency of the merged plan. Treasury's position effectively precludes a critical and declining plan from extending its solvency by merging into a healthier plan.[4]

MPRA enhanced PBGC's pivotal role in mergers. MPRA amended the existing rules under ERISA §4231 by adding a new ERISA §4231(e)(1), clarifying PBGC's authority to take actions it deems appropriate to promote and facilitate the merger of two or more multiemployer plans. PBGC should use its statutory authority to modify Prop Reg. §4231.12(a)(1) to allow the plan sponsor of the merged plan to use separate accounting with respect to the merged-in plan when making the annual determination that the suspension of the merged-in plan benefits remains necessary. Such

---

[2] PBGC reports in its FY 2016 Projections Report that its multiemployer program likely will be insolvent by the end of fiscal year 2025. *See*, PBGC FY 2016 Projections Report (August 2017), p.2.

[3] Our discussion of PBGC's proposed regulations regarding mergers and transfers highlights and expands the comments NCCMP provided to PBGC on August 5, 2016, in response to PBGC's request for comments on the proposed rules on mergers and transfers between multiemployer plans, available at: www.regulations.gov/document?D=PBGC-2016-0003-0009

[4] On July 31, 2017, NCCMP filed comments in response to the Department of the Treasury Request for Information (82 Fed. Reg. 27217, June 14, 2017) Implementing Executive Order No. 13771 (January 30, 2017) and No. 13777 (February 24, 2017) urging Treasury to, among other things, revise its position on the restoration of benefits post-merger in light of MPRA's intent to provide remedial tools to troubled plans, available at: www.regulations.gov/document?D=TREAS-DO-2017-0012-0050

a modification would encourage more plans to remediate their financial condition with a combination of suspension and merger. Under such separate accounting, no increase in past service for the merged-in plan participants would be permitted, but future benefit improvements for the participants in the merged-in plan would not be precluded.

In its proposed regulations, PBGC describes "facilitation" for purposes of ERISA §4231(e)(1) as including, among other things, support with related requests to other government agencies. At minimum, PBGC should work with Treasury to revise its position regarding the prospective restoration of benefits post-merger so that more plans are able to use suspension and merger as remedial tools promised under MPRA.

PBGC's Regulations Should Retain Current Solvency Tests -- Prop Reg. §4231.6 (responsive to RFI questions 5, 10 and 13)

For plans to engage in a merger or a transfer, the plan sponsor of each plan that exists after the transaction must demonstrate that, post-transaction, the benefits of the participants and beneficiaries are not reasonably expected to be subject to suspension under the insolvency provisions of ERISA §4245. This requirement is satisfied if the applicable solvency test as described in PBGC's regulations is satisfied.

Contrary to MPRA's intent to help troubled plans, Prop. Reg. §4231.6(a) tightens the solvency test for plans that are not significantly affected by: (i) lengthening the required period from five to 10 years after the effective date of the transaction; and (ii) increasing the multiplier for the fair market value of assets immediately after the transaction from five to 10 times the amount of the pre-transaction benefit payments. The proposed regulations also tighten the solvency test for significantly affected plans under Reg. §4231.6(b) by lengthening the solvency requirement from five years to 10 years. Tightening the safe harbors is contrary to MPRA's remedial intent and unduly restricts the transactions in which plans may seek to engage.

PBGC should incorporate the solvency tests as described in the current regulation and not the proposed regulation as sufficient for the plan to demonstrate that, post-transaction, benefits are not reasonably expected to be subject to suspension under ERISA §4245.

PBGC's Regulations Should Provide a Safe Harbor Demonstration of Solvency -- Prop. Reg. §4231.3 (responsive to RFI questions 1, 5, 10, 11 and 13)

PBGC's proposed regulations retain the provision in the current regulations that if a plan's actuary cannot demonstrate that a plan meets the applicable plan solvency test under Prop. Reg. §4231.6, the actuary may, as provided under Prop. Reg. §4231.3(a)(3)(ii), "otherwise demonstrate" that benefits under the plan are not reasonably expected to be subject to suspension under ERISA §4245. However, PBGC has not issued guidance or information regarding how such a demonstration is made. Because more plans may seek to use this method of demonstrating solvency, PBGC should issue guidance or examples regarding how the demonstration could be made.

