December 12, 2022

VIA EMAIL TO reg.comments@pbgc.gov
Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
445 12th Street SW
Washington, DC 20024-2101.

RE: 4213 proposed rule

Ladies and Gentlemen:

We are three consulting actuaries who began our careers working for sponsors of single-employer defined-benefit pension funds and who now focus on multiemployer funds. Our clients are sponsors of multiemployer funds as well as unions and other employers contributing to them. Between us we have almost 70 combined years of experience in the multiemployer community and about 110 years of overall pension-consulting experience.

We write to address several issues and share our thoughts as requested on subject pronouncement, and we appreciate this opportunity to share our comments and the anticipated attention with which you will read them.

1. The proposed language seems to indicate that use of the ERISA Section 4044 termination rates would represent a valid approach in all circumstances, yet they would be the lowest rates allowed. However, if a plan is approaching insolvency, then a lower rate – or even a 0% interest rate – would seem appropriate. In addition, as interest rates rise, the 4044 rates may exceed the valuation rates in some cases. These situations do not seem to be addressed.

2. We are surprised at the prominent use of the word "settlement" in the press release and preamble to the regulations, *e.g.*, that ERISA requires "an employer to settle its share of the plan's unfunded liabilities." Throughout the extent of Congress's statute under "Subtitle E – Special Provisions for Multiemployer Plans; Part 1 – Employer Withdrawals," the word settlement does not appear. Also, in pages of relevant regulations by the PBGC, the word settlement seems to appear only once, in the context of settling a legal case. Neither does the word settlement appear on PBGC's own website page where ERISA 4044 annuity rates are posted. One place where settlement is defined is in Accounting Standard Codification Topic 715-30, which refers to an irrevocable action on the part of the plan sponsor of a single-employer defined-benefit pension plan. Therefore, PBGC and those promoting the proposed regulations are referring to a term that they expect to have some universal meaning in support of their position.

3. In the preamble, PBGC agrees that withdrawal liability represents the employer's share of any unfunded vested benefits that the plan may have. The notions of settlement and risk

transfer, while interesting, do not appear anywhere in the statutes or regulatory guidance. It is up to the trustees if they want to continue to take risk with the assets supporting the withdrawn employer's liability or not. They then also take on the risk of additional contributions or less contributions depending on whether or not the investments underperform or overperform.

4. PBGC says that use of §4044 rates is reasonable since the withdrawing employer is not subject to future gains or losses so a settlement rate is appropriate without considering what the likely future will bring. The remaining employers absolutely take on the future risk via actions of the trustees, and they can mitigate this risk by shifting more assets into less risky investments which would be considered by the actuary; however, few plans actually do this in practice. If the trustees' actions force continuing employers to continue to take on the risk, why should the actuary assume a different practice will occur, and why should the withdrawing employer be so burdened?

5. The preamble expresses concerns about a plan not collecting an adequate amount from a withdrawing employer but shares no concerns when a withdrawing employer overpays its share of the plan's UVBs. Accordingly, many in the actuarial profession have abided by the tradition of valuing his/her best estimate for such amounts of withdrawal liability, expecting a 50/50 chance that the amount will prove correct over time. Instead, the preamble states that the proposed rule would tend to increase the amount of withdrawal liability collected. While a laudable goal for all concerned, the regulations proposed clearly suggest that bias is allowed to be introduced by the plan in anticipating current low returns for this purpose while often similarly forecasting much rosier returns for long-term funding.

6. The preamble discusses an actuary's perspective in which plan trustees' investment-risk appetite, asset allocation choices, and the actuary's best estimate of the plan's future investment returns following the withdrawal are not relevant to the assessment of withdrawal liability. How is this possibly allowed? The proposed regulation removes the requirement of a best estimate for anticipated future investment experience but imposes it on other assumptions. Because the PBGC's intent here seems to increase the amounts of withdrawal liability assessed, and because it does not seem to have a problem while some actuaries have to date been using a rate of return that does not represent their best estimate of experience, could PBGC possibly look the other way when actuaries choose demographic assumptions that similarly do not represent an actuary's best estimate of future experience? For instance, could one assume that the demographic complexion of the group covered under the plan and its expectations for the future should also not be relevant to the assessment of withdrawal liability, leading actuaries to the possibility of assuming that all future retirees will elect to retire immediately upon their first eligibility to do so or that actuaries shall assume that retirees just won't die? These last two assumptions also support PBGC's intention that withdrawal liability provide the most amount of money for the plan upon an employer's withdrawal.

