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Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005−4026

Submitted online at www.regulations.gov

RE: Requests for Approving Certain Alternative Methods for Computing Withdrawal Liability and Settlement of Withdrawal Liability and Mass Withdrawal Liability

Dear Mr. Daniel Liebman and Ms. Constance Markakis:

Horizon Actuarial Services, LLC ("Horizon Actuarial") is a national firm specializing in providing actuarial and consulting services to multiemployer benefit plans. We respectfully submit for consideration our comments on the request for information ("RFI") by the Pension Benefit Guaranty Corporation ("PBGC") regarding requests for approving certain alternative methods for computing withdrawal liability and the settlement of withdrawal liability and mass withdrawal liability.

Horizon Actuarial serves as the actuary to over 90 multiemployer pension plans across the United States, including a few that have applied and received approval for alternative allocation methods. The comments included in this letter are intended to be general in nature, and they do not necessarily apply to the plans for which we are the actuary.

Introduction

If properly structured and executed, two-pool withdrawal liability allocation methods can enable multiemployer pension plans to better attract new employers and retain existing employers, which can help strengthen plan solvency and funding. With a stronger contribution base, moderately underfunded plans can more quickly reach full funding. Perhaps more importantly, a stable contribution base will make distressed plans better equipped to avoid insolvency, or at least forestall it.

With those points in mind, we encourage PBGC to provide guidance to plan sponsors on how to apply for approval for two-pool allocation methods. At the same time, we also caution against guidance that is overly prescriptive, or an application process that imposes an unreasonable burden on the plan sponsor. PBGC should aim to facilitate and streamline the approval process for two-pool methods that meet the statutory requirements.

The following comments touch on various topics within the subject of two-pool allocation methods: how two-pool methods can help attract and retain employers; how settlement arrangements interact with two-pool methods; how two-pool methods might allocate withdrawal liability to employers that have transitioned to the "new pool"; and PBGC's role in reviewing and approving applications for two-pool methods. This letter also briefly touches on whether two-pool methods could be adopted by plans in the construction industry. This letter, however, does not cover certain topics raised in the RFI, such as mass withdrawal liability or benefit and contribution schedules for employers in the new pool.

Attracting New Employers

One potentially significant benefit of the two-pool method is to encourage new employers to participate in the plan. If a plan is underfunded, the infusion of contributions from new employers could be a meaningful factor in restoring the plan to financial health. Bringing new employers into an underfunded plan is difficult, however, as the prospect of withdrawal liability creates a significant barrier.

There are ways for plans to lessen the barrier posed by potential withdrawal liability. For example, plan trustees may employ the "free look" rule, adopt certain statutory allocation methods (e.g., changing from the one-pool method to the presumptive method), extend contribution allocation fractions from five years to ten years, and proactively communicate any industry exemptions that may apply. In spite of these measures, many potential employers will nevertheless reach the conclusion not to participate in the plan, because they do not want to be responsible for unfunded benefits that existed before they joined the plan.

A two-pool withdrawal liability method can help remedy this situation by more fully insulating new employers from the unfunded vested benefits attributable to existing employers. To many prospective employers, a two-pool method would substantially reduce the barrier posed by withdrawal liability, if not eliminate it entirely.

Retaining Existing Employers

Another potentially significant benefit of the two-pool method is to stabilize future contributions for existing employers by allowing them to transition from the "old pool" into the "new pool." Without a two-pool method, plans may be at greater risk to withdrawals and a declining contribution base among its existing employers.

When a multiemployer plan is underfunded, its participating employers often explore ways to minimize their financial obligations to the plan, both current and future. Many employers explore the option of withdrawing from underfunded plans, due to the dual concern that contribution rates will continue to increase, and that waiting to withdraw will result in a larger withdrawal liability later. Employers that remain in the plan may seek to manage their future contributions and potential withdrawal liability (both the allocated unfunded vested benefits as well as the payment schedule) by limiting their contribution base units. If employers are actively avoiding increasing their contribution base units, that would only exacerbate the plan's underfunding.

By adopting a two-pool withdrawal liability method, the plan signals to existing employers that it has developed a strategy to return to financial stability. An employer transitioning to the new pool would settle its old pool withdrawal liability with the plan and begin making contributions in the new pool going forward. The transitioning employer may also commit to remain in the new pool for a number of years, or perhaps indefinitely. Following the transition, the employer benefits by having the certainty of a withdrawal liability settlement with the plan. The plan benefits from increased and stabilized cash flows from the employer.

Settlement Arrangements

When an employer transitions to the new pool, the terms under which it settles its old pool withdrawal liability are specified in an agreement with the plan. While these "settlement arrangements" (to use the term in PBGC's RFI) coordinate with the plan's two-pool method, they are separate from the method itself and therefore do not require PBGC approval. PBGC has observed that some plans that have received approval for two-pool methods have entered into settlement arrangements with terms that are favorable to the transitioning employer, such as discounted withdrawal liability settlements or modified payment schedules.

As PBGC notes in its RFI, ERISA provides plan trustees with some latitude when negotiating a withdrawal liability settlement with an employer that has withdrawn. It is the ultimate responsibility of plan trustees – acting as responsible fiduciaries – to structure the settlement to maximize the net amount of withdrawal liability expected to be collected. The cost of collection and the employer's financial health may be factors in the trustees agreeing to a discounted settlement or modified payment schedule.