PBGC also should modify Prop. Reg. §4231.3(a)(3)(ii) to add an alternative, safe-harbor solvency test that allows transactions to occur if the transaction enables one or more of the plans involved to avoid or postpone insolvency, provided that none of the plans involved are otherwise adversely affected. For example, PBGC could provide that a showing that a transaction increases the period of solvency for one or more of the plans, but does not decrease the solvency period for any, would satisfy the safe harbor. Safe harbors reduce burdens and costs for plans.

PBGC's Regulations Should Retain Current Definition of Significantly Affected Plan for Transfers -- Prop. Reg. §4231.2 (responsive to RFI questions 5, 10 and 13)

PBGC's proposed regulations also expand the definition of significantly affected plan ("SAP") under Prop. Reg. §4231.2 to include all endangered and critical status plans for purposes of transfers (other than de minimis transfers) so that any transfer by an endangered or critical status plan is subject to more stringent solvency tests. The expansion of the definition of SAP effectively precludes all transfers for endangered and critical status plans.

PBGC should incorporate the definition of SAP as described in the current regulation and not the proposed regulation in furtherance of MPRA's intent to provide troubled plans with remedial tools, and to spare such plans the burden and costs associated with the more stringent tests.

PBGC's Regulations Should Provide a Safe Harbor for New Multiemployer Plans -- Reg. §4001.2 (responsive to RFI questions 1, 2, 5, 10, 11 and 13)

Plans may engage in a series of transactions involving a combination of merger and transfers to shift assets and liabilities in order to improve the funded status of the plans involved in the transactions. On occasion, plans may seek to establish a new multiemployer plan as part of such transactions. There is uncertainty, however, about whether such plans meet the requirements to be considered a multiemployer plan under Title I of ERISA, and applicable regulations. Such uncertainty precludes troubled plans from taking the risk of engaging in transactions that involve establishing new multiemployer plans.

PBGC is mandated under ERISA §4004(a)(1) to encourage the continuation and maintenance of voluntary private pension plans, and has MPRA-enhanced authority under §4231(e) to facilitate transactions under ERISA §4231. PBGC should use its powers under these provisions to implement MPRA's remedial tools by amending Reg. §4001.2 to include a safe harbor for new multiemployer plans created or established as a result of a transaction under ERISA §4231. Under the safe harbor, such plans would be considered multiemployer plans, provided that: (i) the plans otherwise meet the definition of multiemployer plan as described under ERISA §4001(a)(3); and (ii) the plans elected to be subject to the requirements of the Pension Protection Act of 2006 to the extent permitted under applicable law. Meeting the requirements for the safe harbor should be considered persuasive for purposes of Title I of ERISA.

Partitions[5]

PBGC's Should Facilitate Discussions with Treasury to Amend Applicable Regulations to Require Acceptance of the Plan Actuary's Actuarial Assumptions and Methodologies -- Reg. §4233.7 (responsive to RFI questions 5, 10, 11 and 13)

Under MPRA, PBGC may order a partition only if Treasury, after consulting with DOL and PBGC, approves a suspension of benefits. PBGC's ability to order partitions, however, has been derailed by Treasury's failure to implement MPRA as intended.

Treasury has interpreted the statutory provisions of MPRA as not specifying a standard for its review of actuarial assumptions and methods used in suspension applications as selected by the plan actuary. In implementing MPRA through regulations, Treasury has deemed this perceived statutory silence as authorization to select any standard Treasury deems appropriate. As a result, Treasury has determined that any actuarial assumptions that are not developed in precise accord with the opinions of Treasury staff are unreasonable and provide a basis for denying a suspension application.[6]

With this approach, Treasury has given itself unlimited discretion to ask for supplemental and additional information to develop the assumptions it prefers, which causes the cost of suspension and partition applications to be unnecessarily increased and beyond what is affordable for most troubled plans.

