February 21, 2017

Submitted Electronically via the Federal eRulemaking Portal

Pension Benefit Guaranty Corporation
Regulatory Affairs Group, Office of the General Counsel
1200 K Street N.W.
Washington, D.C. 20005-4026

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

Ladies and Gentlemen:

We write on behalf of certain employer clients[1] in response to the request for information issued by the Pension Benefit Guaranty Corporation (the "PBGC") on January 5, 2017 regarding the "two-pool" withdrawal liability arrangement (the "RFI" and such method, the "Hybrid Arrangement") adopted by certain multiemployer pension plans ("Hybrid Plans").[2]

I. BACKGROUND

Employers that contribute to multiemployer pension plans are acutely concerned about their withdrawal liability exposure. In many cases, employers that currently contribute to multiemployer pension plans seek to institute measures to manage and ameliorate the amount of potential withdrawal liability that they will be assessed. The alternatives available to contributing employers include the possibility of seeking to withdraw from multiemployer pension plans. Employers that do not currently contribute to multiemployer pension plans in many instances are unwilling to start contributions to multiemployer pension plans in light of their potential withdrawal liability exposure. The Hybrid Arrangement represents a salutary modification as it allows Hybrid Plans to increase their long-term viability as it bolsters the ability of Hybrid Plans to attract, and retain, contributing employers.

As described in more detail below, Hybrid Plans have a separate "new employer pool" that is generally structured in a manner that is intended to avoid the creation of unfunded vested benefits. In addition, if unfunded vested benefits are created in a new employer pool, employers in the new employer pool are generally only responsible for the unfunded vested benefits directly attributable to their specific employees. Hybrid Plans generally also allow existing contributing employers to become "transitioned employers" by withdrawing from their current "old employer

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[1] This letter is not intended to express the views of our clients as a whole and should not be attributed to any of our clients in particular.

[2] Requests for Approving Certain Alternative Methods for Computing Withdrawal Liability; Settlement of Withdrawal and Mass Withdrawal Liability, 82 Fed. Reg. 1376 (Jan. 5, 2017).

pool" and entering the new employer pool after making arrangements to satisfy their legacy withdrawal liability obligations. This structure makes it easier for Hybrid Plans to attract, and retain, contributing employers, which helps preserve the contribution bases of the Hybrid Plans. It also allows Hybrid Plans to realize withdrawal liability payment streams from transitioned employers while still requiring the employers to make ongoing contributions. We understand that hundreds of employers have entered into contractual arrangements with Hybrid Plans to become transitioned employers in an effort to continue pension accruals for their covered employees while containing their overall withdrawal liability exposure.

The attraction, and retention, of contributing employers is vitally important to multiemployer pension plans because plans with shrinking contribution bases are at higher financial risk than multiemployer pension plans with stable, or growing, contribution bases. A complete summary of these risks is beyond the scope of this response. However, as one example, plans with more inactive participants than active participants are more sensitive to asset losses.[3] The attraction, and retention, of contributing employers is one of the primary reasons why multiemployer pension plans adopt the Hybrid Arrangement.[4]

Although Hybrid Plans offer new and transitioned employers with some additional certainty regarding their long-term withdrawal liability exposure, the PBGC has not yet approved any Hybrid Arrangement that clearly limits the exposure of new and transitioned employers to mass withdrawal liability. Employers and multiemployer pension plans would welcome definitive guidance from the PBGC regarding the application of mass withdrawal liability for Hybrid Plans, and guidance in this regard that would insulate employers in a new employer pool from mass withdrawal liability generated by the corresponding old employer pool would help Hybrid Plans attract, and retain, additional contributing employers.

II. EMPLOYERS CANNOT BEAR ADDITIONAL WITHDRAWAL LIABILITY EXPOSURE

As noted above, the exposure to withdrawal liability is a key concern for employers that contribute to multiemployer pension plans, as well as employers considering the possibility of undertaking the obligation to contribute to multiemployer pension plans. Troubled multiemployer pension plans have seen their financial conditions deteriorate over the last ten years due to increasing employer withdrawals, employer bankruptcies, and other failures, which were further exacerbated by significant investment losses in 2008 from which the plans are still recovering. As a result, many employers that contribute to multiemployer pension plans have seen their estimated withdrawal liability steadily increase (at times materially) with each plan year. At the same time, the likelihood that many multiemployer pension plans will actually pay

3 Pension Benefit. Guar. Corp., Multiemployer Pension Plans: Report to Congress Required by the Pension Protection Act of 2006, 14 (Jan. 22, 2013).

