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June 6, 2007

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

Re: Draft Procedure under PPA Section 1106
[Submitted by E-Mail]

Dear Friends,

These comments are submitted on behalf of a group of professionals representing roughly 20 or so pension plans that are planning to make the election authorized by Section 1106 of the Pension Protection Act of 2006 ("Section 1106"), as amended by section 6611(a) of H.R. 2206 of the Iraq Accountability Appropriations Act, (the "Amendment"), which became law on May 26, 2007. Our group worked closely with Congress to secure enactment of Section 1106 and the Amendment, which was designed to assure that Section 1106 would be interpreted and applied in a way that would make it readily available to the plans intended to benefit.

We applaud the PBGC for making the draft Section 1106 election procedure (the "Draft") available for public comment. However, as explained in detail below, we urge the agency to revise and streamline the election procedure to meet both the substance and the spirit of Section 1106, as amended.

In particular, we call on the PBGC to roll back the data and documentation requirements of the Draft, asking only for the minimum necessary for plans to demonstrate their eligibility to make the election. Given the extremely short deadline for plans to make the election, requiring them to assemble extra data and materials would undercut the streamlining effect of the Amendment and would be viewed as an effort to thwart its intent.

The Amendment

In summary, the Amendment has two main points.

Maintained pursuant to a collective bargaining agreement. The Amendment provides an objective standard for determining, in the case of a plan that makes a Section 1106 election,

whether an employer is maintaining the plan pursuant to a collective bargaining agreement. That test is met:

> if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

There is no place for agency discretion in the application of this test. If at least two separate employers are signatory to collective bargaining agreements requiring them to contribute, authorizing them to cover any of their union-represented employees in the pension plan, or recognizing such participation, they are maintaining the plan pursuant to a collective bargaining agreement, regardless of any other facts or circumstances surrounding the employees' plan participation.

Effective date of 1106 election. The Amendment allows plans to make their 1106 elections effective as of any plan year starting as early as January 1, 1999 or ending as late as December 31, 2007.

Specific Comments on the PBGC Draft Procedure

1. Three-Agency Solution

A Section 1106 election applies, by its terms, "for all purposes under … [ERISA] and under the Internal Revenue Code of 1986 …", ERISA section 3(37)(g)(ii), see IRC section 414(f)(6)(B). Sections 1(a) and 2(f) of the Draft reflect this. Yet the Preamble to the Draft implies that the IRS and DOL have only confirmed their concurrence with a multiemployer status election approved by PBGC if the plan meets the safe harbor outlined in the Draft.

It is imperative that a plan that elects multiemployer status "for all purposes" under the principal governing law be assured that that the election will be respected for all those purposes. We urge that the Preamble be revised to remove any doubt about the across-the-board impact of an 1106 election.

2. Timeliness of Submission

To speed the completion and consideration of these submissions, the procedure should include a summary checklist of the information and documents required, and make clear that a submission is considered complete if it includes most of the core information covered in the checklist. It should also be revised to confirm that the plan sponsor may later supplement or update the filing, or correct inadvertent errors – whether or not at PBGC's request – without affecting affect the timeliness of the submission, as long as the plan sponsor reasonably believed that it was largely complete at the time it was filed. This is important because a number of these plans cover

employees of hundreds of employers, many of which are small, with few employees and fewer still who can respond promptly and correctly to a complex data request.

Of course, once the filing in support of a Section 1106 election is streamlined as we are suggesting this should be much less of a problem.

3. Collective Bargaining Agreements and Related Data

The Draft asked for inclusion with the Section 1106 election of a copy of each collective bargaining agreement ("CBA") requiring the employer to contribute to the plan during each of the 2003 – 2006 plan years, along with a breakdown of the number of plan participants covered under each such agreement and the amount contributed or required to be contributed on their behalf. In our view, this asked for too much documentation even before enactment of the Amendment. Now it is clear that this part of the information request can and should be pruned dramatically.

