



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

September 27, 2018

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Desk Officer for Pension Benefit Guaranty Corporation
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Filed via Electronic Mail: OIRA_DOCKET@omb.eop.gov

Re: Submission of Information Collection for OMB Review; Comment Request; Survey of Multiemployer Pension Plan Withdrawal Liability Information

Dear Sir or Madam:

This is in response to the Pension Benefit Guaranty Corporation's ("PBGC") notice of Submission of Information Collection for OMB Review; Comment Request; Survey of Multiemployer Pension Plan Withdrawal Liability Information ("Notice") published in the Federal Register on August 28, 2018 (83 FR 43911). We appreciate PBGC's efforts to collect information on withdrawal liability to estimate, with more precision, its multiemployer program liabilities for purposes of its financial statements and to model withdrawal liability assumptions more accurately. However, as explained below, we suggest clarification of certain issues raised by the Notice and PBGC's Proposed Survey of Terminated and Insolvent Multiemployer Plans ("Survey")¹.

Specifically, we are concerned that the Notice and Survey may create unnecessary and additional administrative expenses for already financially distressed insolvent and terminated plans. We are also concerned that the Survey requires information, broadly described, that may raise disclosure concerns for employers regarding the potential for release of proprietary information. In addition, we are concerned that information required in the Survey regarding certain plan sponsor decisions on the assessment of withdrawal liability may be subject to review by PBGC, and that such review may exceed PBGC's authority granted under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The National Coordinating Committee for Multiemployer Plans ("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

¹ The Survey is currently available on PBGC's website listed under "Federal Register Notices Open for Comment," "Information Collections," "Proposed Survey of Terminated and Insolvent Multiemployer Plans" at: <https://www.pbgc.gov/prac/laws-and-regulation/federal-register-notices-open-for-comment>.

environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America's working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue 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 trusted by employer and employee trustees.

SUMMARY OF COMMENTS

On September 14, 2018, NCCMP filed comments on PBGC's Proposed Rule Regarding Terminated and Insolvent Multiemployer Plans and Duties of Plan Sponsors, RIN 1212-AB38 ("Proposed Rule") and associated documents on PBGC's website.² Under the Proposed Rule, certain plans are required to, among other things, provide withdrawal liability information to PBGC. Given that the Proposed Rule and the Notice and Survey appear to raise similar issues regarding that information, this comment incorporates many of the issues raised in NCCMP's comment on the Proposed Rule.

Under the Proposed Rule, certain terminated and insolvent plans would be required to provide withdrawal liability information to PBGC. The Notice provides that PBGC is requesting OMB approval of the Survey that the same terminated and insolvent plans would be required to complete. The Survey requires the reporting of substantially similar information to that described in the Proposed Rule but uses a different reporting template. The Notice provides that PBGC is requesting that OMB approve PBGC's use of the Survey for three years.

If PBGC intends to use the Survey to require the reporting of withdrawal liability information prior to the Proposed Rule becoming a final regulation, the Notice and Survey should be clarified to prevent duplicative reporting requirements. For example, the Notice and Survey should be clarified to state that plans completing the Survey prior to a final regulation being issued would not be required to also complete the reporting requirements under the final regulation, once issued, for the same plan year. Such clarification would help prevent compliance ambiguity and unnecessary costs to plans in complying such reporting requirements.

As raised in NCCMP's comments on the Proposed Rule, the information required in the Survey appears to be overly broad and may raise disclosure concerns for employers regarding the potential for release of proprietary information. Although the Notice states that information provided to PBGC would be confidential to the extent provided in the Freedom of Information Act and the Privacy Act, the Notice should be clarified to specify how the agency intends to handle, under the

² NCCMP's comment appears at <https://www.regulations.gov>, ID: PBGC-2018-0007-0003. Our response includes review and consideration of the information provided on PBGC's website listed under "Federal Register Notices Open for Comment," "Proposed Rule," "E-filing Portal screenshots" regarding "Proposed Terminated and Insolvent Regulations Instructions," "Proposed Actuarial Valuation Information," and "Proposed Withdrawal Liability Information" provided at: <https://www.pbgc.gov/prac/laws-and-regulation/federal-register-notices-open-for-comment>.

Acts, information provided by plans and the extent to which the agency believes 29 C.F.R. Part 4901 would apply.

Further, like the Proposed Rule, the Survey requires information to be provided by plan sponsors regarding employers that have withdrawn but have not yet been assessed withdrawal liability. As raised in NCCMP's comments on the Proposed Rules, we are concerned that the required information may subject plan sponsor decisions regarding those employers to review by PBGC that extends beyond the authority granted under Title IV of ERISA.

