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

RE: 4213 Proposed Rule, Federal Register Number 2022-24588

Dear Sir/Madam:

The PBGC proposes to address multiemployer withdrawal liability interest rates because withdrawing employers are resorting to the Courts to challenge a plan's actuarial assumptions which are highly prejudicial to the withdrawing employer. The legal argument is that the interest rate assumption that plan actuaries use to value nonforfeitable benefits fails to satisfy section 4213(a)(1) of ERISA because it is substantially lower than the actuary's best estimate of anticipated average returns on plan investments. The higher the interest rate selected by the actuary, the less money the fund needs today to pay liabilities in the future. The lower the interest rate, the more money the fund needs today.

This in not just a legal argument, however, contrived by lawyers to save Plaintiff employers money. It is a matter of both fundamental fairness and adherence to the statutory text in allocating plan liabilities. When litigants use the law in this way, they seek a legal vehicle to return a semblance of fairness and statutory fidelity to the withdrawal liability process. What is unfair about this process? On its face, the law offers a plan's actuary broad, but not unlimited, discretion in setting the rate. The statute employs now familiar and limiting language—using actuarial assumptions and methods which "in the aggregate are reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S. Code § 1393(a)(1).

This process and language of the statute, however, have been stretched beyond their limits. They have been abused to invite a plan's actuary to disincentivize multiemployers from withdrawal itself by employing the "best estimate" rationale to paint the worst possible future financial picture that can be actuarially justifiable. This approach stands in sharp contrast to the plan's actuary painting the most rosy and optimistic interest rate for return on investments the actuary can adopt without risking professional embarrassment. Thus, "best estimate" means whatever the actuary wants it to mean. At the end of the day section 4213(a)(1) is not being used as Congress intended.

The Sixth Circuit Court of Appeals, however, put an end to an actuary's departure from the law's text. It brought the parties back to a single legal standard for both the withdrawal liability rate and the expected return rate. In Sofco Erectors Inc. v. Trustees of the Ohio Operating Engineers Pension Fund and the Ohio Operating Engineers Pension Fund, 15 F.4th 407 (6th Cir. 2021), the court applied the statutory text and meaning correctly concluding that ERISA does not permit the plan to use different rates for funding and withdrawal liability.

The Sixth Circuit also zeroed in on the actuary's double standard. It held:

> In other words, the actuary justified the rate used for withdrawal liability by considering a hypothetical mass withdrawal, rather than the "anticipated experience under the plan," 29 U.S.C. § 1393(a); by looking to assets that the fund has not indicated it will ever purchase, rather than the fund's actual portfolio, see *Eberhard Foods*, 831 F.2d at 1263; and by factoring in rates mandated by the PBGC in other contexts, but not here, instead of looking at the "experience of the plan and reasonable expectations," 29 U.S.C. § 1393(a). While the actuary's true "best estimate" deserves deference, it must be his "best estimate of anticipated experience under the plan."

Sofco Erectors, Inc., 15 F.4th at 421.

The problem is not just departure from the statute and an actuarial double standard. The problem runs much deeper and concerns inappropriate plan influence and loyalties. Frankly, actuaries want to keep their job. Indeed, as well understood in Nat'l Ret. Fund On Behalf of Legacy Plan of Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc., 946 F.3d 146 (2d Cir.), cert. denied *sub nom*. Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc., 208 L. Ed. 2d 22, 141 S. Ct. 246 (2020) there are underlying influences that also skew the actuary's approach.

> The opportunity for manipulation and bias is particularly great where funds use different interest rate assumptions for withdrawal liability and minimum funding purposes. Indeed, Arbitrator Jaffe specifically acknowledged that "[t]his potential for bias to operate is particularly great if the changed assumptions and methods relate only to those used to calculate the [UVBs] of the fund for purposes of withdrawal liability and not for funding or other purposes (as appears to have been the case in this matter)." App'x at 39-40 (emphasis added); see *Concrete Pipe*, 508 U.S. at 633 n.19, 113 S.Ct. 2264 ("we are aware of at least one case in which a plan sponsor exercised decisive influence over an actuary whose initial assumptions it disliked") (citing Huber v. Casablanca Indus., Inc., 916 F.2d 85, 93 (3d Cir. 1990)). This appeal, therefore, illustrates the type of results that can be "attacked as presumptively unreasonable both in arbitration and on judicial review" of which *Concrete Pipe* warns. *Concrete Pipe*, 508 U.S. at 633, 113 S.Ct. 2264.

Nat'l Ret. Fund, 946 F.3d at 152.

Yet, in the wake of the *Sofco* court's restoration of the statutory meaning of section 4213(a)(1), the PBGC is having none of it. Using its authority under section 4213(a)(2) the corporation asserts it is merely proposing a rule consistent with the determination of withdrawal liability based on "actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability."

The proposed rule, however, is far from this standard. It would specifically permit the use of an interest rate anywhere in the spectrum from section 4044 rates alone to funding rates alone. The new rule is also freed from the methodology in 4213(a)(1) and ostensibly with it, all court rulings pursuant to that section. Far from taking defiance of the statute, double standards, and corrupting plan influence seriously, the PBGC doubles down reenergizing business as usual.

As a result, the choice is clear. On the one hand, actuaries may continue to use 4213(a)(1) to determine interest rates, but run the very real risk of other federal circuits adopting *Sofco's* reasoning and rule which has the effect of mandating, as per the statute, that ERISA does not permit the plan to use different rates for funding and withdrawal liability.

On the other hand, the PBGC's new rule effectively reinstates the status quo *ante*, and among other results legitimates the Segal blend, effectively giving the green light to plan actuaries nationwide to conduct business as usual. The only difference is that when they dust off last year's report and swap out this year's cover page, that they do not forget to note their "actuarial assumptions and methods" are based on 4213(a)(2), not 4213(a)(1).

Rather than address the underlying lack of fundamental fairness, statutory infidelity and undue influence in withdrawal liability proceedings, the PBGC's proposed rule simply invites a whole new wave of litigation challenging its own *alter ego* 4213(a)(2) version of 4213(a)(1)'s requirements.

As such, we encourage the PBGC to proceed as follows:

1. We encourage the corporation to decline to adopt its proposed rule permitting funds to use different interest rate assumptions for withdrawal liability and minimum funding purposes, by recognizing that the corporation has wandered far from the statutory text of the law.

2. We encourage the corporation to adopt the *Sofco* rule that ERISA does not permit the plan to use different rates for funding and withdrawal liability, thereby returning fundamental fairness to the withdrawal process.

3. We also encourage the corporation to come to terms with the reality of the situation--that "opportunity for manipulation and bias is particularly great where funds use different interest rate assumptions for withdrawal liability and minimum funding purposes." The corporation's "bait and switch" scheme appears oblivious to this reality.

In conclusion, arbitrators and judges, trained in law and the rule of law as noted above, are neither simplistic nor easily mislead. They see what is going on and will continue to cut through the actuarial haze to articulate the law's requirements as best expressed in *Sofco*. The corporation's 4213(a)(2) approach cannot withstand this rule and will eventually meet the same legal fate as 4213(a)(1).

Sincerely,

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