Documentation of one or two CBAs. Under the Amendment a plan need only show that, within the relevant time frame, it was maintained pursuant to one or more CBAs by at least two employers for the benefit of at least one employee each. Accordingly, that is all that should have to be documented in the 1106 election package. Plans should not be called upon to collect and submit copies of all collective bargaining agreements that covered participants during the pertinent plan years, if they can demonstrate that they qualify for the election by submitting two such agreements.

Number and cost of benefits for union-represented participants. Plans could be required to report how many participants were covered, during the relevant period, under the one or two CBAs that they file with the Section 1106 election package. Or, to ease the filing requirement and eliminate another area for possible inadvertent error, the plan sponsor could be required to certify that at least two employers covered at least one plan participant apiece under those CBAs. There is no apparent reason for requiring a report on the amount of contributions required specifically with respect to the union-represented participants, especially since most of the plans that are likely to make Section 1106 elections do not, to our knowledge, identify the contributions attributable to bargained and non-bargained participants separately.

Eliminating the head-count and dollar-count features has the additional advantage of eliminating the need for guidance on how those counts would be conducted.

Relevant CBAs. As now amended, the law treats a plan as maintained pursuant to a CBA if the agreement, "expressly or otherwise", authorizes the employer to contribute to the plan or to facilitate participation in it by the employer's union-represented employees. The term "expressly or otherwise" makes clear that the CBA does not need to specify a contribution requirement, or even to name the pension plan in which the people working under the agreement will participate. Since it is a fundamental tenet of federal labor law that retirement benefits are a mandatory subject of bargaining, an employer cannot legally have its bargaining-unit employees participate in a pension plan unless their union consents, expressly or otherwise. See *Inland Steel Co.*, 77 NLRB 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied* 336 U.S. 960 (1949).

Safe harbor. The Draft contains a safe harbor under which a plan will be deemed to be maintained pursuant to one or more CBAs if at least 50% of its active participants are covered by CBAs and at least 50% of the contributions are required to be made on their behalf. Consistent with these comments, we do not believe such a safe harbor is either necessary or appropriate.

4. Contributions from Tax Exempt Employers

The Draft proposes several practical alternatives for plans to show that their contributing employers are tax exempt. We appreciate and support that decision.

Section 1106 allows plans to make the election if "substantially all of the plan's employer contributions" for the relevant period were made or required to be made by tax exempt organizations. In other contexts, "substantially all" has been interpreted to mean at least 85%, see *Central States, Southeast and Southwest Areas Pension Fund v. Robinson Cartage Company*, 55 F.3d 1318, 1321 (7th Cir. 1995), *Continental Can Co. v. Chicago Truck Drivers Pension Fund*, 916 F2d 1154 (7th Cir. 1990). We recommend that the PBGC adopt that standard as a safe harbor, to reinforce the objective character of the Section 1106 election.

Note that a plan could meet the substantially-all-contributions standard regardless of how many or how few contributing employers are tax exempt, as long as tax exempt employers are responsible for substantially all of contributions. We recommend that PBGC streamline the procedure further and allow plans to demonstrate that they meet this eligibility requirement by demonstrating the tax exemption of the employers that made or were required to make substantially all of the contributions for each of the pertinent plan years, rather than reporting on the taxable status of all contributing employers. Plans using the proposed 85% safe harbor would only have to report on employers contributing up to that level, for example.

It would be helpful too if the PBGC clarified that only the first page of the LM-2 need be provided by a plan using the LM-2 to demonstrate that an employer is tax exempt, rather than having to submit the entire document.

5. Employers and Their Controlled Groups

Section 3(d)(3)(ii) requires a listing not only of each employer required to contribute to the plan and any controlled-group connections among the contributing employers, but also of all trades or businesses of each contributing employer. This asks for more data than the PBGC reasonably needs to judge whether a plan is eligible to make a Section 1106 election. Since this excess information is likely to confuse the employers, who may, as a result, delay responding or respond incorrectly, we urge you to pare this down to the essentials.