I. Survey Requirement Regarding Withdrawal Liability Information

On July 16, 2018, PBGC issued the Proposed Rule that, among other things, requires the reporting to PBGC of withdrawal liability information by certain terminated and insolvent plans. On June 21, 2018, PBGC published a notice of its intent to request OMB approval of the Survey and on August 28, 2018, PBGC issued the Notice. The Notice provides that PBGC is requesting OMB approval of the Survey that certain terminated and insolvent multiemployer plans would be required to complete. The Survey requires the reporting of substantially similar information to that described in the Proposed Rule but uses a different reporting template. If approved by OMB, PBGC would be allowed to use the Survey to collect information for three years.

Clarification Needed to Avoid Duplicative Reporting

We understand the immediate need for PBGC to obtain withdrawal liability information to better estimate, report and model its liability regarding the multiemployer program. We also appreciate the delay in information gathering during the uncertain length of time necessary for the Proposed Rule to progress to a final regulation. However, if PBGC intends to use the Survey to require the reporting of withdrawal liability information prior to the issuance of a final regulation, the Notice and Survey should be clarified to avoid duplicative reporting requirements. For example, the Notice and Survey should be clarified to state that plans completing the Survey prior to the issuance of a final regulation would not be required to also complete the reporting requirements under the final regulation, once issued, for the same plan year. This clarification would prevent ambiguity and unnecessary costs to plans in complying with reporting requirements that require substantially the same information but use different filing templates.

II. Withdrawal Liability Information

Consistent with PBGC's Proposed Terminated and Insolvent Regulations Instructions ("Instructions") implementing the Proposed Rule, the Survey provides that certain plans must file with PBGC information about withdrawal liability in the aggregate and by employer, that the plan has or has not yet assessed withdrawal liability.

For each employer not yet assessed, the Survey requires information to be provided as including the name of the employer and the reasons the employer has not yet been assessed withdrawal liability. For each employer assessed withdrawal liability, the Survey requires the name of the employer and payment information, including the schedule of payments and whether the employer is current on payments. In the event of a lump sum settlement, information is required as to amount and the date of payment.

Unlike the Proposed Rule and the Instructions which require the plan sponsor to file the withdrawal liability information with PBGC within 180 days after the earlier of the end of the plan year in which the plan terminates or becomes insolvent and each plan year thereafter unless there is no updated information to file, the Notice and Survey do not appear to specify a filing deadline.

Requirement to Provide Withdrawal Liability Information Appears to be Overly Broad

As raised in NCCMP's comments regarding the Proposed Rule and Instructions, neither the Notice nor the Survey appear to specify the time period for which withdrawal liability information is required. As currently described, it is unclear whether, in a plan's initial submission of the Survey, the plan sponsor is required to provide information as to the plan's entire historical experience with employers and withdrawal liability or information more limited in scope. Because of this ambiguity, the requirement to provide withdrawal liability information, as described in the Notice and the Survey, appears to be overly broad.

Required Withdrawal Liability Information may Raise Disclosure Concerns for Employers Regarding the Release of Proprietary Information

The Notice provides that information in the Survey provided to PBGC would be confidential to the extent provided in the Freedom of Information Act and the Privacy Act. However, the Notice should be clarified to specify how the Acts would apply as well as the extent to which part 4901 of PBGC's regulations (29 C.F.R. Part 4901) may apply including, but not limited to, §4901.24 regarding confidential commercial or financial information submitted to PBGC. Disclosure of such information may include proprietary information that may, among other things, interfere with employers' ability to conduct business. Accordingly, the Notice should be clarified to specify how the agency intends to handle, under the Acts, information provided by plans and the extent to which the agency believes 29 C.F.R. Part 4901 would apply.

Required Withdrawal Liability Information may Improperly Subject Plan Sponsor Decisions to PBGC Review

As NCCMP noted in its comments on the Proposed Rule, the Proposed Rule states that "[I]t is particularly important for PBGC to identify all sources of available funding given the declining financial position of the multiemployer program." PBGC's statement regarding the identification of "all available sources of funding" and the requirement in both the Proposed Rule and the Survey that a plan sponsor provide details as to its reasons why employers may not have been assessed withdrawal liability suggests that PBGC may review such plan sponsor decisions for compliance with regard to fiduciary duties under Title I of ERISA. Although compliance with Title I fiduciary requirements is not specifically subject to PBGC review, and is not enforceable by PBGC, compliance with such requirements has and continues to provide guidance and incentive for plan sponsors to take appropriate action with regard to all withdrawn employers and thereby acts to provide significant protection for PBGC's interests.

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CONCLUSION

We appreciate that up-to-date withdrawal liability information will assist PBGC's efforts in estimating, with more precision, its multiemployer program liabilities and in modeling its withdrawal liability assumptions more accurately. However, for the reasons explained, we urge clarification of the Notice and Survey.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "m d scott", is centered on a light gray rectangular background.

Michael D. Scott
Executive Director