GCIU - Employer Retirement Fund
Newspaper, Commercial Printing, and Printing Specialties & Paper Products Industries
2323 Eastlake Ave E Seattle WA 98102 • (800) 322-1489 • Formerly IP&GCU-Employer Retirement Fund

December 13, 2022

Via Email to reg.comments@pbgc.gov

Pension Benefit Guaranty Corporation
445 12th Street SW
Washington, DC 20024-2101

Re: 4213 Proposed Rule

Ladies and Gentlemen:

As the Board of Trustees of the GCIU-Employer Retirement Fund (Fund), a national, multiemployer, defined benefit pension plan, we write to you on behalf of the Fund to provide the following comments to proposed regulation 29 CFR Part 4213.

By way of background, the Fund was established in 1955, and provides pension benefits to members of the Graphic Communications Conference of the International Brotherhood of Teamsters[1] who work in the publishing, printing, and paper converting industries in the United States. However, due to significant innovation and technological advancements, these industries have experienced significant changes in the last few decades. As a result, their operations have been consolidated and centralized, thereby reducing the number of players in those industries. With this came a decrease in employers participating in the Fund as well as the number of active participants, the employees of these companies. The Fund has experienced hundreds of withdrawals of employers since 2002, when it first began assessing withdrawal liability.

Today, the Fund is a mature plan, with more retirees and vested terminated participants than active participants. It is in critical and declining status as defined by the Pension Protection Act of 2006, as amended by the Multiemployer Pension Reform Act of 2014. As Trustees, we had to take a comprehensive approach to stave off insolvency so that the Fund would be able to pay benefits for as long as possible. One of the methods used by the Fund has been a robust withdrawal liability collection program. Under this program, the Fund's actuary determined, under ERISA section 4213(a)(1), that his best estimate of anticipated experience under the plan is the settlement interest rate assumption prescribed by the PBGC under section 4044 of ERISA because withdrawing employers are, in effect, settling their liabilities and bear no risk of future investment losses.

[1] The Graphic Communications Conference of the International Brotherhood of Teamsters is the successor to the Graphic Communications International Union, which succeeded the International Printing & Graphic Communications Union and its predecessor, the International Printing Pressman & Assistants' Union of North America.

However, this "best estimate of anticipated experience" standard has been the subject of numerous legal challenges from employers withdrawing from the Fund. Indeed, in the past five years, every employer withdrawing from the Fund with an assessment that could be reduced if a higher interest rate assumption was used, has challenged the assessment in some form. Over the years, these challenges have prevented the Fund from collecting millions of dollars that could be used to pay pensions. The Fund has been forced to consider reduced settlement amounts adjusted for litigation risk, or face years of arbitrations and litigation, which include legal fees and litigation costs, and potential adverse decisions from arbitrators and courts. For example, recently, the Fund received an unfavorable decision from the Ninth Circuit Court of Appeals that greatly reduced the liability of a group of employers.[2]

The lack of consensus among courts regarding the interest rate assumptions used to calculate withdrawal liability has encouraged withdrawing employers to develop strategies to defeat the very purpose of the withdrawal liability statutes, which were intended to ensure that an employer paid its proportionate share of the plan's unfunded vested benefits, including those that are attributable to its own employees! As the PBGC is aware, to date, three appellate circuit courts have issued decisions that discourage plans from assessing withdrawal liability using any rate other than the expected rate of return on its investments, thus eliminating an actuary's independence in determining an assumption, as required under ERISA section 4213(a)(1).[3]

Accordingly, we are encouraged by the prospect of regulatory guidance that will provide much needed clarity for both plans and withdrawing employers, and we write in support of the proposed regulations. In providing our comments, we recognize that there are vast differences in operational and financial needs among Taft-Hartley, multiemployer, defined benefit pension plans. Each plan has unique characteristics, and every plan is governed equally by management and union trustees who are the fiduciaries managing these plans. This governance structure works best when the plan

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[2] *GCIU-Employer Ret. Fund v. MNG Enterprises, Inc.*, 51 F.4th 1092 (9th Cir. 2022).

