# Iron Workers Local 17 Fringe Benefit Funds, Inc.

INSURANCE PLAN • PENSION FUND • ANNUITY FUND

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August 10, 2021

*Via E-mail at reg.comments@pbgc.gov*
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington DC 20005-4026

**RE: Comment on Special Financial Assistance by PBGC (RIN1212-AB53)**

Dear Sirs:

The Iron Workers Local 17 Pension Fund ("Pension Fund") implemented a benefit suspension under the Multiemployer Pension Relief Act of 2014 in February 2017 which is currently on track to leave the Fund with over $160 million in assets as of 2051. This MPRA Suspension Plan was thoroughly vetted and hard fought to get into place under the legislative relief available at the time. When the provisions that ultimately became the Special Financial Assistance Program ("SFA") in the American Relief Plan Act of 2021 ("ARP") were announced, the legislators claimed that the financial loans/grants would be enough to restore the benefits which were suspended to plans that implemented cuts under MPRA. However, in crafting the regulations necessary to implement the new SFA program, the PBGC did not merely fund the suspended benefits, they reset the whole process eliminating the benefits gained by the prior funding relief law.

The Board of Trustees for the Iron Workers Local 17 Pension Fund ("Trustees") worked with their Plan professionals, participants, contributing employers and Local Union to come up with a plan that shifted the burden for overcoming the significant funding deficiencies from the active membership without significantly impacting any group of retiree/terminated vested participants. The application was initially filed in December 2015 but then refiled in July 2016 due to changes in the final regulations which required additional documentation and more hurdles to obtaining approval.

After the second application was filed, the MPRA benefit suspension application was vetted by both Treasury and the PBGC over a period of six months. During this time, both agencies agreed that the resources dedicated to reverse the Pension Fund's trajectory toward insolvency was enough to maintain solvency over at least 50 years. These resources included the future contributions and investment income earned on the plan assets during this fifty- year period. The PBGC reviewed and checked all of the participant calculations to ensure that the suspended benefits prepared by the Pension Fund were accurate and consistent with the proposed plan. The Pension Fund incurred significant costs in navigating

the MPRA application process which required considerable projections and justification for all of the underlying projections and assumptions.

After initial approval by Treasury, the participants of the Pension Fund, including current retirees and deferred vested participants, were contacted by the Local Union through group meetings and individually by phone. Each participant had the opportunity to get answers to questions on the current solvency issues if the MPRA plan was not adopted and the impact of the benefit cuts if the benefit cuts were adopted prior to the required participant vote in December 2016. Each participant received notice of the impact on their own current and future monthly pension benefit if they voted to approve the MPRA Suspension Plan. The membership of Local 17 came together and decided as a collective that it was in the best interest of all iron workers to accept the MPRA benefit cuts in 2017 rather than run the Pension Fund into insolvency. Out of the 936 votes cast, 616 voted to approve the MPRA Benefit Suspension in order to maintain a solvent Pension Fund for the foreseeable future.

After three and a half years, the MPRA plan is ahead of the initial projections due to a combination of better than expected hours (pre-March 2020) and investment returns for most plan years including the 2020-21 Plan year that just ended.

The current interpretation of the amount of special financial assistance adopted by the PBGC regulations, disregards all of the prior work taken by the Treasury, PBGC and Pension Fund by ignoring the fact that they already agreed these resources were only enough to provide ongoing benefits at the MPRA Suspension levels. They should be disregarded for determining the "amount of special assistance" a MPRA Plan needs to restore the MPRA Benefit Suspensions.

**PBGC should revise the Interim Final Regulations to fully fund the restored MPRA Benefits Suspensions so the Priority Group 2 Plans that receive the SFA payments are at the same funded level in 2051 they would be if they remain under the approved MPRA Benefit Suspension Plan.**

Our primary concern is the PBGC's interpretation of ERISA Section 4262(j)(1), which states:

> The amount of the financial assistance provided to a multiemployer plan eligible for financial assistance under this section shall be such amount required for the plan to pay all benefits due during the period beginning on the date of the payment of the SFA payment under this section and ending on the last day of the plan year ending in 2051.

The PBGC's interpretation is found in Regulation Section 4264.4(a) which provides:

> The amount of special financial assistance for a plan is the amount (if any), subject to adjustment for the date of payment as provided in Section 4262.12, by which
>
> (1) The value as of the plans SFA measurement date of all of the SFA eligible plan obligations, exceeds
> (2) The value, as of the plans SFA measurement date, of all SFA-eligible plan resources.

Plan resources referenced in (2) above are defined in Regulation Section 4264.4(c), which states:

> The value of SFA-eligible plan resources as of the plan's SFA measurement date, is the sum of –

(1) The fair market value of plan assets on the SFA measurement date; and
(2) The present value of the future contributions, withdrawal liability payments, and other payments expected to be made to the plan (excluding the amount of the financial assistance under section 4261 of ERISA and special financial assistance to be received by the plan) during the coverage period.

Using this definition of "resources" will reverse the trajectory of any MPRA Benefit Plan that takes the SFA payment away from long term solvency. In order to avoid this contrary result, we believe that the interim final regulation should also exclude the present value of resources determined necessary to restore the solvency/funded levels under the MPRA Benefit Suspension Plan as already approved by the Department of Treasury in consultation with the PBGC. This will allow the MPRA Benefit Suspension Plans (Priority Group 2 Plans) that receive a SFA payment to have the same level of assets at the end of 2051 as projected if they were to continue with the MPRA Benefit Suspension. This interpretation will meet the legislative goals to restore the benefits suspended under MPRA without adversely impacting the active participants who will be left with 30 years of contributions for an insolvent pension plan in 2052, if not sooner.