Under PBGC's statutory mandate, as described in ERISA §4004(a)(1), to encourage the continuation and maintenance of voluntary private pension plans, PBGC should facilitate discussions with Treasury for the effective implementation of the remedial tools promised under MPRA. PBGC should also amend §4233.7(c)(2) to provide that PBGC must accept the plan actuary's assumptions and methodologies used to project solvency, taking into account the proposed suspension and partition, unless such assumptions and methodologies do not meet the applicable Actuarial Standards of Practice as specified by the Actuarial Standards Board.

II. WITHDRAWAL LIABILITY PROVISIONS

As discussed in depth in our previous comment, NCCMP believes that, in some circumstances, withdrawal liability may protect multiemployer plans by stabilizing plans with a high potential for

---

[5] Our discussion of PBGC's regulations regarding partitions highlights and expands the comments NCCMP provided to PBGC on April 6, 2015, in response to PBGC's request for information on partition of eligible multiemployer plans and facilitated mergers, as well as comments NCCMP provided on August 18, 2015, on the interim final rule on partitions of eligible multiemployer plans; available at: www.regulations.gov/contentStreamer?documentId=PBGC-2015-0001-0013&attachmentNumber=1&contentType=pdf; and www.regulations.gov/document?D=PBGC-2015-0004-0009.

[6] As expressed in the comments filed by NCCMP on July 31, 2017, in response to the Department of the Treasury Request for Information (82 Fed. Reg. 27217, June 14, 2017) Implementing Executive Order No. 13771 (January 30, 2017) and No. 13777 (February 24, 2017), NCCMP urged Treasury to modify its regulations to provide that Treasury must accept the plan actuary's assumptions used to project solvency, taking into account the proposed suspension, unless such assumptions and methodologies do not meet the applicable Actuarial Standards of Practice as specified by the Actuarial Standards Board. See Footnote 4 above for link to comments filed by NCCMP.

insolvency, but also believes that withdrawal liability should not be allowed to deter employer participation.[7]

To harmonize these interests, NCCMP believes well-designed alternative withdrawal liability arrangements, including two-pool alternative withdrawal liability arrangements,[8] alone or in strategic combination with other tools available under ERISA and as introduced under MPRA, may enhance the financial security of all multiemployer plans. Such arrangements offer the possibility of bolstering the financial security of plans by attracting new employers to plans with growth potential. The arrangements also may be beneficial to plans generally by providing potentially significant and near-term cash infusions in the form of continued contributions, in addition to withdrawal liability payments that may extend plan solvency and preserve plan benefits longer term. However, to realize the full potential of two-pool alternative withdrawal liability arrangements and the remedial tools provided under MPRA, modifications to PBGC's regulations are required.

PBGC's Current Review Process of Two-Pool Alternative Withdrawal Liability Arrangements is Beyond its Statutory Authority -- Reg. §4211.23 (responsive to RFI questions 5, 9, 10 and 13)

NCCMP recognizes that ERISA §4211(c)(5) directs PBGC to "prescribe by regulation a procedure by which a plan may, by amendment, adopt" an alternative withdrawal liability allocation, and that PBGC has exercised that authority and established criteria for approving an alternative withdrawal liability allocation as set forth in Reg. §4211.23. However, notwithstanding the terms of the statute and its own regulations, neither of which include a review of the terms and conditions of withdrawal liability payments, PBGC's current approval process includes such a review and approval.

When the Trustees of a multiemployer plan determine withdrawal liability payments, their actions are authorized by ERISA §4219(c)(7) and §4224 and are subject to ERISA's fiduciary duty rules. Approval by the PBGC is not required.

