NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, D.C. 20006 • PHONE 202-737-5315 • FAX 202-737-1308

MICHAEL D. SCOTT
EXECUTIVE DIRECTOR
E-MAIL: MSCOTT@NCCMP.ORG

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Submitted electronically to: www.regulations.gov

Re: Comments on Proposed Revisions of the Form 5500 Annual Information Return; (RIN: 1210-AB97)

Dear Sir or Madam:

The National Coordinating Committee for Multiemployer Plans (NCCMP) welcomes the opportunity to provide stakeholder comments on the proposed changes to the Form 5500 annual information return and associated schedules (Proposed Modifications), as proposed by the Department of Labor (DOL), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) (collectively, the Agencies), and published in the *Federal Register* on September 15, 2021.[1]

NCCMP is the only national organization devoted exclusively to protecting the interests of the job-creating employers of America and their labor partners, as well as the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America's working men and women.

NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code (IRC) Section 501(c)(4), with members, plans, and contributing employers in every major segment of the multiemployer universe. Those segments include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking industries. Multiemployer plans are jointly trusteed by employer and employee trustees.

---

[1] 86 Fed. Reg. 51,488 (Sept. 15, 2021).

NCCMP routinely expresses to the Agencies the views of NCCMP's membership as reflected in NCCMP's filed comments in response to the Agencies' actions. The Proposed Modifications address reporting requirements under the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) for Defined Contribution Groups and multiple employer plans, including pooled employer plans. The Proposed Modifications also include non-SECURE Act related changes, including changes to the Schedule MB and the Schedule R routinely filed by multiemployer defined benefit (DB) pension plans. NCCMP offers the following comments regarding aspects of the Proposed Modifications that most impact multiemployer DB plans – proposed changes to the 2022 Form 5500 Schedule MB.

The Agencies have proposed adding new questions to the 2022 Form 5500 Schedule MB (Multiemployer Defined Benefit Plan and Certain Money Purchase Actuarial Information) and have proposed modifying the demographic and benefit attachment requirements so that the Agencies may better project DB pension plans' and insurance programs' liability. As discussed below, the Proposed Modifications should clarify certain aspects of the requested information and, for the reasons discussed below, certain information requested in the Proposed Modifications is unlikely to be useful. Such information should therefore not be required to be submitted.

Importantly, NCCMP supports the Agencies' efforts to obtain more information so as to better measure the financial well-being of multiemployer plans and risk posed to PBGC. Nevertheless, as NCCMP has noted in its past comments regarding Form 5500 modification efforts, obtaining such information is not without cost.[2] Nowhere is the impact of increased costs more apparent than it is with multiemployer plans, where every dollar spent for administrative purposes directly reduces the amount in the trust fund that is available to provide benefits for participants and beneficiaries.

Schedule MB Modifications

The instructions to "Line 3. Contributions Made to Plan" should clarify terminology used.

Line 3 of Schedule MB requires the showing of all employer contributions (including amounts owed for withdrawal liability) and employee contributions for the plan year. The Proposed Modifications would require an attachment to the Schedule MB that provides a breakdown of the total withdrawal liability amounts by date, separately specifying the "periodic" withdrawal liability amounts and "lump sum" withdrawal liability amounts.

[2] See, for example, NCCMP's comments regarding RIN 1210-A63 dated December 5, 2016 (https://nccmp.org/wp-content/uploads/2017/07/NCCMP-Comments-to-DOL-on-Proposed-Rule-and-Revisions-of-Form-5500-12-5-16.pdf).

The Proposed Modifications should clarify what qualifies as a "periodic" payment versus a "lump sum" payment. For example, an employer may have commenced making periodic payments on a schedule provided by the plan but may be delinquent on making payments. The employer may then make a lump-sum payment of missed payments to the plan. In another example, an employer may make advance payments in the form of a lump sum. It is unclear under the Proposed Modifications how such payments are to be reported.

The instructions to "Line 6f. Withdrawal Liability Interest Rate" are unclear as to what is intended to be reported in the case an employer "withdrew" from the plan. Also, the requirement to identify an interest rate for purposes of withdrawal liability would impose an additional burden on, and cost to, to some plans.

Line 6 of the current Schedule MB requires information about actuarial assumptions used to determine plan liabilities. The Agencies propose adding a new requirement that the interest rate used to determine the present value of vested benefits for purposes of determining withdrawal liability be identified. However, as proposed, the instructions state that this requirement applies to any employer that "withdrew" from the plan during the plan year. Although this request may appear clear on its face, it is not. First, it is not clear that the definition of "withdrawal" is limited to complete withdrawals. Although the definition of "withdrawal" in Schedule R is limited to complete withdrawals, it is not clear that this definition carries over to Schedule MB. This definition should be clarified. Additionally, because partial withdrawals may not be recognized until a substantial time after they occur, providing a timely and accurate response that includes partial withdrawals may be difficult.

Furthermore, for plans in the building and construction industry especially, knowledge that a withdrawal occurred may not be obtained for years after the date of withdrawal. Because a withdrawal of an employer in the building and construction industry does not occur unless the employer continues to perform, or otherwise resumes, covered work within the jurisdiction of the plan for which contributions are not owed within the five years following the cessation of the obligation to contribute to the plan (the Cessation Date), it may take up to five years before a withdrawal will actually occur. Once a withdrawal has occurred, however, the date of withdrawal is retroactive to the Cessation Date, *see* ERISA Sections 4203(b)(2) and (e). Furthermore, since all controlled group members are considered to constitute a single employer, *see* ERISA Section 4001(b), a plan may not become aware of the existence of a controlled group member immediately. Even for non-construction employers, it may take some time for a plan sponsor to determine whether an expired collective bargaining agreement will be renewed, or a cessation in contributions is temporary or permanent.

