

*WESTERN PENNSYLVANIA
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**COMMENTS OF THE BOARD OF TRUSTEES OF THE WESTERN PENNSYLVANIA
TEAMSTERS AND EMPLOYERS PENSION FUND**

to

PENSION BENEFIT GUARANTY CORPORATION INTERIM FINAL RULE

SPECIAL FINANCIAL ASSISTANCE BY PBGC
RIN 1212-AB53

August 11, 2021

The Board of Trustees of the Western Pennsylvania Teamsters and Employers Pension Fund welcome the opportunity to offer comments on the Preamble and Interim Final Rule (“IFR”) that the Pension Benefit Guaranty Corporation (“PBGC”) published in the Federal Register on July 12, 2021, at 86 Fed. Reg. 36598. The Trustees of the Pension Fund have diligently used the tools provided in the Pension Protection Act of 2006 (“PPA”) and the Multiemployer Pension Reform Act of 2014 (“MPRA”) to forestall projected insolvency. Implementation of the available tools has presented the Trustees with the need to take some of the most difficult and painful actions ever faced in their professional careers. Facing the projection of imminent insolvency, they have reduced future benefit accruals from 2.0% of contributions to the current level of 0.5% of contributions, while also reducing or eliminating adjustable benefits (most notably, subsidized early retirement benefits). The Trustees determined these painful actions were required in furtherance of their fiduciary duties under ERISA and were adopted in the best interests of all participants and beneficiaries. The necessity for these actions was actuarially demonstrated in our MPRA application, including projections that unless benefits were suspended, the Plan would go insolvent in the 2028 plan year.

The Fund’s MPRA benefit suspension was implemented exactly two years ago on August 1, 2019. Although it did not eliminate the Plan’s negative cash flow, it was reduced by nearly 50%. The Fund’s most recent written record on the effect of the benefit suspension shows that but for the benefit suspension, insolvency would be projected to be in the 2029 plan year. This strongly suggests that the amount of a SFA grant would be very substantial in absolute terms. However, since the grant would come with conditions, we cannot determine whether a SFA grant, albeit significant, would put the Plan’s long term viability in a better or worse position until the Plan’s actuarial and financial forecasts are scrutinized, and comments set forth herein are clarified by PBGC in the final rule.

We are hopeful the SFA will provide a realistic avenue for the Plan to restore suspended benefits and arrange for make-up payments. On the eve of passage of the American Rescue Plan Act, the Fund began receiving hopeful calls from participants who followed the Butch Lewis Act and related legislative proposals. The Board of Trustees was also hopeful that the financial assistance needed to cure the difficulties caused by the deregulation of the trucking industry and Wall Street's misdeeds would be reflected in the SFA program design. We anxiously awaited the publication of PBGC regulations setting the terms and conditions for receipt of SFA. We fully expected that those rules would provide for restoration of the benefit suspension and make-up payments without putting the Plan in a worse position at the end-point of the 30-year projection period.

Unfortunately, the terms and conditions in the IFR raise troubling questions which trustees of plans that have adopted MPRA benefit suspensions will face when deciding what action is consistent with their fiduciary duties.

Both PBGC and the Department of Labor have acknowledged that a major goal of the SFA program is the restoration of benefits suspended under MPRA and make-up payments for benefits suspended under MPRA. In sub-regulatory commentary and guidance, both agencies publicly encourage MPRA plans to promptly restore benefit suspensions. However, only DOL implicitly recognizes the fiduciary duty conundrum the IFR imposes on trustees of MPRA plans. Nevertheless, since the statute does not include a fiduciary duty safe-harbor, the potential litigation risk remains. We urge PBGC to recognize that by modifying the IFR with changes in the Final Rule, it can alleviate this potential fiduciary duty barrier to achievement of the statute's policy goal. The legislation history of the statute should not be ignored in setting the terms and conditions for receipt of SFA.¹

Congress recognized that Budget Office estimates might not be sufficient to enable the SFA program to achieve its goals. This is why the statute includes a highly unusual "unlimited" financial appropriation for SFA grants provided through 2030. PBGC fails to appreciate the significance of the discretionary authority it was given and does not utilize this discretion to harmonize the SFA program's terms and conditions in furtherance of the statutory goals. We urge PBGC to reconsider or clarify terms and conditions in its administration of the SFA program to be in line with the goals of the statute. In the sections below, we offer a legally justifiable analysis supporting proposed changes to the IFR. These suggestions are focused on the unique problems PBGC's IFR imposes on plans which have suspended benefits under MPRA. Our comments and suggestions, which we urge be reflected in the final rule, are set forth below.

