



Submitted via electronic mail to reg.comments@pbgc.gov

August 11, 2021

Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005-4026

Dear Ladies and Gentlemen:

**Comments on Pension Benefit Guaranty Corporation Interim Final Rule
Special Financial Assistance by PBGC**

The McKeogh Company is an actuarial and benefits consulting firm focusing on multiemployer pension and health benefit plans. We consult to many of these plans of varying size and across several industries. We also consult with employers with respect to these plans and have served as expert witness in certain legal proceedings involving these plans. We submit comments regarding the Interim Final Rule (IFR) issued by the PBGC on July 9, 2021 and published in the Federal Register on July 12, 2021. That IFR sets forth requirements related to the Special Financial Assistance (SFA) provisions of the American Rescue Plan Act of 2021.

Benefit Improvements

What constitutes a benefit improvement? What seems a simple question has been the source of much debate in the multiemployer pension plan world, particularly since the passage of the Pension Protection Act of 2006. Is it something that comes about solely as a result of a plan amendment? Is a plan that bases a benefit accrual on the amount of contributions being made on behalf of a participant in fact increasing benefits if the relevant collective bargaining agreement calls for an increase in the contribution rate? Is a pay-based plan increasing benefits if pay increases? (We note that some plans are, in fact, pay-based if benefits are a function of contributions, which in turn are a function of pay – even if pay is not mentioned in the plan document defining benefit accruals).

The notion of benefit improvements comes up in the IFR in two critical areas. First, in the application for SFA where actuaries need to calculate the present value of plan obligations and resources, is it appropriate to assume annual pay increases in determining future contributions and future benefit accruals if both contributions and benefits are pay-based? A similar question applies to plans that base benefit accruals on contributions.

The second -- and more important -- area where clarification is necessary relates to restrictions on plans that receive SFA. The IFR states that a prospective “benefit or benefit increase must not be adopted during the SFA coverage period unless (i) the plan actuary certifies that employer contribution increases projected to be sufficient to pay for the benefit increases have been adopted or agreed to ...”. That statement seems to be in direct conflict with the requirement that “... a plan that receives special financial assistance is deemed to be in critical status within the meaning of section 305(b)(2) of ERISA until the last day of the last plan year ending in 2051.” ERISA section 305(f)(1)(B) has an additional requirement that no benefit increase is permissible during a rehabilitation period unless the plan is on track to emerge from critical status by the end of the rehabilitation period. It seems to us that these rules are completely contradictory: The IFR implies that prospective increases are possible during the SFA coverage period but the plan is deemed to be in critical status along the way. ERISA requires that a critical status plan must be reasonably expected to emerge from critical status by the end of the rehabilitation period, a date that comes decades earlier than the end of the SFA coverage period.

Restoration of Suspended Benefits

Trustees of many plans that have suspended benefits under provisions of the Multiemployer Pension Reform Act of 2014 face difficult decisions under the IFR requirements for two reasons. First, the SFA is determined only on the present values of restored benefits expected to be paid by the end of the 2051 plan year, but the value of the all the suspended benefits would be included in any plan amendment restoring those benefits – even those paid after 2051. So, execution of the plan amendment could, other things being equal, create additional unfunded liability.

Secondly, consider a plan that suspended benefits but is not projected to be insolvent by 2051 currently. By applying for SFA, they must restore suspended benefits. After the benefits are restored, the Plan is projected to be insolvent before 2051. The SFA will keep the Plan solvent up to 2051. As we read the IFR, these plans would, in effect, use up any of their current surplus first with the remaining shortfall made up by the SFA. In this example, a plan that would be projected to be more than 0% funded at 2051 prior to SFA would, by design, be projected to be 0% funded at 2051 after restoring benefits and accepting SFA. We believe it is highly unlikely that these plans would restore suspended benefits given the costs and risks involved. This seems like an unintended consequence of the IFR provisions.

We suggest that the determination of SFA for restoring suspended benefits be the present values of those benefits restored regardless of the current funding provision of the plans involved.

Post SFA Mergers

The McKeogh Company serves as enrolled actuary for several plans that are (a) relatively small, (b) are at significant risk of becoming insolvent and (c) have healthy sister plans that would be merger candidates under the right conditions. In these cases, mergers could make sense for all the parties involved: the participants, the employers and unions sponsoring the plans, and the PBGC.

It is perhaps fortuitous that the IFR does not get into much detail regarding the life of the plan resulting from the merger of what we'll call an SFA Plan and a non-SFA plan. Let us respectfully make some suggestions:

- Clarify, at the least, that the non-SFA plan is not burdened by the merger. It should not have to use mass withdrawal assumptions as required for the non-SFA plan. It should not have restrictions on benefit improvements, etc. This may require some segregation of assets and liabilities at first but preferably not for 30 years.
- Allow benefit increases for future service for participants that were in the SFA plan that merged with the non-SFA plan. The benefit increases can and should be allowed only if the merged plan can otherwise afford to adopt them. There would be a reasonable expectation that two participants under the same plan working with the same or similar contribution rates would have the same benefit accrual for service after the merger. That would likely be a goal of the plan sponsors even though it might reasonably take time to achieve that goal.
- Set up some de minimis rules so that a small plan could be absorbed by a large plan without incurring unnecessary recordkeeping expenses.
- Allow for some transition rules so that whatever recordkeeping requirements created by the merger would be temporary. These rules might apply to withdrawal liability calculations, asset segregation, and benefit design.

We thank the PBGC for the opportunity to submit these comments and would be pleased to discuss anything contained above.

Sincerely,

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