Comments to Pension Benefit Guaranty Corporation ("PBGC") Section 4213 Proposed Rule

1. ERISA Section 4213(a)(1) provides that withdrawal liability be determined by a multiemployer plan using actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, "offer the actuary's best estimate of anticipated experience under the plan". ERISA Section 4213(a)(2) grants authority to the PBGC to issue regulations providing actuarial assumptions and methods for determining unfunded vested benefits for withdrawal liability. However, based on the specific "best estimate of anticipated experience under the plan" language of ERISA Section 4213(a)(1) that Congress adopted, one would think that the PBGC regulations issued under ERISA Section 4213(a)(2) would align and be designed with similar intent to provide the actuary's best estimate of the anticipated experience under a plan, including with respect to the applicable discount rate. Put another way, the PBGC should not ignore the provisions of ERISA Section 4213(a)(1) with respect to the applicable discount rate in formulating regulations under ERISA Section 4213(a)(2), which it appears to have done. Certainly, the standard set by ERISA Section 4213(a)(1) is important since Congress adopted the provisions of that ERISA Section as the default. Instead, the proposed regulations allow an actuary to ignore the goal of providing the best estimate of anticipated experience under the plan when it comes to determining the discount rate to be used in determining unfunded vested benefits for withdrawal liability calculations and allows an actuary to take into account factors that in reality have little if anything to do with the plan's anticipated experience. The proposed regulations should be revised to align with ERISA 4213(a)(1) and how that provision has been recently interpreted by Federal appeals courts in their *Sofco Erectors* and *Energy West* decisions so as to have an actuary offer its best estimate of a multiemployer plan's anticipated experience under the plan (and align more closely with the plan funding rate).

2. The PBGC offers a theory justifying the use of PBGC rates on a blended basis along with funding rates for determining the discount rate used to value of unfunded vested benefits for calculating a withdrawing employer's withdrawal liability. The theory is that blend may be used because a withdrawing employer ceases to participate in the plan's investment experience and because the employer is arguably settling its plan liabilities once and for all and bears no risk of future losses. However, as has been noted in Federal Appeals Court decisions addressing this issue, there is nothing in the statutory text to indicate that ERISA adopted a regime similar to mass withdrawals for individual multiemployer plan withdrawals, and there is no indication that Congress intended to give an actuary the discretion to dilute their best estimate of anticipated experience of a multiemployer plan in order to shift risk onto a departing employer. An actuary using a blend of funding rates and PBGC rates is factoring in an interest rate used for plans that essentially go out of business, even though in the context of a single employer withdrawal, the multiemployer plan is neither going out of business nor being required to purchase annuities to cover the departing employer's share of vested benefits. An actuary should not base the discount rate for determining unfunded vested benefits on investments that the plan is not required to and might never invest in, based on a formula that is not tailored to the unique characteristics of the plan. Accordingly, the discount rate used to value unfunded vested benefits for calculating withdrawal liability should reflect actual plan experience.

3. In the "Applicability" section of the preamble to the proposed regulations, the PBGC states that the proposed rule does not preclude the use of an interest rate assumption described in proposed regulation 4213.11(b) to determine unfunded vested benefits before the effective date of the final rule. Giving retroactive effect to a rule or regulation is not favored under the law. *Bowen v. Georgetown University Hosp*., 488 U.S. 204 (1988), and with its gratuitous statement that is exactly what the PBGC seems to be doing. The PBGC ignores applicable governing case law, such as the Sixth Circuit's *Sofco Erectors* decision and the D.C. Circuit's *Energy West* decision cited in footnote 3 and 4 of the preamble. The PBGC should clarify its statement that while the proposed rule may not preclude the use of an interest rate assumption described in the proposed regulation to determine unfunded vested benefits, the determination of unfunded vested benefits should be accomplished in accordance with applicable law.

As applied to the discount rate assumption, using the plan's particular characteristics means the actuary must estimate how much interest the plan's assets will earn based on their anticipated rate of return. An actuary cannot base the discount rate "on investments that the plan is not required to and might never buy, based on a set formula that is not tailored to the unique characteristics of the plan." Sofco Erectors, Inc. v. Trustees of Ohio Operating Eng'rs Pension Fund, 15 F.4th 407, 421 (6th Cir. 2021) (cleaned up). Thus, risk-free rates might be appropriate if a plan were invested in risk-free assets, or perhaps if it planned to invest the withdrawal liability payments in risk-free assets. But if the plan is currently and projects to be invested in riskier assets, the discount rate used to calculate withdrawal liability must reflect that fact.