

Via Electronic Submission
(www.regulations.gov)

August 10, 2021

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

**Re: Comments in Response to Interim Final Rule:
Special Financial Assistance by PBGC
RIN 1212-AB53**

The United Food and Commercial Workers International Union (“UFCW”) respectfully submits the following comments to the Pension Benefit Guaranty Corporation (“PBGC”) in connection with the PBGC’s Interim Final Rule (“Rule”) on the requirements for special financial assistance applications and related restrictions and conditions developed pursuant to the American Rescue Plan Act of 2021 (“ARPA”). UFCW applauds the passage of ARPA, particularly the special financial assistance provisions that will provide much needed relief to so many pensioners who rely on benefits from multiemployer pension plans covering a wide range of industries, including notably retail and manufacturing. However, critical to delivering on ARPA’s promise that pension benefits be protected for the next thirty years is the development of rules by the PBGC that facilitate the long-term viability of multiemployer pension plans.

UFCW is a labor organization that represents working men and women across the United States. UFCW’s 1.3 million members work in a range of industries, with the majority working in retail food, meat packing and poultry, food processing and manufacturing and retail stores. We are North America’s neighborhood union and the largest union of young workers, with 40% of UFCW members under the age of 30. UFCW members are from many backgrounds and walks of life but come together as UFCW for the shared goal of achieving the American dream. UFCW is about workers helping workers improve working and living standards through better wages, benefits, and working conditions.

Hundreds of thousands of current and former UFCW members are covered by multiemployer defined benefit pension plans. While the vast majority of these plans are well funded and will not be eligible for special financial assistance offered by ARPA,

- 2 -

a number of UFCW affiliated multiemployer plans are eligible for the assistance to deliver promised benefits. Accordingly, UFCW has a strong interest in ensuring that ARPA's relief provisions are implemented consistent with Congress's intent so that the special financial assistance fully protects the benefits provided by these plans through the year 2051 and that plans remain viable after that date.

1. Amount of Special Financial Assistance.

Under newly enacted Section 4262 of ERISA, federal funds are transferred to the PBGC to pay amounts to certain eligible multiemployer plans. These amounts are paid to eligible plans in one lump sum payment and there is no obligation by the eligible plans to repay these amounts.

Under ERISA Section 4262(j), the amount of the special financial assistance is the "amount required for the plan to pay all benefits due during the period beginning on the date of payment of the special financial assistance payment...and ending on the last day of the plan year ending in 2051..." Under the Rule, 29 CFR Section 4262.4(c), the PBGC has taken the position that the amount of financial assistance is the amount by which the special financial assistance obligations falls short of all plan resources. Plan resources as of the specified measurement date equals the sum of the fair market value of assets on the measurement date plus the present value of future contributions, withdrawal liability payments, and other payments expected to be made to the plan (excluding the special financial assistance).

Contrary to the position of the PBGC, nothing in the provisions of ARPA mandates that all plan resources, including future contributions to a multiemployer plan, be deployed to pay all benefits due through 2051. As we noted in prior comments to the PBGC dated April 30, 2021, plan assets also reflect contributions that are made to a plan to fund benefits due after 2051. Take, for example, covered employees first participating in a multiemployer plan eligible for assistance after March 2021. Many of those employees will not retire until close to, if not after, 2051. Yet virtually all of the contributions made on their behalf would be used to determine the amount of assistance needed to pay benefits only up until 2051. Because ongoing employer contributions to a multiemployer plan are the direct outcome of collective bargaining, younger employees will have less of an interest in remaining in plans if they will become insolvent at or around the same time in 2051 and before many participants have retired. In fact, younger employees likely would not agree to have employer contributions made on their behalf (and which are deferred wages) being used entirely to fund older workers' benefits. The approach used in the Rule will weaken the commitment of the stakeholder employees, unions and employers to remain in these defined benefit plans for the long term.

- 3 -

ARPA's payments to shore-up the multiemployer pension system should ensure that retirement benefits are available for as many of participants actively accruing benefits so that these stakeholders remain committed to continued participation and employers do not withdraw from these plans.

Additionally, taking into account all existing assets of each multiemployer plan in determining the amount needed to pay benefits through 2051 will lead to many plans reaching insolvency at around the same point in time. There is no indication that Congress intended the financial assistance to result in a mass number of insolvencies occurring in or about 2051.