As NCCMP observed in its previously-submitted comments, PBGC's current approval process, which includes review and approval of the terms and conditions of withdrawal liability payments, expands the agency's authority beyond what is provided under applicable statutory and regulatory

[7] *See* NCCMP's comments provided to PBGC on February 21, 2017, in response to PBGC's Request for Information regarding requests for approving certain alternative methods for computing withdrawal liability and settlement of withdrawal liability and mass withdrawal liability. Our discussion here highlights and expands our previously submitted comments, available at: www.regulations.gov/document?D=PBGC-2017-0001-0004.

[8] As used here, the term "two-pool alternative withdrawal liability arrangements" generally refers to a two-pool alternative allocation method consisting of two pools of assets and liabilities—the old pool and the new pool. The old pool generally consists of total plan assets and liabilities less assets and liabilities in the new pool. The new pool generally consists of assets and liabilities associated with employers that had not previously contributed to the plan and/or existing contributing employers that have withdrawn from the plan and have paid or are paying withdrawal liability to leave the old pool, subject to the terms of a settlement agreement and plan rules. In the event there are no employers remaining in a pool, or in the event of mass withdrawal, the pools collapse into one and the statutory allocation method is as specified under the plan.

provisions when, instead, PBGC should continue to recognize the DOL's role and remain focused on the criteria PBGC set forth for itself in Reg. §4211.23.

Should PBGC maintain its current review process without modification, PBGC should, at a minimum, be more timely in making its decisions, and more transparent regarding its review process. Using the measures NCCMP previously outlined, PBGC should provide plan sponsors with a better understanding of the scope of PBGC's review process so that plan sponsors can better determine whether to undertake efforts to design an alternative withdrawal liability arrangement and the likelihood of PBGC granting approval of such method.

PBGC's Regulations Should Provide that an Allocation Method under Which Separate Liability Pools are Subject to the Presumptive Method is a Statutory Allocation Method -- Reg. §4211.11 and §4220.1 (responsive to RFI questions 5, 10 and 13)

ERISA §4211 requires construction industry plans to use the presumptive allocation method in determining withdrawal liability and restricts the use by such plans of any alternative allocation method. This restriction precludes construction industry plans from withdrawal liability relief available to plans in all other industries.

PBGC has stated in Opinion Letter 86-22 that an allocation method that is a combination of two or more of the statutory allocation methods is not itself a statutory allocation method. However, that Opinion Letter does not address whether an allocation method that uses a single statutory allocation method but creates separate liability pools would be considered a statutory allocation method.

To provide relief to construction industry plans, PBGC should amend Reg. §4211.11 to provide that, subject to ERISA §4220, construction industry plans may adopt an allocation method, as applied to construction industry employers, that uses an approach similar to a two-pool approach. Such an approach would be considered a statutory allocation method, provided the two or more separate liability pools are subject to the presumptive method. PBGC should also amend Reg. §4220.1(b) to conform to the modification made to Reg. §4211.11 that such plan amendments made are subject to the requirements of ERISA §4220, and the regulations thereunder, as currently stated.[9]

PBGC's Regulations Should Provide Plan-Designed Withdrawal Liability Rules for Certain Critical and Declining Status Plans -- Reg. §4220.1(responsive to RFI questions 5, 10 and 13)

As discussed above, under current PBGC practice, plans, including critical and declining status plans, seeking to settle withdrawal liability as part of an alternative allocation method must receive PBGC approval. PBGC's current approval process is often subject to extended delay and requests for additional information. Critical and declining plans that have taken all reasonable measures

[9] ERISA §4220 requires, among other things, that PBGC must disapprove a plan amendment within 90 days after receipt of a complete request for approval, subject to extension. If PBGC does not disapprove the amendment within that timeframe by its action or failure to act, the amendment may be made effective without PBGC approval. The standard for PBGC's review is whether the proposed amendment creates an unreasonable risk of loss to PBGC or plan participants and beneficiaries.

and are not expected to emerge within the rehabilitation period, especially those plans that are forestalling insolvency, have limited resources and shortened timeframes in which Trustees may be able to make decisions that could have a favorable impact on plan outcomes, including decisions related to withdrawal liability.

