General Comment: The Department has proposed civil penalties for plans that fail to comply with disclosure requirements provided pursuant to the Pension Protection Act of 2006.
We note, however, that many of the proposed penalties apply for violations of public policy for which there are no regulations or even proposed regulations.

In our detailed comments (which are attached) we examine some of these policies and note specific instances in which this is the case. We urge the Department to defer the imposition of such penalties until the regulatory environment has been adequately clarified.

February 19, 2008

National Coordinating Committee for
Multiemployer Plans
815 16th Street, NW
Washington, DC 20006

Submitted Electronically via
Regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington D.C. 20210
Attention: Civil Penalties Under 502(c)(4)

Re: Proposed Regulations Regarding ERISA Civil Penalties
RIN 1210-AB24

Dear Friends,

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to provide these comments on the proposed regulations regarding civil penalties under the Employee Retirement Income Security Act of 1974 ("ERISA"), as contained in the Federal Register of December 19, 2007, Volume 72, Number 243, pages 71842-71847.

The NCCMP is a non-profit, non-partisan organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service and trucking industries. It is the only national organization devoted exclusively to protecting the interests of approximately ten million workers, retirees, and their families who rely on multiemployer plans for defined benefit pension benefits and the approximately twenty-six million who receive health and other benefits from such funds. The

NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women.

General Observations Regarding the Proposed Regulations

The Proposed Regulations would establish procedures for assessing new civil penalties for failure to disclose certain documents to plan participants, beneficiaries, employers, and others as required by ERISA. The Pension Protection Act of 2006 ("PPA") granted the Department of Labor ("DOL") the authority to assess civil penalties. The proposed regulations set forth how the maximum penalty amounts are computed, identifies the circumstances under which a penalty may be assessed, sets forth certain procedural rules for service and filing, and provides a plan administrator a means to contest an assessment by the DOL by requesting an administrative hearing.

The PPA permits the DOL to assess penalties on the plan sponsors and administrators of multiemployer defined benefit plans for failing to furnish: 1) employers with a notice of potential withdrawal liability, as required by new ERISA section 101(l), and 2) actuarial, financial, or funding information upon request, as required by new ERISA section 101(k).

Administrators of defined benefit plans could also be assessed penalties for failing to notify participants, beneficiaries, labor unions representing those individuals, and contributing employers of the plan's election to defer required charges against the plan's standard funding account.

Administrators of defined contribution plans that include an automatic contribution arrangement could be assessed penalties for failing to provide affected participants with notice of the arrangement's features, as required under new ERISA section 514(e)(3).

Discussion of Proposed Regulations

The DOL invited comments regarding the impact of the proposed regulations on certain entities, and any alternative approaches that may serve to minimize the impact on certain entities.

1. Disclosure obligations should be clarified before penalties are applied.

In view of the amount of the potential penalties, it is important that the disclosure obligations, be clarified by regulation before the penalties are applied. Some of the disclosure obligations, the failure to comply with which may result in penalties, have not yet been the subject of regulations. Others have been the subject of proposed regulations. Until final regulations are issued, it would be inappropriate to assess penalties. Furthermore, in one case discussed below, there are apparently inconsistent statutory provisions that seriously complicate disclosure by Plans.

2. The Proposed Regulations should clarify what constitutes a failure to give notice of potential withdrawal liability.

Withdrawal liability occurs when an employer that withdraws from an under-funded multiemployer pension plan. The employer is liable to the plan for the employer's proportionate share of the fund's unfunded vested benefit liability.

Under ERISA §4221(e) a plan was only required to provide information to enable the employer to calculate withdrawal liability. The Plan was permitted, but not required, to calculate

the employers specific withdrawal liability and could charge for that calculation. This section was not repealed by PPA.

Under new ERISA § 101(l), added by the PPA, funds shall furnish a notice of the estimated amount that the withdrawing employer would owe, and an explanation of how the estimated amount was determined, including: actuarial assumptions and methods, data regarding employer contributions, unfunded vested benefits, annual changes in plan's unfunded vested benefits, and the application of any relevant limitations on the estimated withdrawal liability. *See* ERISA § 101(l)(1)(B).

The PPA provision allows the Plan to make a reasonable charge to cover "copying, mailing and other costs of furnishing such notice." It is not clear that this includes the actuarial fees involved in making the calculation. However, as noted, ERISA 4221(e) was not repealed and that permits the Plan to charge for such calculations. While the costs associated with preparing withdrawal liability estimates are not insubstantial for plans which use the presumptive method, the magnitude of the administrative burden and associated costs for preparing withdrawal liability calculations for plans that use the attributable method under ERISA 4211(c) are substantially greater. To require plans to provide such estimates to employers at plan expense would present a substantial cost burden to such plans which, in the absence of 4221(e) protections, would be borne by plan participants, providing a service for the employer community (rather than for the exclusive benefit of plan participants) for which the primary purpose in providing estimates of such liabilities in the past has been to facilitate the sale of such companies to willing purchasers.

Therefore, before penalties are implemented for the failure of a pension fund to provide the notice of the estimated amount of withdrawal liability, these statutory provisions—ERISA §101(l) and §4221(e)—must be reconciled. The "other costs of furnishing such notice" which ERISA §101(l) authorizes, may (and we would submit, should), in fact, refer to the actuarial costs that ERISA §4221(e) authorizes to be charged. A fund should not be subject to penalties because an employer has declined to pay the actuarial cost for making the withdrawal liability calculation. The proposed civil penalty regulations should address this situation.

3. The Proposed Regulation should clarify to what automatic contribution arrangements the civil penalties apply.

A similar issue arises with respect to automatic contribution arrangements. IRS has issued proposed regulations with respect to "qualified automatic contribution arrangements" and "eligible automatic contribution arrangements". See Federal Register, November 8, 2007, Volume 72, No. 216, pages 63144-63155.

Both Code §414(w)(4) and 502(c)(4) provide how Notice must be given to participants in "eligible automatic contribution arrangements". The definition of such arrangements includes a requirement that contributions under the arrangement must be invested "in accordance with regulations prescribed by the Secretary under [ERISA] section 404(c)(5)."

In addition to the automatic contribution arrangements described in §414(w)(4) and 502(c)(4), there are two other types of automatic contribution arrangements that may not meet the definition in ERISA §514(e) because they are not required to provide a default investment "in accordance with regulations prescribed by the Secretary under [ERISA] section 404(c)(5)." These other arrangements include "qualified automatic contribution arrangements" as defined in Code §§401(k)(13) and 401(m)(12) and pre-PPA automatic contribution arrangements as

described in Revenue Rulings 98-30 and 2000-8. Therefore, the regulations should clarify that notice failures in connection with automatic contribution arrangements that do not meet the definition in ERISA §514(e) are not subject to the civil penalties in these proposed regulations.

Conclusion

The NCCMP requests that the Department provide clarification as discussed above in the final regulations. We will be happy to discuss these comments with you, or provide additional information you may need as you finalize these regulations.

Sincerely,

Randy G. DeFrehn
Executive Director