When plan trustees are structuring a settlement arrangement with a transitioning employer, their goals are somewhat different than when settling withdrawal liability with an employer that has completely and permanently withdrawn. In a transition, the trustees seek to maximize the *overall* positive impact the transition is expected to have for the plan, not just the withdrawal liability settlement alone. If the trustees decide to offer a discounted withdrawal liability settlement or modified payment schedule to a transitioning employer, it should be because they have determined that (1) the discount was necessary to encourage the employer to transition, and (2) the expected increase in future contributions resulting from the transition exceeds the cost of offering the discount.

Plan trustees should also carefully consider whether any settlement discounts or other favorable terms will be offered universally or on a case-by-case basis. If the incentives are offered on a case-by-case basis, the trustees should establish a process for evaluating the specific criteria that would determine whether a transitioning employer should be offered a discount. If the incentives are offered universally, the trustees should have a clear understanding of the impact the discounts, when applied broadly, will have on plan funding and solvency. Again, it is the ultimate responsibility of the trustees to determine that the terms of settlement arrangements are expected to have an overall positive impact on the plan.

<u>Withdrawal Liability for Transitioned Employers</u>

When an employer transitions to the new pool, there is a question as to how the employer should be treated for withdrawal liability purposes. The question revolves around the nature of the old pool withdrawal liability settlement for the transitioning employer. Is the amount of the settlement unconditional? Or is the settlement contingent on certain conditions being met after the transition?

After an employer transitions, the plan trustees will expect the employer to make contributions in the new pool for a number of years after its transition (or perhaps indefinitely). In some cases, this expectation becomes a requirement. For example, the plan trustees may structure the settlement arrangement to impose penalties on the employer in the event that it subsequently withdraws from the new pool within a certain number of years (or perhaps ever). In that situation, a penalty could take the form of the employer losing favorable terms it may have received in its settlement arrangement, such as a discounted settlement amount or modified payment schedule.

A more severe penalty would be to nullify the settlement entirely and recalculate the employer's withdrawal liability based on its subsequent withdrawal date. (We are not aware that any plans have imposed such a strict requirement in a settlement arrangement, or under which circumstances a transitioning employer would accept such terms.)

When determining the unfunded vested benefits allocated to a transitioned employer, a plan's two-pool method should appropriately reflect any contingencies that may exist in the applicable settlement arrangements. Consider a situation in which an employer would be required to pay back the discounted settlement it received as part of its transition, in the event that it were to subsequently withdraw from the plan. In that case, it may be appropriate to allocate the liability related to the discount to the transitioned employer instead of reallocating it to the remaining employers in the old pool. The two-pool method should consider the 20-year payment cap, as applicable when measuring the liability related to the discount.

Ultimately, if a plan's two-pool method appropriately allocates old pool unfunded vested benefits to employers that have transitioned, it will avoid an inappropriate over-allocation of unfunded vested benefits to employers remaining in the old pool.

<u>PBGC Role</u>

As stated earlier, we encourage PBGC to provide guidance to plan sponsors on how to apply for approval for two-pool allocation methods. At the same time, we also caution against guidance that is overly prescriptive or an application process that imposes an unreasonable burden on the plan sponsor. We encourage PBGC to facilitate and streamline the approval process for two-pool methods that meet the statutory requirements.

We understand that PBGC is particularly interested in the settlement arrangements plans may make with employers that transition from the old pool to the new pool. We also understand that PBGC's current practice is to request information on any proposed settlement arrangements as part of its review of the approval request for a two-pool method.

We offer the following comments on this topic:

- Some parties may question whether PBGC has authority under ERISA to evaluate individual settlement arrangements between the plan and its participating employers. We believe, however, it is reasonable for PBGC to request information on the terms of any *standard* settlement arrangement the plan has developed and contemplates using in conjunction with its proposed two-pool method.

- It may be helpful for PBGC to provide a model settlement arrangement document, or perhaps a list of terms it expects the settlement arrangements to include. We caution, however, against creating a model arrangement or set of terms that is overly prescriptive or rigid.

- Plan trustees have the latitude as fiduciaries to modify the terms of any standard settlement arrangement for specific employers, on a case-by-case basis. In other words, if PBGC approves a plan's request for a two-pool method, the plan trustees may later exercise their fiduciary discretion and agree to settlement terms for a specific transitioning employer that differ from those in the standard arrangement.

- Given the above points, PBGC may wish to focus on how the two-pool methods themselves are structured to handle settlement discounts or modified payment schedules, especially those that are contingent on continued participation in the plan. For example, the method should appropriately allocate any additional liability a transitioned employer would have to pay in the event that it subsequently withdraws.

Construction Industry Plans

Plans in the building and construction industry are required by law to allocate unfunded vested benefits under the 20-pool presumptive method. Many construction industry plans, however, could benefit from a two-pool allocation method, just as plans in other industries can. In spite of the construction industry exemption, underfunded plans face significant barriers to organizing new employers, due to the emphasis lenders place on withdrawal liability.

We encourage PBGC to consider (or reconsider) whether the statute permits a construction industry plan to apply for approval of a two-pool alternative allocation method. For example, would the statute permit a two-pool method for construction industry plans if unfunded vested benefits in both the old pool and new pool were allocated according to the presumptive method? In other words, is it possible for there to be two separate pools of unfunded vested benefits within the presumptive method?

Closing

We appreciate the opportunity to provide comments on this topic of alternative withdrawal liability allocation methods. If you have any questions or would like to discuss our comments, please feel free to contact us directly.

Respectfully,

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