To provide meaningful relief to such deeply troubled plans, PBGC should prescribe new regulations under ERISA §4224 to allow certain critical and declining status plans the ability, subject to ERISA §4220, to adopt rules and other terms and conditions, notwithstanding any contrary provisions in Part 1 of Subtitle E, for the satisfaction of an employer's withdrawal liability.[10] The suggested new regulations would provide that such actions would not be inconsistent with ERISA or applicable regulations. The new regulations would be limited to critical and declining status plans for which the plan sponsor has determined, pursuant to ERISA §305(e)(3)(A)(ii), all reasonable measures have been taken but the plan either is not reasonably expected to emerge from critical status as of the end of the rehabilitation period, or is forestalling insolvency. PBGC also should amend Reg. §4220.1(b) to conform to the new regulations to provide that plan amendments made pursuant to the new regulations are subject to the requirements of ERISA §4220, and the regulations thereunder, as currently stated.[11]

III. PROPOSED FORM 5500 MODERNIZATION REGULATIONS

The Modernization Regulations Should be Withdrawn and Re-Proposed Before Being Finalized (responsive to RFI questions 5, 8, 9, 10, 11 and 13)

While the NCCMP recognizes that this is a three-agency regulation—PBGC, DOL and the Internal Revenue Service (IRS) (collectively Agencies)—we believe that PBGC should be conscious of the burdens and costs the Agencies are imposing on pension plans.

---

[10] The relief as described here mirrors the relief provided under the "Multi-Employer Pension Plan Partnership Act of 2017," H.R. 2117, as introduced on April 25, 2017 in the 115th Congress (2017-2018) by Rep. Pete Sessions [R-TX-32] except that the relief described herein requires regulatory action whereas relief provided under H.R. 2117 requires amending ERISA §4224 by adding "(a)" to the first paragraph and by adding a new paragraph "(b)" at the end which states:

> (b) Notwithstanding any contrary provisions of this part, in the case of a multiemployer plan that is in critical status within the meaning of subsection (b)(2) of section 305 and whose plan sponsor determines pursuant to subsection (e)(3)(A)(ii) of such section that the plan cannot be reasonably expected to emerge from critical status by the end of the rehabilitation period, such plan may adopt rules for the purpose of forestalling or avoiding insolvency that provide for other terms and conditions for the computation of the amount of an employer's withdrawal liability (not to exceed the amount that would otherwise be determined without regard to this subsection). Any such rule shall become effective at the end of a 90-day period that begins on the date of adoption of the rule unless the corporation disapproves the rule before the end of the 90-day period (except that such 90-day period shall be tolled during any period in which a request by the corporation for additional information is pending). The corporation may disapprove a rule under this subsection only if it reasonably determines that the rule creates an unreasonable risk of loss to plan participants and beneficiaries or to the corporation.

[11] See text related to Footnote 9, above.

The NCCMP gave specific suggestions regarding the Form 5500 Modernization Regulations in its December 5, 2016 and July 31, 2017 comment letters.[12] This response to PBGC is identical in emphasizing our overall concern that the Form 5500 Modernization Regulations fail to strike an appropriate balance between the burden and significant administrative costs imposed on plans and the benefits the plans themselves might receive. The Form 5500 Modernization Regulations require plans to incur the cost of complying with enhanced disclosure requirements that benefit the Agencies' enforcement efforts and third-party research needs, but do not provide a corresponding benefit to the plans.

The NCCMP believes that the Agencies significantly underestimated the cost of compliance when the regulations were proposed, especially for multiemployer plans given their unique structure. The Form 5500 Modernization Regulations require reporting of information that generally is not compiled or requires presentation of data in a way that is significantly different from the way in which it is compiled. Additionally, many of the proposed changes require "yes" or "no" answers to questions with undefined terms, procedures that are lacking in detail, and penalties or consequences for answers that are provided in good faith but might not turn out to be accurate.

