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From: Margaret's Mail [mtobin@nccmp.org]

Sent: Friday, March 18, 2005 2:38 PM

To: e-ORI@dol.gov

Subject: Comments on proposed Regs re ERISA section 101(f) as added by Section 103 of the PFEA 2004

Attached please find comments from NCCMP for your consideration regarding the above captioned regulation. Thank you.

The National Coordinating Committee For Multiemployer Plans

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March 17, 2005

Office of Regulations and Interpretations
Employee Benefits Security Administration
US Department of Labor, Room N-5669
200 Constitution Avenue, NW
Washington, DC 20210
Attention: PFEA '04 Project

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2005 MAR 18 PM 3: 24

Re: Multiemployer Funding Notice

Dear Madam or Sir,

On behalf of the National Coordinating Committee for Multiemployer Plans (the NCCMP), I am pleased to offer these comments on your proposed regulation under ERISA section 101(f), as added by Section 103 of the Pension Funding Equity Act of 2004 (PFEA'04).

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. Our purposes is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

The NCCMP was heavily involved in the legislative process that led to the enactment of this new disclosure requirement, working with Congressional staff to come up with an approach that would provide useful information to multiemployer-plan stakeholders. We strongly support the goal of improved transparency, with the caution that it is equally important to avoid sowing confusion about a plan or making excessive demands on its resources. We appreciate the Department's efforts to balance those concerns in the development of the proposed regulation.

We think that improvements discussed below would streamline the process and improve the usefulness of the information provided.

1. Employers to Which the Funding Notice Must Be Sent

a) Employers Obligated to Contribute. As a result of the PFEA amendment, ERISA now states that, "for each plan year" a multiemployer plan must send a funding Notice "to each employer that has an obligation to contribute under the plan ..." By contrast, the proposed regulation would expand that, to require that the Notice be sent as well to each

employer "who otherwise may be subject to withdrawal liability" under section 4203 of ERISA. That latter phrase seems to include employers that have withdrawn, unless they either have no withdrawal liability or have already paid it off, as well as those who might turn out to have withdrawal liability under special industry rules.[1]

We do not see how the statutory term "has an obligation to contribute" can be interpreted to include an employer that, as defined in section 4203 of ERISA, has permanently ceased to have an obligation to contribute. This expansion of the Notice requirement is not authorized by the statute. Whether or not potentially-withdrawn employers might have "a direct financial interest in the plan's funding status" as the Preamble to the proposed regulation suggests,[2] that is not how the law identifies the employers to whom the Notice must be sent.

b) Employer controlled groups. Extending the Notice obligation to employers that "may be subject to withdrawal liability" could expand the class of recipients geometrically. That is because withdrawal liability is imposed on a contributing employer's entire controlled group, see ERISA sections 4001(b)(1), 4201. Requiring Notice to all controlled group members would pose problems for plans much greater than the need to make and mail more copies of the document. The fact is, a plan rarely knows all of the corporations, trades or businesses that are under common control with a contributing sponsor unless the affiliated companies are "alter egos" of one another under labor law.

Until it is necessary to determine the existence of, and bill for, withdrawal liability, multiemployer plans have no need to know the details of the ownership of the contributing employers and the employers would probably resent the plans' inquiring into them. Therefore, most multiemployer plans would be unable to comply with a mandate that they circulate a standard plan financial Notice annually to all businesses linked through common ownership and control to the companies that are obligated to contribute as well as to those whose contribution obligations may have ceased.

The law, of course, does not require that Notices be sent to controlled-group members, since, by its terms, it only requires Notice to employers that have an obligation to contribute, and it is not in a part of the law in which "employer" is defined to include the controlled group.

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[1] The Preamble to the proposed regulation says that this phrase is aimed at employers that have ceased to have an obligation to contribute under construction, entertainment or trucking industry plans but may turn out to have withdrawal liability based on future events. We note that there are other situations in which an employer's exposure to withdrawal liability depends on future events, e.g., a company that sold assets under an ERISA s. 4204 procedure or an employer whose contribution obligation may or may not have terminated, depending on the outcome of a labor dispute. Also, it is not clear that the proposed language requiring Notice to each employer that "otherwise may be subject to withdrawal liability" is limited to those whose liability is contingent on future events.

[2] For example, the amount of an employer's withdrawal liability is determined as of the end of the plan year preceding the cessation of the obligation to contribute, see, e.g., ERISA sections 4203(e), 4211(b)(2)(A)(ii), and would not be affected by later changes in the plan's financial condition.

