November 28, 2022

Submitted via email to: [***reg.comments@pbgc.gov***](mailto: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: RIN 1212-AB54
4213 Proposed Rule

Ladies and Gentlemen:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I appreciate the opportunity to comment on proposed interest rate assumptions that an actuary may use in determining the benefits liability of an employer who withdraws from a multiemployer pension plan.[1] The AFL-CIO welcomes this rulemaking and strongly supports the Pension Benefit Guaranty Corporation (the "PBGC") proposal.

The AFL-CIO is a voluntary democratic federation of 58 national and international labor unions that collectively represent 12.5 million working people. By coming together in unions, working people negotiate with their employers for fair pay and benefits including the ability to retire with dignity. Our core mission is to ensure that working people are treated fairly and respectfully on the job, that their hard work is rewarded, and that their workplaces are safe. We also provide a voice for working people in electoral politics and in the legislative process.

The AFL-CIO is a key stakeholder in the multiemployer pension plan system. By definition, a multiemployer pension plan covers workers represented by one or more unions, and the active and retired members of many AFL-CIO affiliated unions participate in these plans. We appreciate the PBGC's work in producing the proposal which, given recent court challenges to withdrawal liability determinations,[2] will bring needed direction to plan actuaries, trustees, and counsel.

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[1] The notice of this proposed rulemaking, "Actuarial Assumptions for Determining an Employer's Withdrawal Liability" was published in the Federal Register on October 14, 2022 (87 FR 62316).

[2] *See GCIU-Employer Retirement Fund v.* MNG *Enterprises*, 51 F.4th 1092 (9th Cir. 2022) (successful challenge to use of PBGC termination rates); *United Mine Workers of Am. 1974 Pension Plan v. Energy West Mining Co.,* 39 F.4th 730 (D.C. Cir. 2022) (successful challenge to use of PBGC termination rates); *Sofco Erectors, Inc. v. Trs. of Ohio, Operating Eng'rs, Pension Fund,* 15 F.4th 407 (6th Cir. 2021) (successful challenge to use of "Segal Blend"); *New York Times Co. v. Newspaper and Mail Deliverers'--Publishers' Pension Fund*, 303 F. Supp. 3d 236 (S.D.N.Y. 2018) (successful challenge to use of "Segal Blend"); *but see Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund,* 331 F. Supp. 3d 365 (D.N.J. 2018) (unsuccessful challenge to use of "Segal Blend").

The determination of an employer's withdrawal liability to a multiemployer pension plan—i.e., that employer's proportionate share of the plan's vested, yet unfunded, benefits—turns on several actuarial assumptions, one of the most consequential being the interest or "discount rate." For forty years, PBGC had no need to exercise its statutory authority to establish discount rate assumptions for withdrawal liability calculations[3] because plans were able to rely without controversy on their respective actuary's "best estimate" as expressly permitted by ERISA section 4213(a)(1).[4] In recent years, however, withdrawing employers have initiated litigation challenging plan actuaries' best estimate determinations, with some judges striking down the professionals' determination in favor of their own. As a result, plans have been facing unworkable uncertainty as to what discount rate assumptions are legally acceptable for withdrawal liability purposes. This uncertainty extends to plans receiving special financial assistance ("SFA")—the proposal will affect the withdrawal liability rate for these plans after the later of ten years of their receipt of SFA or the expected SFA payout period. The possibility of a higher interest rate will provide employers with an incentive window to exit the plan prior to 2051—an incentive that the final SFA rule sought to eliminate.

The AFL-CIO supports the PBGC's proposed alternative to the "best estimate" standard when determining a discount rate. In permitting a plan to use its funding rate, the PBGC termination rate, or a rate in between, the PBGC proposal presents a seamless alternative to the assessment and collection of withdrawal liability because it encompasses the range of discount rates that multiemployer plans have been using since the withdrawal liability was first established.[5] The proposal reflects an understanding of the need for flexibility as to actuarial assumptions given plans' differing past and anticipated experience.

This proposal is immensely helpful not only because it will stem costly and time consuming litigation, but also because it will strengthen the retirement income security of multiemployer pension plan participants. When courts substitute their own lower liability assessments for those of plan actuaries, or when litigation results in a lower withdrawal liability settlement, plan participants face increased risk that their plan will not be able to pay all accrued benefits. We urge the PBGC to act expeditiously to complete this rulemaking.

I am pleased to share the AFL-CIO's views regarding the particular questions posed by PBGC. Specifically, it is our view that the range of interest rate options should not be narrowed, and the top of the range should not be lowered. Nor should the PBGC specify criteria for the selection of the discount rate of other withdrawal liability assumptions such as the estimated date of insolvency, the expected funding mix and or/the plans' funded ratios. Finally, we do not believe that the final rule should specify any other assumptions used in withdrawal liability assessments.

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[3] ERISA §4213 (a)(2) provides for "actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability."

[4] That section permits "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 . . . ."

[5] *See* the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

These recommendations should help ensure that multiemployer pension plans and their advisors will have sufficient flexibility to reflect plans' particular circumstances and experience in their respective withdrawal liability calculations.

Thank you for your consideration of our views.

Sincerely,

William Samuel
Director, Government Affairs