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November 23, 2020

Via Electronic Mail (*reg.comments@pbgc.gov*)

RIN 1212–AB36
Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington D.C. 20005-4026

Re: Proposed Regulations Regarding Methods for Computing Withdrawal Liability, Multiemployer Pension Reform Act of 2014

To Whom It May Concern:

On behalf of 32BJ North Pension Fund ("Fund"), we are writing to comment on the proposed regulations issued by Pension Benefit Guaranty Corporation ("PBGC") on February 6, 2019 ("Proposed Regulations"). The Proposed Regulations discuss, in part, the calculation of withdrawal liability for multiemployer plans covered by Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") that have emerged from critical or endangered status under Section 305 of ERISA ("plans"). The Proposed Regulations provide simplified methods for, among other things: (i) allocating a plan's unfunded vested benefits to withdrawn employers, and (ii) calculating a withdrawn employer's withdrawal liability installment schedule.

As discussed in more detail below, the Fund encourages PBGC to issue the Proposed Regulations in final form so that boards of trustees of plans that have emerged from critical or endangered status are able to adopt the simplified methods in the Proposed Regulations and have a clearer understanding of how these calculations are intended to work.

In addition, the Fund suggests that the final regulations clarify the application of the simplified method for determining a withdrawn employer's installment schedule to employers that withdraw from a plan after the plan has emerged from critical or endangered status, but while the employer continued to contribute, as required under labor law to maintain the status quo, pursuant to an expired collective bargaining agreement that includes a schedule of the plan's rehabilitation plan or funding improvement plan.

Background

The Fund is a multiemployer defined benefit pension plan that provides retirement benefits to employees who work in the building service industry, primarily in the Bronx and Westchester counties of New York. The Fund is maintained pursuant to collective bargaining agreements between SEIU Local 32BJ ("Union") and several employer associations and individual employers. As of January 1, 2019, the Fund had a total of 14,412 participants (actives, terminated vested participants and retirees) and 1,333 contributing employers. The Fund is administered by a joint board of trustees, with equal representation by both union and management. The day-to-day operations of the Fund are handled by a third-party administrator ("TPA").

Currently, there are approximately 170 collective bargaining agreements that require contributions to the Fund. The Fund performs, on average, approximately 25 withdrawal liability calculations per year, which includes actual withdrawals as well as requests for withdrawal liability estimates pursuant to Section 101(l) of ERISA.

The Fund was first certified to be in critical status on March 31, 2009 for its plan year that began on January 1, 2009. The Fund's Board of Trustees adopted its Rehabilitation Plan effective November 25, 2009, which was reviewed on an annual basis and updated consistent with the requirements of applicable law. The schedule(s) included in the Fund's Rehabilitation Plan required annual increases in contributions, ranging from approximately 4% to 8%, depending on the schedule adopted and the time at which it was adopted. On or about March 30, 2020, the Fund's actuary certified that the Fund had emerged from critical status and was in the "green zone" for its plan year beginning January 1, 2020. Following emergence, questions have arisen with respect to the calculation of withdrawal liability.

Specifically, ERISA Section 305(g)(3)(A) provides that "any increase in the contribution rate (or other increase in contribution requirements unless due to increased levels of work, employment, or periods for which compensation is provided) that is required or made in order to enable the plan to meet the requirement of the funding improvement plan or rehabilitation plan shall be disregarded in determining the allocation of unfunded vested benefits to an employer under section 4211 [of ERISA] and in determining the highest contribution rate under section 4219(c) [of ERISA]…"

ERISA Section 305(g)(4) provides that "in the case of increases in the contribution rate (or other increase in contribution requirements unless due to increased levels of work, employment, or periods for which compensation is provided) disregarded pursuant to paragraph (3), this subsection shall cease to apply as of the expiration date of the collective bargaining agreement in effect when the plan emerges from endangered or critical status. Notwithstanding the preceding sentence, once the plan emerges from critical or endangered status, increases in the contribution rate disregarded pursuant to paragraph (3) shall continue to be disregarded in determining the highest contribution rate under section 4219(c) [of ERISA] for plan years during which the plan was in endangered or critical status."