2. Content of the Notice

ERISA section 101(f)(2)(C) allows plans to include with the Notice "any additional information which the plan administrator elects to include to the extent not inconsistent with regulations prescribed by the Secretary." The NCCMP encouraged Congress to give plan administrators that latitude so that they could, if they chose, explain the sources of any funding shortfalls or otherwise put the funding information in context for the participants. For example, a plan might explain that a plan is not currently 100% funded because of a recent benefit increase, but that the trustees expect the funded level to recover within a few years.

Subsection (b)(9) of the proposed regulation addresses this statutory provision. It allows plan administrators to include additional information "provided that such information is necessary or helpful to understanding the mandatory information ..." It is not clear what is contemplated as "necessary" here. The NCCMP is concerned that that might be viewed as narrowing the type of information that can be included with the required. We suggest that it be dropped in favor of a rule against adding information that designed to mislead or confuse the recipients of the Notice.

3. Model Notice

For safety's sake, most plans are likely to use the model Notice. Here are some suggestions to make it clearer.

a) <u>Plan's Funding Level</u>. The law requires that the plan report the ratio of actuarial value of assets to current liability. However, this is different from the ratio that may be required to be reported on the SAR, which compares market value of assets to current liability. The model Notice should include a brief explanation of why the participants are receiving two different figures for what is likely to looks to them like the same basic number.

Also, we expect that few if any plans determine withdrawal liability on this basis. Since this Notice is going to employers as well as participants, they will want to include a caveat alerting those receiving the Notice that this percentage does not represent the value of the plan's unfunded vested benefits as calculated for withdrawal liability purposes. That should be included in the model, for the convenience of the many plans that will want to use the model and may be uncomfortable about modifying it.

b) <u>Rules Governing Insolvent Plans</u>. The law requires that this explanation be given. However, because the word "insolvent" could be unnecessarily alarming, we suggest adding sentence at the end of the first paragraph of this section saying something like, "We are giving you this information to help you understand the way in which the PBGC protects your benefits, but that does not mean that your plan is in danger of becoming insolvent." Plans that are in danger of becoming insolvent within, say, 5 years would be required to delete that statement.

c) Benefit Guarantees. The third sentence of the first paragraph of this section says, "the maximum guaranteed payment for a vested retiree, therefore, is ..." For multiemployer plan guarantees retirees are not treated any differently from others, so we suggest substituting "participant" for "retiree" in that sentence. Also, it might be worth adding right before that sentence, a statement that the maximum is the same regardless of the age at which the individual retires.

4. Regulatory Impact Analysis

We would not ordinarily comment on this part of the proposed regulation, because the compliance requirements and associated costs emanate largely from the law itself, not the regulation. However, since multiemployer plans must pay for this kind of activity out of funds that would otherwise be used for benefits, we want to correct some apparent misperceptions about the likely cost of doing so.

a) Professional Service Fees. The Preamble to the proposal states that the Notice is expected to be reviewed and adapted by service providers, "specifically by legal counsel at an hourly rate of $83."

In fact, the hourly rates of attorneys for multiemployer funds tend to range from about $150 to $500 - $600. Reviewing and adapting the model Notice for a given plan is, as the Department apparently assumed, likely to be handled by a mid-range attorney rather than the fund's most senior counsel. Accordingly, we suggest that you assume an average hourly cost for this of about $350.

Also, while reviewing and adapting the Notice may not consume significant professional time, responding to the inquiries that it provokes – especially from employers, who are not accustomed to receiving Notices from the multiemployer plans to which they contribute – will engage more of the plan advisors' time. Some plans, concerned that the Notices could be unduly unsettling (at least in the early years), may want to hold special briefings for union and employer representatives, to help them understand the information so they can reassure participants and employers. Employers themselves may incur costs if they refer the Notices to their own attorneys or accountants.

The cost of these additional professional services should be taken into account in estimating the total added costs that this new requirement will entail for the multiemployer community.

b) Organizing for Employer Mailings. Multiemployer plans are organized to communicate with their participants. Because they do not necessarily send regular mailings to all contributing employers, many may need additional data collection and systems work to do so now. This cost, as well, should be part of the economic-burden estimate.

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The NCCMP would appreciate the opportunity to discuss these issues with the Department, as well as any other matters that may come up as you work toward a final rule. If you are planning to hold a public hearing, we hereby request the opportunity to participate. If we can be of help in any other way, please be in touch with me at the above address, or by email at rdefrehn@nccmp.org.

Thank you for your consideration.

Sincerely,

Randy G. DeFrehn
Executive Director