As UFCW noted previously, at a minimum, there should be a carve-out of a proportionate share of assets required to fund benefits due after 2051, including for participants first participating in these plans after the date of the receipt of financial assistance, applying reasonable turnover assumptions by the plan's actuaries. PBGC has the plain authority to adopt such a rule and this approach is consistent with how benefits are funded on an ongoing basis.

2. Interest Rate Assumptions Used to Determine Special Financial Assistance and Investment of Special Financial Assistance.

Section 4262(e) of ERISA requires that the plan actuary use the interest rate assumption from the plan's most recent zone certification filed prior to January 1, 2021. However, for purposes of determining the amount of special financial assistance, the interest rate assumption is limited to the 3rd segment bond rate of the 24th month average yield curve for the month in which the application is filed or the preceding three months plus 200 basis points. Currently, the capped interest rate is in the neighborhood of 5.5%.

In contrast to the capped interest rate used to determine the amount of special financial assistance, Section 4262(d) of ERISA requires that "[s]pecial financial assistance shall be invested by plans in investment-grade bonds or other investments as permitted by the corporation." The rate of return for investment grade bonds is substantially below the capped interest rate to be used to determine the amount of special financial assistance and is likely to remain far below that capped rate for the foreseeable future. Consequently, absent the PBGC exercising the express authority granted to it under Section 4262(d) to allow for other investment vehicles that can generate higher rates of return, it is almost certain that there will be a significant funding shortfall. Measuring a plan's needs assuming returns of 5.5% but limiting the plan's ability to earn more than 2 to 3% from the proceeds of the special financial assistance virtually guarantees that plans will run out of money to pay benefits years before the target date of 2051.

- 4 -

We are pleased to see that the PBGC is seeking public comments under the Rule on (1) the potential benefits and risks of investing special financial assistance in vehicles that are or have the nature of fixed income, (2) whether permissible investments of special financial assistance be limited to fixed income, (3) what the appropriate amount is that may be invested in non-investment grade assets, and (4) what is the proper relationship to other plan asset allocations. We urge the PBGC to exercise its statutory authority under ARPA to allow plans to invest the special financial assistance in asset classes other than investment grade bonds. There are a variety of approaches that the PBGC can employ to authorize investments that will allow returns to align with the capped interest rate assumptions. One such approach could allow a plan to invest in other asset classes as long as the plan continues to maintain a low projected standard deviation from an assumed rate of return based on: (1) the capped interest rate assumption used in the application for assistance; and (2) reasonable capital market expectations. This approach can be coupled with guidelines on appropriate investment restrictions, such as the maximum use of leverage, exposure to hedge funds and maximum investments in equities, etc.

Modern portfolio theory has proven that portfolio diversification can actually improve return potential and lower actual risk. A diversified well executed investment program managed by a fiduciary with appropriate expertise can mitigate additional risk factors associated with asset classes such as public equity, private equity, real estate, high yield fixed income, and private credit. Use of a well-defined Investment Policy Statement also can assist in creating guardrails against risk of loss associated with investing in other asset classes.

Optimizing the returns in a risk-controlled manner also can decrease the amount of risk a plan utilizes with respect to investing the existing legacy assets. Additional restrictions can be placed on the maximum amount of special financial assistance that can be invested in non-investment grade bonds, both in the aggregate and by specific asset class (e.g. total non-investment grade assets may not exceed 50% of all special financial assistance with limits on equities at 25%, core real estate 5%, high yield 5%, etc.). The PBGC can also mandate overall restrictions on permissible investments, including on legacy assets, so that the overall risk return profile of the plan is designed to ensure solvency at least through 2051. By exercising the authority expressly granted to it under ARPA, the PBGC can achieve the most significant goal of this watershed legislation – to enable the special financial assistance to provide pension benefits at least through the year 2051.

- 5 -

3. Priorities for Applications for Assistance.

ERISA Section 4262(d) allows the PBGC to restrict applications for special financial assistance in the first two years following the date of enactment. Using this general priority system, the Interim Final Rule establishes six priority subgroups with established timetables under which plans within those subgroups may apply to the PBGC for assistance. The last priority subgroup (group 6) for applying for special financial assistance are those plans for which the PBGC computes the present value of financial assistance under Section 4261 of ERISA to be in excess of \$1 billion. However, there is a seventh category of plans that are eligible for special financial assistance but which do not fall within a priority category that are referred to as “[a]dditional plans that may be added by PBGC based on other circumstances similar to those described for priority groups 1-6.” The date those plans may apply to the PBGC is not set forth in the Interim Final Rule and the PBGC only indicates that applications may be set as of a “[d]ate to be specified on PBGC’s website no later than March 11, 2023.”