We are aware that the comments of many other stakeholders in the employee benefit community mirror the concerns voiced by NCCMP. We recommend that the Form 5500 Modernization Regulations be withdrawn, and that the Agencies develop new proposed regulations that are better crafted to achieve legitimate regulatory purposes without imposing undue burdens.

IV. NOTICE AND PENALTY REGULATIONS

PBGC should amend its regulations to provide that plans receiving financial assistance are exempt from monetary penalties under ERISA §4302 for late or delinquent filing issues in order to preserve plan resources and minimize the administrative burden on such plans. In addition, PBGC should revise certain regulations to eliminate requests for outdated or unnecessary information.

PBGC's Regulations Should Exempt Certain Plans from Penalty -- Reg. §4302.2 (responsive to RFI questions 5, 6, 10, 11 and 13)

ERISA §4302 generally provides that liability to PBGC is incurred for certain failures to provide multiemployer plan notices. Under ERISA §4302, and the regulations thereunder, PBGC may assess a daily penalty amount, as adjusted annually for inflation.

Given the financial devastation already experienced by an insolvent plan that is reliant on financial assistance from PBGC, PBGC should amend Reg. §4302.2 to exempt from penalty plans that are, at the time of the failure to provide notice, receiving financial assistance if the plan otherwise maintains good-faith compliance with applicable PBGC notice requirements.

[12] Available at: https://www.regulations.gov/document?D=EBSA-2016-0010-0153, and www.regulations.gov/document?D=TREAS-DO-2017-0012-0050.

PBGC Should Amend its Notice Regulations for Administrative Efficiency and Accuracy -- Reg. §4245.4, 4245.5, 4245.6, and §4281.45 (responsive to RFI questions 5, 6, 8, 10, 11 and 13)

PBGC should amend the above-reference regulations as follows:

- *Notice of Insolvency Provided to Interested Parties*: PBGC should amend Reg. §4245.4(a) to clarify that after the initial notice of insolvency, annual notices of the plan's continued insolvency need not be issued for subsequent years by plans that are receiving financial assistance. PBGC should also amend the explanation of PBGC-guaranteed benefits provided under Reg. §4245.4(b)(5) to reflect the current PBGC guarantee.

- *Notice of Insolvency Benefit Level Provided to Participants in Pay Status or Reasonably Expected to Enter Pay Status*: For each insolvency year, the plan sponsor is required to notify participants in pay status, or reasonably expected to enter pay status, of the level of benefits expected to be paid during the year. For insolvent plans receiving financial assistance, this annual notice is unnecessary given that the PBGC guarantee amount will not change on an annual basis except: (1) in the extraordinary event of a significant monetary infusion that allows the plan to repay financial assistance and pay plan benefits while remaining solvent; (2) as a result of PBGC multiemployer program insolvency; or (3) as a result of Congressional action.

  Accordingly, PBGC should amend Reg. §4245.5(a) and Reg. §4281.45(a) to provide that a notice of insolvency benefit level is provided once to participants who are in pay status as of the plan year in which the plan receives financial assistance unless the PBGC guarantee amount changes, in which case subsequent notices with revised insolvency benefit levels would be required. Participants that enter pay status after the date the plan first receives financial assistance would also be entitled to a notice, with subsequent notices issued as necessary to reflect any changes in the PBGC guarantee amount.

- *Notice of Insolvency Provided to PBGC* and *Notice of Insolvency Benefit Level Provided to PBGC*: PBGC should amend Reg. §4245.4(a)(4) and Reg. §4245.6(a) to delete the requirement that plans identify the IRS key district that issued the plan's determination letter as the IRS no longer has key districts.