Specifically, as emphasized above, a plan needs to be sponsored by at least two employers that maintain it pursuant to one or more CBAs. For this purpose, corporations, trades or businesses under common control are treated as a single employer. Thus, at least two employers that are not part of the same controlled group must be maintaining the plan pursuant to CBAs. A plan making a Section 1106 election should be required to demonstrate that it satisfies that test, by

showing that the employers whose CBAs are being submitted are not under common control within the meaning of the applicable regulations. However, there is no reason to require the plan to canvass all of its contributing employers in an effort to identify any trades or businesses in which any of them may have an ownership interest, and then to analyze those links to determine whether they amount to common control.

We have no objection to PBGC's asking for a current list of employers that are obligated to contribute to the plan or whose employees are covered by the plan, and for an indication whether any of those employers are under common control with one another. We do, however, recommend dropping the requirement to report any other trades or businesses to which the contributing employers may be related.

6. Effective Date of the Election: "Relevant Period"

As noted, the Amendment allows eligible plans to designate the first day of any plan year that starts and ends during the period 1999 – 2008 as the effective date of the shift to multiemployer status. The plan must have met the criteria for the election – maintained by two or more employers pursuant to CBAs, substantially all of the contributions from tax exempt organizations – for the three plan years immediately preceding that effective date.[1]

Obviously, the revised procedure will have to address this new feature of the Section 1106 election. References in these comments to "the relevant period" or the "relevant plan years" are references to that 3-year period and, where appropriate, to the year designated as the first year of multiemployer status.

7. Withdrawal Liability Rules

Section 3(d)(5)(v) of the Draft asks plans that identified themselves as multiemployer plans in their filings with PBGC for any of their 2003 – 2005 plan years to submit a copy of their withdrawal liability rules and data concerning withdrawal liability assessed, as part of their Section 1106 election package. It is not apparent why that was considered relevant to the Section 1106 election prior to the Amendment.[2] Now that plans can make the election retroactively based solely on a showing that they were maintained pursuant to collective bargaining agreements and that substantially all of their contributions were from tax exempt employers the irrelevance of that inquiry is evident. We recommend that it be deleted.

8. Date of Plan Establishment

To be eligible to make a Section 1106 election, a plan must have been established before September 2, 1974. Section 3(d)(5)(iv) of the Draft asks for the date the plan was established,

[1] Section 1106 does not require a demonstration that a plan meet those criteria as of the year the election takes effect or any later date, although it does provide that the election is terminated following a plan year in which less than half the contributions are from tax exempt employers.

[2] Among other things, MPPAA prescribes a presumptive basis for determining and collecting withdrawal liability precisely so that multiemployer plans do not have to be amended to do so.

"as reflected in a plan document, trust instrument … [or certain other formal documentation] relating back to the period during which the plan was established." It is not clear whether that means the documentation must date from that period, or just that it refer to the plan's establishment during that period. Since some of the plans expected to make the election date from the 1960s or earlier, original documents may no longer be available. Plans should be able to meet this requirement by submitting more recent documents that reliably refer to the plan as having been established earlier.

Also, given the possible difficulty in locating foundational documents, a plan making a Section 1106 election should only be required to prove by the 8/17/2007 filing deadline that they were established before September 2, 1974, regardless of how much earlier the plan may in fact have been adopted.

Plans to Which the 2007 Amendment Applies

In determining the status of any plan that submits a Section 1106 election to be a multiemployer plan, the law now calls on DOL, IRS and PBGC to apply the concept of "maintained pursuant to a collective bargaining agreement" as added by the Amendment, whether or not the PBGC ultimately approves the plan's submission in support of its election. This point is evident from the text of the Amendment, and it will be of primary importance if the PBGC continues to require the submission of exhaustive historical data and supporting documentation as part of the Section 1106 election process. Given the very short time left for assembling the submission package and the small size and limited administrative capabilities of many of these plans' contributing employers, it is essential that a plan's multiemployer status not be put at risk due to omissions or inaccuracies.

