Dexter Hofing LLC

April 8, 2019

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

Subject: Comments on Proposed Regulation: "Methods for Computing Withdrawal Liability, Multiemployer Pension Reform Act of 2014" (RIN 1212-AB36)

To Whom It May Concern:

Dexter Hofing LLC[1] respectfully submits the following comments in response to the regulation proposed by the Pension Benefit Guaranty Corporation (PBGC) regarding simplified methods and other aspects of computing withdrawal liability under the Multiemployer Pension Reform Act of 2014.

We have limited our comments to two specific issues in proposed § 4219.3 of particular concern to contributing employers. Specifically, (a) the inclusion of contribution increases that result in benefit accruals as an integral part of the benefit formula and (b) inclusion of increases after emergence from endangered or critical status.

Increases That are an Integral Part of the Benefit Formula

ERISA § 305(g)(3)(B) contains very broad wording regarding the increases that are to be considered to be required by the funding improvement plan or rehabilitation plan. One of the few exceptions refers to increases that "provide an increase in benefits, including an increase in future benefit accruals, permitted by subsection (d)(1)(B) or (f)(1)(B)". In our experience, virtually all of the attorneys advising our clients have interpreted this section to include only those increases permitted by the subsections cited. And, with a few exceptions, most of the withdrawal liability calculations we have seen from plans have excluded increases that became effective in plan years beginning after December 31, 2014 even if such increases are benefit bearing. We believe that including increases other than those specifically referred

[1] Dexter Hofing LLC is an actuarial consulting firm with a practice limited to consulting to employers on multiemployer pension plan issues. We have provided consulting services to over 400 different employers including many of the largest contributors to multiemployer pension plans.

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to in § 305(d)(1)(B) or § 305(f)(1)(B) requires stretching the statutory wording beyond its fairly clear intent.

Presumably the intent of § 305(g)(3) was to eliminate one of the reasons that many employers were considering withdrawing from troubled plans. In troubled plans, the effective liability, defined as the present value of withdrawal liability payments, is typically limited by the withdrawal liability payment amount determined under § 4219(c). When that amount limits the assessment from a plan, any increase in the contribution rate immediately increases the employer's effective withdrawal liability proportionally. Many of our clients were concerned about the ever-increasing potential withdrawal liability and mass withdrawal liability resulting from increased contribution rates required under funding improvement or rehabilitation plans and were seriously considering withdrawing from plans to avoid the effect of such increases. In many cases, employers decided to remain in the plans as a result of the protection that they, in good faith, thought was provided by § 305(g)(3). The proposed regulation would remove this protection and would thus restore the incentive for employers to attempt to withdraw from such plans.

Increases After Emergence

A simplified approach for handling increases after emergence from endangered or critical status is described in § 4219.3(b). Under that section, an employer would automatically bounce up to the then current high rate if such rate was still in effect at the beginning of the plan year after the plan year that includes the expiration date of the collective bargaining agreement. In many situations, the bargaining parties do not reach agreement before the expiration date and continue to negotiate with the terms of the existing contract remaining in effect. If the plan year ends soon after expiration of the collective bargaining agreement, the higher rate could be imposed on the employer even if the ultimate bargaining agreement provides for a lower contribution rate. This clearly unfair result could be avoided by providing a grace period after contract expiration during which the higher rate would not apply if it had not been agreed to in bargaining. A rule similar to the rule that imposes the default schedule when no agreement is reached within 180 days might be appropriate here.

Section § 4211.4 Comments

The concerns described above also apply to the similar provisions in § 4211.4. We have not focused on those since a contribution increase that is reflected in both the numerator and denominator of the allocation fraction is unlikely to have a material effect on the contributing employer. However, any changes to proposed § 4219.3 should also be included in § 4211.4.

Dexter Hofing LLC appreciates the opportunity to provide input to PBGC on this important topic. If you would like to discuss any of these issues please contact James Dexter (267-928-3988 or jdexter@dexhof.com) or Mitchell Hofing (212-899-5307 or mhofing@dexhof.com).

Sincerely,

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