[3] See *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 39 F.4th 730, 738 (D.C. Cir. 2022)(using the plan's particular characteristics when calculating an employer's withdrawal liability, as required by ERISA, means that when making a discount rate assumption, the actuary must estimate how much interest the plan's assets will earn based on their anticipated rate of return); *Sofco Erectors, Inc. v. Trustees of Ohio Operating Engineers Pension Fund*, 15 F.4th 407, 421 (6th Cir. 2021) (using the "Segal Blend" approach to valuing multiemployer pension fund's unfunded vested benefits for withdrawal liability purposes violated ERISA's mandate that the interest rate for withdrawal liability calculations be based on the anticipated experience under the plan; the resulting interest rate was not the actuary's best estimate of anticipated experience under multiemployer pension plan, and instead, it diluted the actuary's best estimate with rates on investments that the plan was not required to and might never buy based on a set formula that was not tailored to the unique characteristics of the plan); and *GCIU-Employer Ret. Fund v. MNG Enterprises, Inc.*, 51 F.4th 1092 (9th Cir. 2022) (actuary's use of interest rate published by PBGC when calculating employer's withdrawal liability did not satisfy ERISA's requirement that actuarial assumptions and methods be "best estimate" of anticipated experience under plan; actuary's interest rate assumption did not take into consideration expected returns on plan's assets as currently invested).

fiduciaries and plan professionals have flexibility to set plan rules and procedures, including those in determining the interest rate used in valuing plan liabilities when calculating withdrawal liability for exiting employers. With these considerations in mind, we offer three suggestions for your consideration.

First, since one of the goals of the proposed regulations is to reduce litigation on this subject, we note that the proposed regulations are unclear on the issue of who must decide whether rates under ERISA section 4213(a)(1) or 4213(a)(2) will apply; and if section 4213(a)(2) is elected, who selects which rate will apply from those that are permitted? In both cases, is it the trustees or the plan's actuary? Silence on this issue will undoubtedly create a new line of litigation with employers and possibly even trustee deadlocks that will need to be litigated. We suggest that the decision should be left to the plan's actuary, as the expert in such things. Thus, we request additional clarification in the final regulations that it is the actuary's responsibility to determine whether to elect ERISA section 4213(a)(1) or 4213(a)(2); and, if section 4213(a)(2) is elected, to select the appropriate rate for the plan.

Second, the proposed regulations state that the rates under ERISA section 4213(a)(2) would be effective for withdrawals occurring after the final rule's effective date. Although the preamble notes that plans are not precluded from using a rate within the parameters of the proposed regulations for withdrawals occurring prior to their finalization, the rationale under the Ninth Circuit's recent decision now effectively prevents plans from doing so because, according to the Ninth Circuit, the section 4213(a)(2) regulations were not effective at the time of the initial assessment, so they could not be relied upon and are, therefore, not persuasive authority with respect to withdrawals occurring before the regulations are finalized. Thus, to meet the true goals of ERISA, we suggest that the final regulations specifically permit the use of ERISA section 4213(a)(2) rates not only for ***withdrawals occurring after*** the final rule's effective date, but also for ***withdrawals assessed (or reassessed) after*** the final rule's effective date.

Based on the recent circuit court decisions, it appears that litigation will persist on this issue unless plans are specifically permitted to use section 4213(a)(2) rates upon reassessment regardless of the year of withdrawal. This reasoning stems from the reality that, unless an arbitrator makes a finding of fact that there is a particular interest rate the plan must use to reassess, a court is unlikely to issue an order directing the plan to use a specific rate. Thus, actuaries are left only to "try again" because their "best estimate" rate was determined .to be inappropriate and there is no default option. This uncertainty is further exacerbated for plans that utilize the presumptive method, even if the proposed regulations become final. Thus, it is imperative that plans be permitted to utilize section 4213(a)(2) rates for withdrawals ***assessed (or reassessed)*** after the regulations become final.[4]

[4] If the effective date of the regulations is going to be tied to the date of withdrawal, we request that, at a minimum, the final rules clarify that they apply to withdrawals occurring in or after ***the plan year*** during which the final rule is effective, since the effective date could otherwise fall in the middle of a plan year, which may create unnecessary acrobatics from both an actuarial and litigation standpoint.

Third, we request that the final rules deem any interest rate assumption falling within the parameters of the 4213(a)(2) regulations but made by a plan actuary under section 4213(a)(1) before the final rule's effective date, as presumptively reasonable. Otherwise, employers who withdraw from plans before the effective date of the final regulations will continue to be allowed to circumvent the intended purpose of the withdrawal liability statutory scheme, in contravention of the stated intent in the proposed regulations and at the continued expense of other contributing employers and pension plan participants.

Thank you for your consideration.

Sincerely,

The Board of Trustees of the GCIU-Employer Retirement Fund