This is consistent with the most natural reading of the amended law. The Amendment lays out in detail the approach to be followed in judging whether a plan that uses the Section 1106 process to formalize its multiemployer status is maintained pursuant to a CBA. Specifically, the definition in ERISA section 3(37)(G)(vii) applies to "a plan making an election under this subparagraph …" That formulation includes all plans that submit Section 1106 elections. It is not limited to those whose elections are ultimately approved by PBGC.

With the enactment of the Amendment, Congress has underscored its determination to allow plans that meet the Section 1106 description, as amended, to be treated for all purposes under ERISA and the IRC as multiemployer plans. A rigid, logistically overwhelming election process would blunt the purpose of the law.

****

We appreciate the PBGC's prompt consideration of these comments, and will be happy to provide any additional information that may be of help in evaluating them.

Sincerely,

Judith F. Mazo, The Segal Company, Washington, DC

John Leary, O'Donoghue & O'Donoghue, Washington, DC

Joyce A. Mader, O'Donoghue & O'Donoghue, Washington, DC

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MICHAEL J. SULLIVAN
GENERAL PRESIDENT

June 8, 2007

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

Re: Draft Procedure under PPA Section 1106

Gentlepersons:

The Sheet Metal Workers' International Association joins in the comments submitted by The Segal Company on June 6, 2007. In particular, the Association writes to emphasize the need for a clear and streamlined election procedure that adheres closely to the terms of the legislation.

Thank you for your consideration.

Sincerely,

Michael J. Sullivan

MICHAEL J. SULLIVAN
General President

MJS/MR/lam
cc: B. Hernandez

KRAFT EISENMANN ALDEN, PLLC
ATTORNEYS AT LAW

June 12, 2007

BARBARA KRAFT (DC, MD)
JAMES M. EISENMANN (DC, MD)
KRISTIN D. ALDEN (DC, MD, VA)

BY FAX (202) 326-4224
John H. Hanley, Director
Constance Markakis, Esq.
Legislative and Regulatory Department
Pension Benefit Guarantee Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Election of Multiemployer Plan Status Under the Pension Protection Act as Applied to the Employees' Retirement Plan of the National Education Association of the United States

Dear Mr. Hanley and Ms. Markakis:

This firm represents the National Staff Organization (NSO) and the National Education Association Retirees Organization (NEARO).

Through its affiliated unions, NSO represents certain active employees of the National Educational Association (NEA) and NEA affiliate employers around the country. Representatives of NSO and NSO affiliated unions sit on the Retirement Board of the Employees' Retirement Plan of the National Education Association ("the Plan").

We are writing on behalf of all actively employed participants in the Plan, including but not limited to employees represented by NSO affiliates. We also write on behalf of retired participants who, although NSO affiliates do not represent them in collective bargaining, are represented on the Retirement Board by representatives of NEARO.

The Plan is a multiple employer plan controlled by the Executive Committee of the NEA, the governing body of the NEA. We have been informed that the Executive Committee of the NEA has voted to convert the Plan to a multiemployer plan pursuant to Section 1106 of the Pension Protection Act (PPA). The NEA Executive Committee vote followed a vote by the Retirement Board, 8 to 6, recommending that the NEA Executive Committee *not* elect multiemployer status for the Plan.

Our comments at this juncture are as follows. We reserve the right to submit additional comments after participants and retirees receive the Notice of Pending Election that we understand the PPA requires NEA to send to participants and beneficiaries in the Plan.

1. The Department of Labor's Model Notice of Pending Election of Multiemployer Status, issued December 1, 2006, stated that PBGC had advised it would "establish procedures and provide guidance for making the election," and that the

Department was "of the view that no election under 3(37)(G) [was] effective unless made pursuant to such procedures, including certification by the plan administrator that it has complied with the notice requirements in section 3(37(g)(v)(I)."