7. What about administrative expenses? Under the proposed regulation, an actuary is allowed to use a single rate representing the posted select and ultimate rates on PBGC's

§4044 page, but what about inclusion of an allowance for administrative expenses to be incurred by the lifelong participants remaining in a plan after an employer withdraws? Can PBGC allow for an adjustment to the withdrawal liability to include the present value of future administrative expenses if the §4044 rates are used?

8. Under the proposed regulation, it appears as if the actuary no longer has responsibility for selecting the assumption. Previously we only had the actuary's best assumption under (a)(1), now there is a selection between (a)(1) and (a)(2). This seems to be a selection that should be part of the method which is the trustees' decision as to which paragraph they want to use. The actuary would not be able to make a choice between using his/her best estimate and using a random number since an actuary can only support not using one's best estimate if provided direction from another party. In this case that direction would be from the trustees.

Actuaries who consult to boards of trustees may very well present this to their clients as an option, allowing the boards to attempt to set these assumptions. We have heard talk in the community that deadlocks are easily predictable as each side of the table will likely want a different set of assumptions regarding the anticipated rate of return on of the fund's portfolio. Has PBGC considered these situations?

9. Regarding the blending of the interest rates (*e.g.,* a practice of Segal Consulting), it seems unintelligible that a plan that is very well funded on its actuary's best estimate of anticipated experience under the plan would be able to assess liability using a blending of two interest rates based on a formula that is logically flawed.

A mathematical weighting formula should result in the two interest rates being at the extreme ends of the weighting. In this case, a plan that is about 150% funded on the actuary's best estimate would use the §4044 rates. At the other extreme end, a plan that is 0% funded would use the plan's long term funding rate. However, in reality, as a plan gets closer to insolvency the actuary would likely lower the interest rate to be more in line with the §4044 rates since a long-term funding rate based on a 20 to 30 year investment horizon would not be viable anymore. Therefore, this weighting really results in the §4044 rates being used at both extreme ends of the funding spectrum and a somewhat arbitrary weighting to get a blended rate in between.

Since trustees will now be making this decision, they should understand what they are choosing to do and it seems like the weighting should follow a logical pattern.

10. An important concern is for plans in critical statuses that are using relatively high rates of return for funding yet very low rates of return for assessments of withdrawal liability. The regulations as proposed could cement disassociation between these two rates, encouraging trustees to take greater risks in these riskiest of plans to ease burdens for continuing employers having to satisfy minimum-contribution and/or rehabilitation plan requirements while demanding the largest amounts, almost as penalties, to those employers who bargain out of the funds. Promoting this behavior can beget moral

hazard, likely to lead to more plan failures when they do not achieve those overly optimistic rates of long-term funding. This will not only lead to more pressure on the PBGC but would put the entire multiemployer system at risk overall. In its proposed regulations, PBGC finally recognizes the language under IRC Section 431(c)(3) as being worthy – but only for "other" assumptions. Perhaps a better scheme would be to encourage actuaries to use more realistic interest rates as long-term funding assumptions that could jive more with rates for determining withdrawal liability. This approach would recognize that each plan is one entity, funding benefits under one plan of rules for one population.

11. In the preamble, PBGC shares concerns about increasing litigation over determinations of withdrawal liability, citing employers' objections to an interest rate that was lower than the actuary's best estimate of anticipated average return on plan investments. However, we would argue that much litigation arose because the interest assumption was *unrelated* to the actuary's best estimate of anticipated returns on plan investments.

12. We have trouble with the PBGC proclaiming in its preamble that it is reasonable to base the amount needed to settle an employer's share of withdrawal liability on the market price of settling pension liabilities by purchasing annuities from private insurers when, in most cases, the trustees are not considering nor acting in this manner.

13. Clearly, PBGC has authority to proclaim acceptable actuarial assumptions in ERISA Section 4213. Yet another interest rate has a prominent role in the assessment of withdrawal liability under ERISA Section 4219. While not specifically mentioned in Section 4219, we believe PBGC does have authority to proclaim the proper interest rate under that language as well. While Section 4219(c)(1)(A)(ii) refers to "assumptions used for the most recent actuarial valuation of the plan," many believe that the valuation in question is the one under which the plan's value of unfunded vested benefits, as described in Sections 4201 through 4218, have been determined. Other practitioners somehow believe that this phrase under §4219 refers to a different valuation used for long-term funding of the plan. PBGC could certainly offer clarification in its next round of regulations.

Again, our thanks for your attention to these comments. Please do not hesitate to contact us with any questions you may have.

Sincerely,

Jay K. Egelberg, ASA Richard J. Hudson, FSA William J. McKeon, Jr, ASA