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Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
445 12th Street SW
Washington, DC 20024-2101

Submitted online at www.regulations.gov

Subject: 4213 Proposed Rule

Dear PBGC representative:

Horizon Actuarial Services, LLC is a leading national consulting firm that specializes in providing innovative actuarial solutions to multiemployer benefit plans. We proudly serve pension and health and welfare plans in various industries, including construction, trucking, professional sports, hospitality, entertainment, retail food, and communication. We are the actuary for approximately 100 multiemployer pension plans. Our clients' pension plans cover over 2.5 million participants (nearly 25% of participants in all multiemployer pension plans) and have accumulated over \$100 billion in assets.

We respectfully submit for consideration our comments on the proposed rule by the Pension Benefit Guaranty Corporation ("PBGC") on actuarial assumptions for determining an employer's withdrawal liability. As described below, we have identified a few areas where we believe a revision or clarification to the applicable regulation may be needed. In addition, we have provided responses to specific questions posed by PBGC in the preamble to the proposed rule.

1. Selection of the Interest Rate Assumption

In the absence of PBGC regulations pursuant to Employee Retirement Income Security Act of 1974 ("ERISA") section 4213(a)(2), the requirements for actuarial assumptions used for withdrawal liability purposes fell under ERISA section 4213(a)(1). Plan actuaries clearly own the responsibility of selecting all actuarial assumptions (including the interest rate assumption) used in determining a plan's unfunded vested benefits for withdrawal liability purposes under ERISA section 4213(a)(1), since said assumptions must "*offer the actuary's best estimate of anticipated experience under the plan.*"

However, it is not obvious whether the plan sponsor or plan actuary selects the interest rate assumption under the proposed rule.

First, there is now an option to follow either ERISA section 4213(a)(1) or 4213(a)(2). This is made clear in the proposed rule under 29 CFR § 4213.1, which states: “[t]his part sets forth actuarial assumptions and methods under section 4213(a)(2) of ERISA **as an alternative to the assumptions and methods under section 4213(a)(1) of ERISA for determining withdrawal liability**” [emphasis added].

Which party decides whether to follow ERISA section 4213(a)(1) or 4213(a)(2)? Is this a plan sponsor decision or a plan actuary decision?

Further, if ERISA section 4213(a)(2) is followed, then does the plan sponsor or plan actuary select the interest rate assumption that falls within the permissible range of 29 CFR § 4213.11(b)?

ERISA section 4213(a) states: “[t]he corporation may prescribe by regulation actuarial assumptions which may be **used** by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer’s withdrawal liability under this part” [emphasis added].

The fact that an actuary uses an assumption in their calculations does not necessarily mean that the actuary has selected the assumption. In practice, actuaries routinely use assumptions set by another party to perform calculations. For example, actuaries use assumptions set by the plan sponsor for financial accounting purposes.

2. Retroactive Application

The preamble states that “[t]he changes in this proposed rule would apply to the determination of withdrawal liability for employer withdrawals from multiemployer plans that occur on or after the effective date of the final rule.” As a result, it appears PBGC’s intention is to have 29 CFR § 4213 apply on a prospective basis, which won’t occur until some date in the future when the final rule is released.

A prospective effective date leaves plans vulnerable to costly challenges on the interest rate assumption by employers that withdraw from a plan prior to the effective date of the final rule. This includes current challenges and potential future challenges that may arise as a result of withdrawals that occur prior to the effective date of the final rule.

We recommend that PBGC consider applying the final rule retroactively to when employer withdrawal liability was first effective under the Multi-Employer Pension Plan Amendments Act of 1980 (or “MPPAA”). This would significantly reduce plan costs associated with arbitration and litigation fees to defend challenges on the interest rate assumption related to withdrawals that occur prior to the effective date of the final rule. PBGC indicated in the preamble that a lengthy litigation can cost “over \$1 million” and

we have seen figures substantially higher than that in some circumstances. Providing for retroactive application of the new rules would help avoid unnecessary plan expenses and allow plans to collect an employer's fair share of unfunded vested benefits, which ultimately results in more secure pensions for participants and their beneficiaries. We believe this is something that is in the best interests of plans, participants and beneficiaries, and PBGC.

We note that the preamble also states “[t]he proposed rule does not preclude the use of an interest rate assumption described in proposed § 4213.11(b) to determine unfunded vested benefits before the effective date of the final rule.” We appreciate that PBGC provided support for the use of interest rates within the permissible range described in the proposed rule for withdrawals that occur before the effective date of the final rule in the preamble, but this is only helpful to the extent that it is persuasive to an arbitrator or court. We are aware of at least one case, *GCIU-Employer Retirement Fund v. MNG Enterprises, Inc.*,¹ where these arguments were not found to be persuasive. A retroactive application of the new rules would be significantly more powerful for plans to defend challenges on the interest rate assumption.

We urge PBGC to provide for retroactive application under its forthcoming final rule. However, if this is not ultimately adopted, we would appreciate an expeditious release of the final rule to provide plans protection from unreasonable challenges on the interest rate assumption as soon as possible.