4 The RFI itself notes that Hybrid Plans adopt the Hybrid Arrangement to "[i]n an effort to encourage new employers who may be reluctant to participate in multiemployer plans due to withdrawal liability, as well as current contributing employers who may be reluctant to continue" contributions. 82 Fed. Reg. 1378.

participants the full amount of their accrued benefits has only decreased. To compound these issues, certain multiemployer pension plans have experienced a reduction in the interest rate assumptions used to value their unfunded benefit liabilities. As a result of these changes, the estimated withdrawal liability for employers that contribute to these plans has further increased (in some instances materially).

As a result of these issues, most employers are wary of undertaking new obligations to contribute to multiemployer pension plans. Indeed, many employers that currently contribute to multiemployer pension plans have entertained the prospect of seeking to withdraw from the plans through the collective bargaining process. Put simply, multiemployer pension plans and the PBGC cannot expect employers to continue to contribute to multiemployer plans when doing so potentially results in an exponential increase in the employers' exposure to withdrawal liability. Although an employer can generally only withdraw from a multiemployer pension plan through the collective bargaining process, it will become increasingly difficult for labor organizations to push for benefits offered under multiemployer pension plans when the plans may not even be able to pay the benefits promised under the plans. This will only hasten the pace of employer withdrawals from multiemployer pension plans.

III. HYBRID PLANS HELP ALLEVIATE MANY CONCERNS

Hybrid Plans address many of the concerns set forth above and do so in three key ways.

First, Hybrid Plans typically use the direct attribution method to calculate withdrawal liability for employers that contribute to a new employer pool. As a result, these employers are typically only liable for the unfunded vested benefits, if any, attributable to the employer's specific employees.[5] This shields new and transitioned employers from exposure to the legacy unfunded vested benefits in Hybrid Plans, as well as from exposure for benefits owed to employees of other employers in the new employer pool. In connection with this structure, Hybrid Plans often also add mechanisms to help avoid the creation of unfunded vested benefits in their new employer pools altogether. For example, a Hybrid Plan might automatically adjust the benefit accruals for new and transitioned employers' employees downward as necessary to ensure that the employers' contributions are sufficient to fully fund the accruals.

Second, Hybrid Plans often seek to incentivize existing contributing employers to become transitioned employers by offering more favorable terms for the employers to satisfy their existing withdrawal liability exposure. For example, these terms might include using a more favorable interest rate for the calculation of a lump sum withdrawal liability settlement or offering an extended term for the payment of a transitioned employer's withdrawal liability. In

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[5] In the event that unfunded vested benefits are generated in a Hybrid Plan's new employer pool and one or more contributing employers to the new employer pool withdraw and become unable to pay their withdrawal liability, the remaining employers in the new employer pool typically become liable for the unfunded vested benefits attributable to the delinquent withdrawn employer(s).

exchange for these incentives, Hybrid Plans typically require transitioned employers to agree to contribute to their new employer pools for some minimum term and obtain contractual clawback or penalty rights that apply if the employers prematurely withdraw from the Hybrid Plans. By allowing transitioned employers to join their new employer pools, Hybrid Plans are able to immediately monetize the employers' existing withdrawal liability, which would not be payable in the absence of a withdrawal, in the form of a lump sum payment or a new withdrawal liability payment stream. At the same time, the transitioned employers remain obligated to make ongoing contributions to the Hybrid Plans, so the Plans do not lose their contribution stream.

Third, Hybrid Plans are designed to materially increase the certainty associated with withdrawal liability. This added certainty is derived from the transitioned employer being able to ascertain the amount of withdrawal liability that will be obligated to pay based on its participation in the old employer pool. In addition, the new employer pool is designed to, in theory, not to generate additional unfunded vested benefits. In this way, an employer can remain in a multiemployer pension plan and still project and plan with considerably more certainty for its obligation to pay withdrawal liability, rather than being subject to the vicissitudes of a multitude of variables beyond the employer's control and knowledge, any one of which could result in a material increase in its withdrawal liability obligation that could be devastating to the employer's business.