Plans falling within category 7 should have the same opportunity to apply for financial assistance as plans in category 6 (plans with anticipated special financial assistance of in excess of \$1 billion). Those plans eligible for financial assistance of less than \$1 billion will tend to be plans in lower wage industries, such as the retail and service sectors, where the benefit accrual rates are generally lower than the benefit accruals provided in other higher paid industries. Of course, there is ample data to show that these lower wage industries are dominated by women and people of color who earn less than other demographic groups. The plans covering these workers employed in lower wage sector industries were just as adversely impacted by the dot.com bubble in the early 2000s and financial crisis of 2008-2009. And there is overwhelming agreement that the financial dislocation of the ongoing pandemic fell disproportionately on women and minority populations. There is no supportable policy reason to force plans and their participants in this group to wait behind other underfunded plans simply because the multiemployer plans in which they participate are not eligible for at least \$1 billion in financial assistance. These are the same low wage workers on the front lines that have sacrificed so much during the pandemic – they are entitled to the certainty of knowing when their plans can apply for financial assistance and that their pensions will be secure through 2051.

The delays associated with the timing of applications for financial assistance can have real world consequences. Continued coverage under these plans is dictated by the terms of negotiated collective bargaining agreements. As UFCW previously noted in its April 30, 2021 letter, not knowing for two years or more whether special financial assistance will be granted could have a significant impact on negotiations as contracts expire. Quite frankly, knowing that there is a date certain for applying for financial assistance that is within the next two years could impact whether an employer and

- 6 -

covered employees stay in a multiemployer plan or withdraw and negotiate over a different retirement arrangement.

4. Impact of Special Financial Assistance on Withdrawal Liability.

ERISA Section 4262(m) provides that the PBGC may, in consultation with the Secretary of Treasury, impose reasonable conditions relating to withdrawal liability. UFCW believes that it is important to the ongoing solvency of multiemployer plans that the PBGC not incentivize employers in any way to withdraw from multiemployer plans as a result of a plan's receipt of special financial assistance.

Under the Interim Final Rule, the PBGC has exercised its authority to require that for withdrawals that occur after the plan year in which a plan receives special financial assistance, the interest assumptions used in determining withdrawal liability must be mass withdrawal liability interest assumptions. These interest assumptions must be used until the later of ten years after the end of the plan year in which the plan receives payment of the assistance or the last day of the plan year in which the plan no longer holds special financial assistance or any earnings in a segregated account.

The PBGC considered a regulatory alternative in which special financial assistance assets would be disregarded in the determination of unfunded vested benefits for the assessment of withdrawal liability. The alternative was rejected simply as more administratively complex and therefore less desirable.

We urge the PBGC to adopt an alternative approach in which special financial assistance is not taken into account for the purpose of calculating withdrawal liability. Segregating the assets (and earnings) associated with special financial assistance is not complex from an administrative standpoint and is consistent with the overall legislative intent behind ARPA -- that is to provide financial stability to certain critically underfunded multiemployer plans. The special financial assistance and earnings already will need to be separately tracked. To the extent special financial assistance (which in a number of instances will be the most significant asset of the plan) is counted in determining whether there are unfunded vested benefits, there may be no unfunded liability at all, thereby giving a window of opportunity for employers to withdraw without having to pay the plan anything upon exiting. Depending on the amount of special financial assistance, there may be no unfunded liability even utilizing mass withdrawal liability assumptions. This leads to the opposite result -- that employers will be more likely to leave distressed plans that are temporarily better funded, speeding their insolvency.

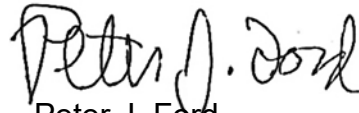
The PBGC has the statutory authority to exclude special financial assistance from the value of plan assets in calculating unfunded vested benefits. The PBGC should exercise its authority at least with respect to the period provided under the

- 7 -

House bill, in which the special financial assistance would not factor into the computation of withdrawal liability for a fifteen-year period. At that time, the remaining amounts of financial assistance can be reflected in the determination of withdrawal liability over the remaining fifteen-year period in which the assistance is to be applied.

The UFCW appreciates the opportunity to provide these comments on the PBGC's Rule. Should the PBGC have any questions concerning these comments, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in black ink that reads "Peter J. Ford". The signature is written in a cursive style with a large, stylized "P" and "F".

Peter J. Ford
General Counsel