In the alternative, the PBGC can revise the formula for determining the SFA payment needed for Priority Group 2 Plans, to fully fund the restored benefits over the thirty-year period on a stand- alone basis without regard to the non-suspended benefits that should be funded in order to meet the MPRA solvency standards through 2051.

**PBGC should revise the Interim Final Regulations to allow a contingent amendment to restore MPRA suspended benefits prior to application and receipt of the SFA payments or eliminate the provisions allowing the advanced restoration.**

The provision regarding Priority Group 2 Plans' ability to reinstate the benefits to pre-suspension levels prior to filing an application provides the participants and beneficiaries with a false impression and puts these plans in an unreasonable position. The Priority Group 2 Plans will not have information on the amount and impact of the SFA funds on the overall solvency of the plan until the application is finalized and submitted to the PBGC. At which time, the PBGC has the ability to reject the application if it does not agree with the amount of SFA funds requested.

In order to reinstate the MPRA Benefit Suspensions, the Trustees will need to revoke the Plan Amendment adopted at the time the MPRA Suspensions were put into place (MPRA Amendment). The interim final regulations as written do not provide Trustees with the authority to revoke the MPRA Amendment on a contingent basis if the SFA application is ultimately withdrawn or denied. This same contingency provision is provided in the model amendment language required to receive a SFA payment (SFA Amendment). See PBGC Regulation Section 4262.6(e)(1). Under the interim final regulations, once the MPRA Amendment is revoked, the Trustees would have to file a new MPRA application before any benefit suspensions could be reinstated. This would be a costly and lengthy process and it is not clear whether the Trustees could even meet the conditions for a MPRA benefit suspension now that SFA payments are available.

Accordingly, by announcing that the Priority Group 2 Plans can reinstate the suspended benefits before filing an application, the PBGC has given itself an undue advantage over all Priority Group 2 Plan. Participants and beneficiaries in these pension plans are led to believe that their benefits are going to be reinstated in full immediately. However, any Priority Group 2 Plan that does so, will have no ability to

reject whatever payment amount under the SFA that the PBGC determines because they cannot go back to the pre-SFA application benefit levels.

The PBGC should revise the interim final regulations to either not allow the reinstatement of benefits until the SFA funds are actually paid, as it does with Priority Group 1 Plans or it should provide a clear authorization for the plans to adopt an amendment revoking the MPRA Benefit Suspensions on a contingent basis.

**The PBGC should update its regulations to include a restriction on any legal cause of action for participants or beneficiaries in a pension plan eligible to apply for SFA payment under this law and should work with the DOL to issue joint regulations or guidance that clarifies that the failure to accept SFA payment is not a per se breach of fiduciary duties.**

Finally, the Trustees believe that the PBGC should work with the Department of Labor to have regulations issued to address the fiduciary breach issues that may arise in the event a Priority Group 2 Plan elects to take SFA funds. In MPRA, the law set forth in ERISA Section 305(e)(9)(I)(iii) provides that no participant or beneficiary affected by the benefit suspension has a cause of action. ARP did not include a similar provision even though similar fiduciary issues arise.

The Trustees filed a MPRA Benefit Suspension application with the Department of Treasury after determining that doing so was in the best interest of the participants and beneficiaries on an aggregate basis. After vetting the application and its impact on all of the participants and beneficiaries, which included the review of the current and suspended benefit for each impacted individual, the decision on whether to implement the suspensions was put to a vote by all participants and beneficiaries.

Prior to filing for a SFA payment, the Trustees need to make another determination that filing for the SFA payment is in the best interest of the participants and beneficiaries on an aggregate basis. If the process that the Trustees follow to make this evaluation is reasonable, the Trustees and Pension Fund should not be found liable for a fiduciary breach or face litigation from conflicting participant groups, regardless of whether they determine to apply for a SFA payment or continue with the MPRA Benefit Suspension.

The DOL regulation should also adopt similar language making it clear that there is no cause of action to sue a pension plan that takes the SFA payment. Otherwise, the plan could not be sued if it cuts benefits but could be sued if it does not reinstate them even in the face of clear evidence that the reinstatement would harm more participants and beneficiaries than it would benefit. The lack of the restriction on the cause of action under ARP (similar to the one provided in MPRA) could cause the Trustees facing this situation to make decisions that are not in the best interest of the plan in order avoid costly and toxic litigation.

Overall, the SFA program created by ARP provided the framework to restore benefits to participants and beneficiaries that suffered benefit reductions under MPRA without running the Pension Fund back into insolvency. However, the interim final regulations prepared by the PBGC did not merely provide the financial assistance to restore benefits, they erased the gains toward solvency. The active participants in any plan that takes the grant will be once again on a trajectory toward insolvency even though they have provided thirty years of additional funding to support the higher benefit levels to the retirees and terminated vested participants. This is contrary to the prior vote taken during the MPRA application process and the stated legislative intent when ARP was passed.

We respectfully request that the regulations be modified with regard to Priority Group 2 plans to fully fund the benefits suspended under MPRA without leaving the current actives with an insolvent plan in the next thirty years. The final regulations should be drafted to ensure that the Priority Group 2 plans are projected to be in the same financial position in 2051 after the MPRA benefits are restored and their fiduciaries have protection from litigation if the decision to accept or decline the SFA payment is made after evaluation and determination that it is in the best interests of all of the participants and beneficiaries.

Sincerely,

Richard Jordan

Rich Jordan
Chairman, Board of Trustees