PROPOSED BUDGET PROVISIONS ON PREMIUMS

A significant element of the Proposed Budget Provisions on Premiums ("Proposed Budget") relates to PBGC multiemployer plan premiums.[13] The Proposed Budget includes a $16 billion increase in PBGC multiemployer premiums over the 10-year budget window.[14]

[13] *See* Proposed Budget of the United States Government, Fiscal Year 2018, for the PBGC premium increase in the Labor Department, pp. 740-741, excerpt at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/lab.pdf

[14] The actual number is $21 billion but $5 billion results from a proposal to accelerate premiums due in October 2027 to September 2027, which would bring the payments inside the budget window.

Increased revenue to PBGC's multiemployer program under the Proposed Budget would come from two new premiums. First, there would be a new variable-rate premium for multiemployer plans based on plan underfunding. This would be similar to the single-employer variable rate premium except that PBGC would be given flexibility as to how to impose and/or waive it. The other premium would be a new "exit" tax assessed on withdrawn employers and payable to the PBGC. This would be in addition to withdrawal liability that is paid to the plan. ERISA currently authorizes only a flat-rate premium for multiemployer plans.

Premium Increases Are Not a Realistic Way to Solve Problems Facing the Multiemployer System; Properly Implementing MPRA and Pursuing Alternative Legislative Approaches Are Essential to Sustainability (responsive to RFI questions 2, 5, 10, 12 and 13)

PBGC's net deficit is the principal driver of calls to increase premiums in the multiemployer program. However, the level of PBGC premium payment contemplated under the Proposed Budget in the coming years would cause the collapse of the entire multiemployer system by forcing employers to leave the system, as described in more detail below. Effective implementation of MPRA would help reduce the financial burden on employers and the magnitude of near-term and long-term benefit losses to participants and beneficiaries in multiemployer plans.

Continued ineffective implementation of MPRA will prove to be costly. Treasury has already precluded the use of suspension by the Central States Pension Fund. The impact of the Central States Fund's inability to use MPRA to restore solvency will be shouldered not only by the plan's participants and beneficiaries, but also by the entire multiemployer system when the plan becomes insolvent. Central States retirees who would have seen a 34% reduction in benefits under a MPRA suspension will instead see a 98% reduction. To put this in dollar terms, Central States retirees who would have received a total of $2.9 billion in benefit payments, would instead receive $66.5 million. Retirees in currently insolvent plans receiving financial assistance from PBGC will see a 95% reduction in the benefits paid by the PBGC. With the Central States Fund's insolvency, the level of PBGC premium payments needed to maintain the current guarantee is unsustainable.

There is a significant economic risk to the employers and their employees, both in the Central States Fund as well as in other multiemployer plans. This is particularly true where those plans share multiple employers with the Central States Fund. When the Central States Fund becomes insolvent, the financial condition of the shared employers likely will weaken given their increased exposure to potential unpaid liability, which will in turn negatively influence the security of the other multiemployer plans. While the precise scope of the economic risk is difficult to quantify today, it is likely to be significant, including reduced revenues and employment levels, reduced access to bank credit and the capital markets, and the potential for a significant number of Chapter 11 and Chapter 7 filings.

The U.S. Government, as well as state and local governments, will directly see reduced tax revenues from retiree pension income, lower corporate revenues, and lower wage income. The U.S. economy and the economies of the individual states and local areas will also see reduced economic activity because of the reductions in pension spending and active employee wage spending.

Proposals to increase PBGC premiums to address multiemployer plan insolvencies ignore these very real economic consequences to plans, employers and employees, industries, the entire multiemployer system, and to the PBGC itself and all levels of government. The most effective approach is to properly implement MPRA and to pursue legislative solutions that provide a realistic means of protecting the interests of all concerned.

CONCLUSION

Given the unique complexities and administrative challenges facing multiemployer plans, the NCCMP requests to be included in PBGC's ongoing efforts to comply with President Trump's Executive Orders. The NCCMP is most useful as a resource to PBGC when the Agency is considering the costs and burdens of PBGC regulations and guidance on multiemployer plans, contributing employers, and plan participants and beneficiaries.

Respectfully submitted,

Michael D. Scott
Executive Director