Notwithstanding these assurances that PBGC would "establish procedures and provide guidance," no procedures or guidance were published. Instead, on April 13, 2007, PBGC published a notice in the Federal Register entitled "Proposed Submission of Information Collection for OMB Review; Comment Request; Procedures for Implementing Multiemployer Plan Elections." The April 13 notice, however, did not contain any procedures or guidance for how multiemployer plan elections were going to be implemented. Rather, the April 13 notice referred indirectly to "PBGC proposed procedures for implementing the multiemployer election" that, apparently, had already been drafted, but that had not been published. As far as we know, the procedures and guidance have not been published to date. Nor did the April 13 notice seek comment on the "proposed procedures." The notice only sought comments on the information PBGC proposed to collect from plans and employers that were contemplating making the election.

As a result of the failure to publish the procedures, participants and beneficiaries were at a disadvantage in understanding exactly what the PBGC was doing with respect to these election procedures, and were less able to educate themselves about the effect of the election on their pension plans and their benefits.

2. The failure to publish procedures and guidance for review by the public, including participants and beneficiaries and organizations representing them, is especially unfortunate in light of the safe harbor created by the draft procedures that is not at all apparent from the PPA and ERISA. (Our obtaining a copy of the draft procedures through the PBGC website was purely fortuitous.)

Section 4 of the draft procedures provides a safe harbor, i.e. that a plan will be deemed to comply with ERISA and the PPA, and that PBGC will approve the plan's application for multiemployer status, if the plan complies with Sections 2(c) and 3 of the draft procedures, including section 3(d)(3)(vi).

Section 3(d)(3)(vi) requires the plan sponsor to certify that the plan is maintained by more than one unrelated employer pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer; that at least 50% of active participants covered by the plan are employed under collective bargaining agreements; and that at least 50% of contributions required to be made to the plan are under collective bargaining agreements.

Our concern is with this "safe harbor," especially the first prong of section 3(d)(3)(vi). The safe harbor appears to broaden the ERISA definition of a multiemployer plan in section 3(37)(A), as one to which more than one employer contributes and one which is maintained pursuant to collective bargaining agreements between one or more unions and more than one employer. At the very least, the safe harbor provides that this fundamental requirement of a multiemployer plan can be met with a certification.

NSO and NEARO believe it is unlikely that the NEA Plan can meet the requirement that a plan be maintained by more than one unrelated employer. Control over the Plan is exclusively in the NEA. Only the NEA may amend or terminate the Plan, for example. Its affiliate employers do not "maintain" or control the Plan. Our concern is that an uncorroborated statement by a plan sponsor that controls the plan may result in a major change in the structure of the plan that will affect participants' guaranteed benefits.

NSO and NEARO, as well as other representatives of participants and beneficiaries in this Plan, have advised that they may file additional comments on these and related issues after the Notice of Pending Election is distributed.

Thank you for considering our comments.

Sincerely,

Barbara Kraft

Barbara Kraft
Kraft Eisenmann Alden, PLLC

cc:

Chuck Agerstrand, NSO President
Ron Goldenstein, NSO Pension & Benefits Committee Chair
Edna Frady, NEARO President

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PLEASE RESPOND TO ST. LOUIS OFFICE

June 11, 2007

Via Overnight Mail
Legislative and Regulatory Department,
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, D.C. 20005-4026

Re: **Comments in Response to Implementing Procedures for a Special Election Concerning Multiemployer Plan Status that May be Made Under the Employee Retirement Income Security Act of 1974, as Amended by the Pension Protection Act of 2006; Comments of International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local Union District Pension Plan ("the Plan")**

Dear Sir:

These comments supplement the comments of the Segal Company, in comments representing approximately twenty (20) pension plans that are planning to make the election authorized by Section 1106 of the Pension Protection Act of 2006. The Plan is one of those twenty pension plans. As the Notice purporting to establish implementing procedures observes, Section 1106 of the Pension Protection Act of 2006 ("PPA"), amends the definition of "multiemployer plan" under ERISA and the Code, to allow certain plans to elect to be multiemployer plans pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation ("PBGC"). Provided that PBGC procedures are followed and the election is made prior to August 17, 2007, such election may be made.

