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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor, Room N-5669
200 Constitution Avenue, NW
Washington, DC 20210

Attn: ERISA §101(k) Proposed Regulation

We are writing to comment on the proposed regulations governing certain financial and actuarial reports that multiemployer plans must now provide upon written request. The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to promote and protect the retirement security of American workers and their families.

New ERISA Section 101(k) provides participants and beneficiaries with access to current information regarding the financial health of their pension plan. Prior to this provision the most current information available was the annual report which often is not accessible to participants until the information it contains is at least seven months old.

Access to current actuarial and financial reports will allow participants to see the numbers that verify or dispute statements and decisions by plan trustees. However, the new disclosure requirements will only help if they are not negated by excessively broad interpretations of the exceptions to the new disclosure requirements. The statute does not grant broad discretion to the plan administrator to interpret what is "proprietary"; nor should the regulation. Similarly, without guidance, a plan could narrowly interpret the meaning of a "periodic actuarial report" or what exactly constitutes "sensitivity testing" to exclude vital analyses provided by the plan actuary. Unless the final regulation specifies the meanings of these terms, plans could whittle away this important new disclosure. A final concern is the fact that the proposed rule adds an exclusion not included in the statute: It permits a plan administrator to withhold "information or data which served as the basis for any report."

Defining the term "Proprietary"

The statute provides that any disclosures under ERISA §101(k) "shall not reveal any proprietary information regarding the plan, any contributing employer, or entity providing services to the plan." The overview of the proposed regulation invites comments on whether the term "proprietary" requires additional clarification. Indeed, we believe the term proprietary must be narrowly construed by the regulation, particularly with respect to information regarding the plan itself. The proposed regulation excludes from disclosure, information that, "the plan administrator reasonably determines to be . . . proprietary information regarding the plan, any contributing employer, or entity providing services to the plan." This grants very broad discretion to plan administrators when determining what information must be disclosed. The individual or entity requesting information should not have the burden of overcoming the plan administrator's "reasonable determination" by a standard akin to arbitrary and capricious. To the contrary, when a plan administrator asserts the proprietary exception, the plan administrator should have the burden of showing that the exception to the general policy of disclosure clearly applies in the particular circumstances. The final regulation should indicate what may be deemed proprietary.

The final regulation should also clarify that any information regarding the plan shall not be deemed proprietary for purposes of disclosures under 101(k) unless the dissemination of such information would be significantly adverse to the operation of the plan in accordance with Section 404(a) of ERISA. This would require that the plan administrator and trustees act in the interests of the plan participants when determining what information is proprietary.

We support the language in the proposed regulation requiring that a plan administrator must inform anyone making a document request under Section 101(k) if any information was withheld because it was determined to be proprietary or individually identifiable. The final regulation should also require the plan administrator to explain why the withheld information is properly characterized as proprietary or individually identifiable.

Periodic Actuarial Reports and Sensitivity Testing

It is our understanding that "sensitivity testing" is a term actuaries use to refer to studies they conduct on the impact of interest rate change assumptions on the plan. The use of different interest rates in plan calculations may drastically affect an actuary's determination that the plan is over or underfunded. In order to ensure that individuals making Section 101(k) requests receive all relevant sensitivity testing conducted by the plan actuaries, the final regulations should broadly define "periodic actuarial reports" to include studies of this nature as well as other reports that are performed for the plan from time to time.

Underlying data

The proposed rule states that the documents required to be disclosed shall not include "any information or data which served as the basis for any report." This rule is not authorized by the statute and could be used to exclude the information sought by requesting parties. It is unclear whether the proposed regulation is merely attempting to establish that *additional documents*

containing the underlying data and information used to develop the reports do not apply to the Section 101(k) disclosure requirement. Because the language in the proposed regulation is unclear, it could lead a plan to exclude or edit out *any underlying information or data* that may otherwise appear in the reports. The reports should be provided to requesting parties unaltered with the narrow exception of proprietary and individually identifiable information. A report could be incomplete and possibly useless if it did not contain the underlying assumptions and other data used to generate conclusions.

Thank you for the opportunity to comment on these important regulations

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