Finally, ERISA Section 305(g)(5) authorizes the PGBC to develop simplified methods for the application these rules.

I. Allocation of Unfunded Vested Benefits

The Fund has adopted the "rolling 5 method" under Section 4211(c)(3) of ERISA to allocate unfunded vested benefits ("UVBs") to withdrawn employers. Under this method, the Fund is required to compare the withdrawing employer's five-year contribution history (the numerator of the fraction) to the total contributions required to be made by all employers during the same five-year period (the denominator of the fraction). One attenuated reading of ERISA Section 305(g) is that when determining the denominator of the fraction, a plan would need to review every collective bargaining agreement each time a calculation is required and include rehabilitation plan contribution increases only for employers whose collective bargaining agreements expired after the plan emerged from critical status.

Given the number of collective bargaining agreements that require contributions to the Fund and the number of withdrawal liability calculations performed by the Fund each year, the Fund's TPA has advised that this approach would be extremely burdensome, resulting in a wasteful increase to the Fund's administrative costs. That is likely true of many plans.

A more reasonable interpretation of Section 305(g) is that once any collective bargaining agreement maintaining a plan expires after a plan has emerged from critical or endangered status, all previously disregarded contributions will be regarded for all withdrawals after that date. In addition to treating all employers the same, this interpretation would significantly lessen the administrative costs to plans that have just endured ten years or more of a rehabilitation or funding improvement plan and are trying to maintain their "green zone" status into the future. It appears that PGBC has recognized this as a reasonable interpretation of the statutory provisions, since this interpretation is consistent with the simplified method described by PBGC in the Proposed Regulations. Accordingly, on behalf the Fund and other similarly situated defined benefit plans, we support the simplified method proposed by PBGC in the Proposed Regulations with respect to the allocation of UVBs to withdrawn employers after emergence from critical or endangered status and encourage PBGC to issue as a final regulation this section of the Proposed Regulations, as proposed.

II. Installment Schedule

To determine the monthly or quarterly withdrawal liability payments an employer is required to make, a plan is required to determine the highest rate at which the withdrawing employer was required to contribute at any time during the preceding ten-year period. For this purpose, the statute appears to require that even after a plan has emerged from critical status, the contribution rates required under a rehabilitation plan or funding improvement plan are disregarded when determining the employer's highest contribution rate. Accordingly, the Proposed Regulations include a simplified method which, if finalized, would appear to allow a plan to use the highest of the contribution rates in effect on December 31, 2014 (the date on which Section 305(g) became effective) or any contribution rate in effect after the plan has

emerged from critical or endangered status within the ten-year look back period. While the Fund agrees that this is a reasonable interpretation of the statute, we respectfully suggest that final regulations clarify one related point.

Specifically, when a collective bargaining agreement expires, the employer has an obligation under labor law to maintain the status quo until impasse is reached in negotiations with respect to wages, hours, and terms and conditions of employment. National Labor Relations Act, § 8(a)(5); *Litton Fin. Printing Div. v. NLRB, 501 U.S. 190* (1991). This obligation has been interpreted to apply to contributions to benefit plans. *See, e.g.*, *American Distributing Company, Inc., Petitioner, v. NLRB, 715 F.2d 446 (9th Cir. 1983).* Accordingly, when a collective bargaining agreement expires, the employer is required to continue contributing to benefit plans, like the Fund, at the same rate under the expired collective bargaining agreement until a new collective bargaining agreement is entered into or the parties reach impasse. The Fund requests that PBGC clarify that a contribution rate that was negotiated while a plan was in critical or endangered status should be included in determining the highest contribution rate for the purpose of Section 4219(c) if an employer withdraws after its collective bargaining agreement expires, but before a successor agreement is adopted.

The Fund appreciates the opportunity to comment on the Proposed Regulations. If you have any questions concerning these comments or the views of the Fund regarding the Proposed Regulations, please contact the undersigned.

Respectfully,

Meredith B. Golfo

MBG:kdb:4204.01

cc: Peter Goldberger

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