IV. MASS WITHDRAWAL ISSUES

Notwithstanding the benefits of Hybrid Plans set forth above, the PBGC has yet to approve a Hybrid Arrangement to our knowledge that specifically addresses the application of mass withdrawal liability for Hybrid Plans. New employers and transitioned employers lack definitive guidance as to whether any reallocation liability assessed to them in connection with a mass withdrawal will include unfunded vested benefits from a Hybrid Plan's old employer pool. In addition, transitioned employers lack definitive guidance as to whether a mass withdrawal could result in redetermination liability with respect to their prior withdrawal from the old employer pool, even if the transitioned employers have entered into an agreement with respect to (and possibly fully paid off) their legacy withdrawal liability.

This leaves a significant uncertainty for employers, and we have seen employers decide to withdraw from Hybrid Plans altogether (and not transition to their new employer pools) because of the potential risk of additional liability in a mass withdrawal scenario. The specter of mass withdrawal liability also discourages new employers from joining or becoming transitioned employers in Hybrid Plans.

Prior to becoming a transitioned employer, an existing contributing employer to a Hybrid Plan typically enters a contractual agreement with the Hybrid Plan regarding the employer's withdrawal from the Hybrid Plan's old employer pool and subsequent re-entry into the Hybrid Plan's new employer pool. Among other things, many of these contractual arrangements specifically address the treatment of transitioned employers in the event that the Hybrid Plan in question experiences a mass withdrawal. In the absence of statutory and regulatory guidance with respect to the application of mass withdrawal liability for Hybrid Plans, transitioned employers relied solely on these contractual arrangements to determine the risks associated with making the transition and would not have made a transition without the protections afforded to them in the contractual arrangements.

The primary appeal of Hybrid Plans for employers is that they are intended to protect new and transitioned employers from liabilities attributable to the Hybrid Plan's old employer pool. This is a reasonable result because the employers that receive this protection are either completely new employers that should not be held responsible for the old employer pool's unfunded vested benefits or transitioned employers that already paid their share of the old employer pool's unfunded vested benefits. However, there is no existing statutory or regulatory guidance regarding Hybrid Plans that applies this principle with respect to mass withdrawal liability.

V. GUIDANCE NEEDED REGARDING MASS WITHDRAWAL LIABILITY

The PBGC should issue definitive guidance regarding the calculation and treatment of mass withdrawal liability for Hybrid Plans. This guidance should provide that new employers in Hybrid Plans face no exposure (and that transitioned employers face no, or little, exposure) to a Hybrid Plan's legacy liabilities. Two examples of guidance that could accomplish this goal are set forth below.

A. The PBGC could confirm that a Hybrid Plan's old employer pool and new employer pool are wholly separate for mass withdrawal purposes and, as a result, any additional liability for a new or transitioned employer in the event of a mass withdrawal would solely relate to the unfunded vested benefits, if any, of the new employer pool.

B. The PBGC could confirm the treatment in Section V(A) above, with the caveat that if a transitioned employer withdrew from the old employer pool during the period established under Section 4219(c)(1)(D)(i) of the Employee Retirement Income Security Act of 1974, as amended, the transitioned employer will remain subject to the imposition of mass withdrawal liability with respect to the old employer pool. However, if a mass withdrawal occurs after such period, the employer shall only be responsible for mass withdrawal liability attributable to the unfunded vested benefits, if any, of the new employer pool as set forth in Section V(A) above.

However, as noted above, employers that have already become transitioned employers in Hybrid Plans typically did so through contractual arrangements that specifically address their exposure in the event of a mass withdrawal. These employers solely relied on such contractual arrangements in making their decision to become transitioned employers. As a result, any regulatory guidance issued by the PBGC should "grandfather" and preserve any contractual arrangements that were entered prior to the date on which PBGC's guidance becomes effective to the extent that the existing arrangements conflict with the PBGC's guidance.

VI. CONCLUSION

The Hybrid Arrangement offers multiemployer pension plans an opportunity to stem the tide of withdrawing employers. However, additional clarity is needed from the PBGC regarding the calculation of mass withdrawal liability for Hybrid Plans to truly incentivize employers to take advantage of the Hybrid Arrangement.

Thank you for your consideration of these comments. If you have any questions or would like to discuss the foregoing in any respect, please contact Ira M. Golub at (212) 969-3008 or igolub@proskauer.com.

Respectfully submitted,

Proskauer Rose

PROSKAUER ROSE LLP