The instructions for proposed question 6f create further confusion by their discussion of plans that do not use a single, fixed rate to discount liabilities for withdrawal liability purposes during the plan year. They require a plan that uses anything other than a single, fixed rate to provide an aggregate rate based upon the assessments made for the withdrawals during the year. This implies that the question may be seeking information solely on withdrawals assessed during the year, which will typically be a very different set of withdrawals from those occurring within the year.

If "withdrew" is intended to refer to employers that have withdrawn and have been assessed withdrawal liability in the plan year, the new reporting requirement would add an additional administrative step. Plan actuaries often calculate withdrawal liability amounts upon request from the plan administrator but generally are not in the position to know if those amounts are assessed to employers. In order to meet this new requirement, the actuary would need to take an additional administrative step, at a cost to the plan, in coordinating with the plan administrator to determine whether employers were assessed during the plan year.

Furthermore, as the PBGC is well aware, many, most likely a majority, of plans do not use a single, fixed interest rate to discount liabilities for withdrawal liability purposes. As the Proposal acknowledges, some plans use the PBGC rate determined pursuant to ERISA Section 4044, which is in fact two or three separate rates that vary based upon the duration of the liabilities, while still others (such as those using the so-called "Segal Blend") take that compound rate and blend it with the rate used for minimum funding purposes. For such plans, the Proposed Modifications provide that the plan is required to report the single equivalent interest rate that produces the same present value of vested benefits. This requirement would impose an additional administrative burden on plans because these calculations are currently not regularly completed by the plan and would require significantly more work to complete. Given the complexity of the calculations, these plans would need additional actuarial support to complete the calculations, which would increase the plan's administrative costs.

Furthermore, the timing issues described above virtually guarantee that the ultimate interest rate that is produced will typically not reflect the actual weighted average applicable to all employers that withdrew during the year. For this reason, it is of limited utility. Our suggestion is to provide actuaries completing Schedule MB with the option to describe any external references by which the rate or rates are determined, along with an explanation of any blending methodology, in lieu of a single interest rate. While a question posed in this manner would not produce a single number, it would be far more accurate and provide useful information at minimal expense to the plans.

The instructions to "Line 8(b)(1). Schedule of Projection of Expected Benefit Payments" require a 50-year projection that would impose an additional cost to plans but would yield little useful information.

The Agencies propose modifying Line 8 to require additional information about the demographics, benefits and contributions to plans. Of particular concern are required benefit projections. Currently, plans with 500 or more participants are required to attach to the Schedule MB a projection of benefits expected to be paid in the next 10 years. The Agencies propose to modify the format of the attachment to show benefit projections broken down by categories (*i.e.,* actives, terminated vested participants, and those in pay status). Additionally, the Agencies propose that the projection be extended from 10 years to 50 years to be completed assuming, among other things, no additional accruals and no new entrants covered by the plan.

The extension of the projection from 10 years to 50 years will impose an additional administrative expense on the plan. Although the expense may be relatively small for plans that have software that can be easily modified to produce such projections, the projections are static and over a long period of time. As such, the projections are unlikely to produce meaningful, reliable or useful information for the Agencies, particularly in the out years, and do not warrant the additional administrative cost to plans. In addition, producing data that we know will be wildly unreliable may sow confusion and concern among the plans' participants, beneficiaries, employers, and other stakeholders.

The instructions to "Line 8(b)(3). Schedule of Projection of Employer Contributions and Withdrawal liability Payments" contains a typographical error.

The following sentence in the instructions contains an error:

> If line 8b(3) is "Yes," in an attachment, separately provide a projection of employer contributions and withdrawal liability payments expected to be received for the entire plan in each of the next ten years starting with the current plan year of this filing based on the assumptions used *for to* determine the plan's status under line 4b.

(Emphasis added).

The instructions and Schedule MB language at "Line 4f" should be further clarified to specify the relevant certification year. The instructions to Line 4f also require a projection for an unclear period of time not typically maintained by plans.

The Agencies propose amending line 4f (in the instructions and the Schedule language) regarding when (or if) plans that are in critical status or critical and declining status based on the "most recent

actuarial certification for the plan year and the most recently adopted rehabilitation plan" are projected to emerge or to become insolvent. It is unclear what is to be reported if, for example, the "most recent actuarial certification for the plan year" is the 2022 actuarial certification (which is based on the 2021 actuarial valuation) but the most recent rehabilitation plan is adopted in a subsequent plan year (and would be based on the actuarial valuation for that year and not the 2021 actuarial valuation). This should be clarified.

The instructions to Line 4f also require that an illustration be provided that shows year-by-year cash flow projections for the period ending with the year the plan is projected to become insolvent (or the 20th year after the valuation year, if earlier) and a summary of the assumptions underlying the projections. It is unclear from the instructions when the 20-year period begins (e.g., as of the filing of the Form 5500, beginning of the plan year, end of the plan year, etc.) and as such should be clarified.

NCCMP appreciates the Agencies' efforts in seeking to improve reporting by DB plans that are subject to Title IV of ERISA, and greatly appreciates the opportunity to comment on aspects of the Proposed Modifications. We are happy to discuss any questions you may have regarding these comments and related issues.

Regards,

Michael D. Scott
Executive Director