

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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To Whom It May Concern:

Founded in 1903, the International Brotherhood of Teamsters (“IBT”) represents 1.4 million hard-working men and women in a wide variety of industries. The IBT and its affiliated local unions sponsor more than 150 multiemployer pension plans, covering about 1.65 million participants. Unfortunately, a number of these plans are in “critical and declining status,” “critical status,” and “endangered status.” The IBT submits these comments on PBGC’s proposed regulations regarding mergers and transfers between multiemployer plans published in the June 6, 2016 Federal Register (“Proposed Regulations”) to focus on the apparent prohibition in the Proposed Regulations on transfers from troubled plans, even where such transfers would be in the best interests of affected plan participants and PBGC. For the reasons noted below, we urge PBGC to modify the Proposed Regulations to permit transfers from “endangered,” “critical,” and “critical and declining” plans in circumstances where the transfer preserves benefits of the affected participants and beneficiaries and does not accelerate the risk of plan insolvency of the transferor plan.

The IBT recently negotiated a collective bargaining agreement with the Kroger Co. (“Kroger”) which includes a proposed transfer that would not be permitted by the current terms of the Proposed Regulation. That agreement contemplates a spin-off of retiree and active liabilities of Kroger and Kroger’s third party logistics subcontractors from the Central States Pension Fund (a “critical and declining” plan) to a new IBT/Kroger multiemployer fund, to which Kroger has committed to significant up-front funding and full funding within three years. This proposed transaction would fully satisfy Kroger liabilities under ERISA. Moreover, this agreement does not require any spin-off of Central States’ assets, and assures Central States that it will receive at a minimum the equivalent of 22 years of withdrawal liability payments (two additional years of payments beyond what is required by ERISA). This proposed transaction (if agreed to by Central States) would provide this group of workers and retirees nearly complete benefit security. Furthermore, this transaction would benefit Central States because it would relieve Central States of all accrued liabilities and benefit payments attributable to this specific group. Yet, this transfer would not be permitted under the Proposed Regulations, even though it does not accelerate the projected insolvency of Central States.

PBGC has the authority to and should modify the Proposed Regulations to permit transfers from troubled plans in circumstances that do not accelerate the risk of plan insolvency of the transferor plan. Section 4231 of ERISA, which provides criteria for transfers between multiemployer plans and importantly, also provides PBGC with broad authority to issue regulations to implement that section. The statutory criteria, “unless otherwise provided in regulations prescribed by [PBGC],” under Section 4231(b) are:

- Notice to PBGC at least 120 days before the effective date of the transfer;
- No participant or beneficiary will have a lower accrued benefit immediately after the transfer;
- Benefits are not reasonably expected to be subject to reduction to guaranteed benefits due to plan insolvency; and
- Each plan has had an actuarial valuation performed in the year preceding the transfer.

Although PBGC does not have to approve all transfers, a request for a PBGC determination that a transfer complies with these requirements operates as protection against possible violations of the prohibited transaction provisions of sections 406(a) and (b)(2). *See* ERISA § 4231(c). These particular provisions were not amended in either the Pension Protection Act of 2006, Public Law 109-280, (“PPA”) or the Multiemployer Pension Reform Act of 2014, Public Law 113-235 (“MPRA”), and PBGC has a long-standing regulation in effect. The Proposed Regulations update the long-standing regulation to address other changes to ERISA enacted in those statutes.

In updating the old regulations to take account of the new statutory provisions, the Proposed Regulations make changes related to the post-PPA plan classification regime. In particular, under the Proposed Regulations, the definition of “significantly affected plan” is revised to include a plan in “endangered” or “critical” status that engages in a transfer (other than a de minimis transfer).¹ The practical effect of this change is to require such a plan to meet the more rigorous solvency test in the regulation in order for the transfer to be permitted. As PBGC explained in the Preamble, under the long-standing old regulation,

only plans transferring 15% or more of their assets, or receiving a transfer of unfunded accrued benefits equaling 15% or more of their assets were treated as significantly affected plans. In PBGC’s view, endangered and critical status plans generally present a greater risk of plan insolvency, and when these plans engage in non-de minimis transfers their risk of insolvency *may* increase. . . . [T]he proposed rule would apply the stricter plan solvency test . . . to non-de minimis transfers involving endangered and critical status plans . . .

¹ A de minimis transfer is defined as one where the transferred liabilities do not exceed 3% of the plan liabilities of the transferor plan and 3% of the assets of the transferee plan. In the case of a transfer from a troubled plan to a newly established plan, even one that will be funded up-front, the de minimis rule can never apply because transferred liabilities will always exceed 3% of the assets of the transferee plan. PBGC should consider an exception to this result as well, in the Final Regulations, where the transaction will result in the protection of participant benefits and will not accelerate insolvency.

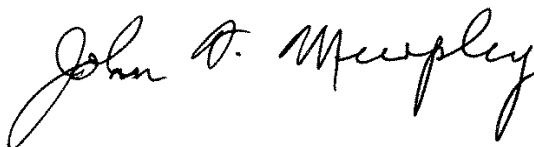
(81 Fed.Reg. at 36232-33; emphasis added.)

By subjecting these plans to a solvency test that will rarely, if ever, be met by endangered or critical status plans, PBGC is effectively prohibiting transfers that may actually postpone insolvency. To alleviate this anomaly, the final regulation should permit transfers that protect participants' benefits (or a class of certain participants) and do not accelerate projected insolvency, *i.e.*, the projected year of insolvency is no earlier after the transfer than before the transfer. Put another way, the emphasis should be on the impact of the *transaction* on insolvency, rather than the plan's general risk of insolvency.

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We appreciate the opportunity to comment on these issues of importance to many thousands of our members and retirees.

Respectfully,

A handwritten signature in black ink that reads "John F. Murphy". The signature is written in a cursive style with a large, sweeping initial "J".

John F. Murphy
International Vice President