The Plan is concerned that the extensive fact-gathering data requested by the PBGC under the guise of "procedures for implementing multiemployer plan elections" go far beyond the procedures necessary for such implementation. The information requested should be merely the information minimally required to establish that multiemployer status exists under the PPA. The PPA test is met:

> "if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the Plan by one or more employers that are signatory."

The procedures must, therefore, establish that this criterion is met. No other additional information need be obtained, except for the tax-exempt status of the contributing employers and the date the Plan was established. Since with respect to the Plan, all such contributors are local unions, district councils, labor councils or apprenticeship funds, they are all tax-exempt organizations, and multiemployer status exists. If at least two (2) separate employers are signatory to collective bargaining agreements requiring them to contribute, then the Plan is maintained pursuant to a collective bargaining agreement under ERISA. There is no necessity to provide a copy of each

collective bargaining agreement requiring the employer to contribute to the Plan, along with a breakdown of the number of Plan participants covered and the amount contributed or required to be contributed on their behalf. Such data goes only to a point of argument as to the wisdom of the PPA amendment. However, the PPA amendment itself is clear and does not require such detail.

To qualify for the election, Section 1106 requires that the Plan be maintained pursuant to collective bargaining agreements and that "substantially all of the plan's employer contributions" are made by tax-exempt organizations. The definition of "substantially all" has been used in other contexts to mean at least 85%. See Central States Southeast and Southwest Areas Pension Fund v. Robinson Cartage Company, 55 Fed. 3d, 1318, 1321 (7th Cir. 1995); Continental Can Company v. Chicago Truck Drivers Pension Fund, 916 Fed. 2d, 1154 (7th Cir. 1990). Here, the Plan meets that definition and can easily establish that more than 85% of its contributing employers are tax-exempt.

While specific requests for tax-exempt status have not generally been made, such requests are not required to achieve that status. Periodic filings made by the employers all assert the tax-exempt status of such employers and their nature as local unions, district councils, labor councils or apprenticeship funds, further, by definition, establish their status as tax-exempt organizations.

Information beyond that required to show that more than two (2) employers are required to make contributions pursuant to collective bargaining agreements, that the Plan was established prior to 1974, and that substantially all contributing employers are tax-exempt entities, should not be requested under these implementing procedures.

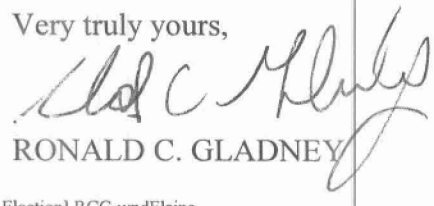
Furthermore, the 2007 amendment to ERISA Section 1006, calls upon the Department of Labor, the Internal Revenue Service and the PBGC to apply the concept of "maintained pursuant to a collective bargaining agreement" whether or not the PBGC ultimately approves the Plan submission in support of its election.

Congressional intent is now clear, and it is the Plan's contention that such intent was clear, even with the PPA of 2006. Section 1106 is crafted so that pension plans such as the Plan were covered, in that substantially all of the Plan's contributors are tax-exempt organizations, the Plan's existence pre-dates September 1974, and it is a multiemployer plan as that term has generally been defined in that more than one employer's contributions to the plan are required pursuant to collective bargaining agreements. Therefore, the Plan is "maintained pursuant to a collective bargaining agreement."

Conclusion

It is respectfully submitted that inquiries pertaining to withdrawal liability rules, control group information and other inquiries not directly related to the Section 1006 definition, are irrelevant and beyond the scope of the procedures necessary to implement Section 1106 of the PPA. Procedures necessary to make an election should be merely those procedures required to implement Section 1106, nothing less and nothing more.

Very truly yours,



RONALD C. GLADNEY

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