3. Permissible Range of Interest Rates

PBGC requests comments on whether the final rule should restrict the allowable options to a narrower range of interest rates or to only specific methodologies for determining rates. Particularly, should the top of the range of permitted interest rates under section 4213(a)(2) be lower than the typical funding interest rate assumption.

The interest assumption described in the proposed rule under 29 CFR § 4213.11(b) allows for a broad range of interest rates that aligns with decades of actuarial practice in this area. As a result, we would not suggest that PBGC consider narrowing the range of interest rates.

We would recommend that PBGC consider widening the range of permissible interest rates to allow for a common actuarial practice in all economic environments.

¹ 51 F.4th 1092 (9th Cir. 2022).

When selecting actuarial assumptions for minimum funding purposes, it is common for a plan actuary to select an interest rate assumption that is developed net of investment-related expenses and separately account for administrative expenses as a load on the normal cost. That is, anticipated administrative expenses for an individual year are directly added to the funding requirements for the year.

When selecting actuarial assumptions for withdrawal liability purposes under ERISA section 4213(a)(1), some plan actuaries select an interest rate assumption based on the funding rate reduced to reflect a load for administrative expenses. That is, the present value of anticipated future expenses necessary to administer accrued benefits are added to a plan's liability.

The practice of using the funding rate reduced to reflect a load for administrative expenses would not be allowable under the proposed rule when interest rates under ERISA section 4044 ("PBGC rates") are either (1) higher than the funding rate or (2) lower than but similar to the funding rate. When PBGC rates are higher than the funding rate, the funding rate represents the lower bound of the permissible range and a rate lower than the funding rate would not fall within the range. Similarly, when PBGC rates are lower than but similar to the funding rate, it is possible that the funding rate reduced to reflect a load for administrative expenses would be below PBGC rates (the lower bound of the permissible range in this circumstance).

We believe that the use of an interest rate based on the funding rate reduced by a load for administrative expenses should be allowable under the final rule in all economic environments. As such, we suggest that PBGC consider widening the range to accommodate this situation.

4. Relationship with Other Factors

PBGC requests comments on what should be the relationship, if any, between (a) the estimated date of plan insolvency, expected investment mix, and/or funded ratio, and (b) permitted withdrawal liability assumptions.

The permissible interest rate range under the proposed rule uses the funding rate as one of its end points. The funding rate is selected by a plan's actuary and is their best estimate of the rate of investment return that plan assets will earn in the future. As a result, a plan's investment mix is a significant consideration when a plan's actuary selects the funding rate. Further, the plan sponsor is responsible for the allocation of plan assets and considers many factors when selecting an appropriate investment mix, including the estimated date of plan insolvency and funded ratio. Therefore, the

permissible interest rate range under the proposed rule already accounts for a plan's estimated date of plan insolvency, expected investment mix, and/or funded ratio.

We do not believe that PBGC should explicitly limit permitted withdrawal liability assumptions under the forthcoming final rule based on the estimated date of plan insolvency, expected investment mix, funded ratio, or any other similar factors. The multiemployer pension system is complex and each plan has unique circumstances. Plans should be provided ample flexibility in selecting actuarial assumptions for withdrawal liability purposes to adequately address these unique circumstances. A prescriptive set of rules, no matter how well thought out and intentioned, is unlikely to provide the flexibility needed to ensure that participant benefits remain secure in the event of employer withdrawals.

5. Other Assumptions

PBGC requests comments on whether the final rule should specify assumptions or methods other than interest rates. Also, if PBGC were to specify assumptions under section 4213(a) of ERISA that included demographic assumptions, such as mortality assumptions, that differed from plans' demographic assumptions, would plans be unlikely to use the PBGC assumptions because of those difference? If so, why?

Individual multiemployer pension plans cover populations in various industries and geographic locations and offer unique benefits. Each individual plan's population exhibits varying employment/retirement patterns and life expectancies. For example, consider a plan covering blue collar workers and a plan covering white collar workers. Blue collar workers have lower life expectancies than white collar workers. No single mortality assumption would be reasonable for use by both plans. A plan's actuary is in the best position to review a plan's covered population and select reasonable assumptions for purposes of measuring an employer's withdrawal liability.

Specifying assumptions and methods, other than interest assumptions, under 29 CFR § 4213 could yield unintended consequences – particularly in situations where a specified assumption differs significantly from the anticipated future experience of the plan. In such situations, the determination of a plan's unfunded vested benefits could be meaningfully understated or overstated. This could result in either (1) lower withdrawal liability for employers, which could put the benefit security for plan participants at risk, or (2) increased withdrawal liability for employers beyond their fair share, which could incentivize less participation from employers in the future. Either outcome could be detrimental to a plan.

As a result, some plans may be unlikely to utilize the alternative basis for assumptions used in determining withdrawal liability under ERISA section 4213(a)(2) if PBGC were to specify assumptions under 29 CFR § 4213 that include prescribed demographic assumptions. This would not relieve plans of the current situation of costly and timely litigations, where the interest rate assumption is often contested.

We appreciate the guidance provided by PBGC on this very important topic of actuarial assumptions for determining an employer's withdrawal liability. We also appreciate the opportunity to provide comments on the proposed rule. If you have any questions or would like to discuss our comments, please feel free to contact us directly.

Respectfully,



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