¹ On March 5, 2021, Senator Schumer in referring to MPRA benefit suspensions states that the statute's goal is to "allow those plans to restore painful cuts and ensure others on the brink do not have to take similar steps." He worried that PBGC might misconstrue the bill's language contrary to Congress' intent and urged the agency to administer the program consistent with the statute's principal goal. "I will be watching how the administration implements this new program very closely to ensure plans receiving financial assistance under the new program are not placed in a worse long term funding position than they are today or are projected to be into the future. This new program is intended to be a long-term solution for these ailing plans, a solution that protects retiree benefits as well as the health of the plans themselves." Congressional Record, March 5, 2021, S1270.

The End-Point Projection – The Concept That ALL Financial Resources Be Exhausted On December 31, 2051 Is Counterproductive.

The IFR requires that plans project the exhaustion of all current and future financial resources on December 31, 2051. PBGC has summarily rejected the suggestion that portions of current assets and future contributions be carved out of the determination of SFA grant amounts. While the situation facing plans which have not implemented a MPRA benefit suspension does not present the question “would accepting a SFA make it worse,” PBGC’s rejection of an asset carve out creates a serious and troubling issue for most MPRA plans.

The zero-asset end-point projection principle presents the 18 plans which have implemented MPRA benefit suspension with a troubling fiduciary duty question concerning the trade off of their current MPRA solvency projection in exchange for an amount of SFA which is not enough to restore benefits and allow the plans to project solvency post-2051. Stated plainly, MPRA plans have been able to project solvency for the indefinite future (i.e., beyond 30 years) as the result of the benefit suspensions. In other words, MPRA allowed these plans to project they will have assets on December 31, 2051 and a sustainable positive cash flow to fund benefit payments for the indefinite future. Younger participants who reasonably expect to collect the promised benefits due after 2051 could claim that the decision to accept SFA with the condition that the plan project insolvency in 2052, is a breach of plan trustees’ fiduciary duty. Since federal agencies do not have authority to enact a safe-harbor protecting trustees from breach of fiduciary duty claims, the IFR should be redesigned to account for this litigation risk by providing that MPRA plans will not be worse off by accepting SFA.

Many have observed that ERISA section 4262(j) may be subject to several different interpretations. However, the interpretation seen in the IFR is contrary to the policy and goals of the statute, and instead unduly frames the rule’s terms and conditions based on a narrow interpretation of one word in the statute – the word “REQUIRED”.² The Oxford English Dictionary defines this adjective as “officially compulsory, or otherwise considered essential; indispensable; in keeping with one's wishes; desired.” This single word is the basis for PBGC interpretation that the statute requires that the SFA amount must be calculated based on a projection that plans will exhaust all available financial resources on December 31, 2051. The word “required” can be interpreted to mean the amount which is in keeping with the statute’s goals,

² During the July 9, 2021 Webinar used to introduce the IFR, PBGC states that this word was “...the key word here...” (8:12/43:39).

Sec. 4262(j) Determination of Amount of Special Financial Assistance.—

- (1) In General.—The amount of 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 payment of the special financial assistance payment under this section and ending on the last day of the plan year ending in 2051, with no reduction in a participant’s or beneficiary’s accrued benefit as of the date of enactment of this section, except to the extent of a reduction in accordance with section 305(e)(8) adopted prior to the plan’s application for special financial assistance under this section, and taking into account the reinstatement of benefits required under subsection (k). (emphasis added)

wishes and desires. We recognize that PBGC was cautioned that if it interpreted the statute as mandating a zero-asset end-point principle, the SFA program would be designed to fail for most plans. PBGC's explanation for not applying a goal oriented interpretation was that such an interpretation "could be supported only by a strained reading of the clear language of section 4262(j)(1)." However, a single word need not tie PBGC to terms and conditions designed to fail.

PBGC's rationale for creating a fiduciary conundrum for MPRA plan trustees is not apparent from the IFR. It seems to arise from a conservative application of the word "required" found in ERISA section 4262(j). PBGC believes this word directs it to include all obligations and all resources from now to December 31, 2051 in projections used to determine the amount of SFA. However, this zero-asset end-point principle is likely to be the very factor dooming the program to failure. Assumptions used by MPRA plans inherently imply that plan funding will be on an upward curve. These are the assumptions a MPRA plan will have in its PPA certification of zone status.³ While PBGC's hands are unfortunately tied in connection with the interest rate assumption required under ERISA 4262(e)(3), we recommend that it abandon its undue reliance on the word "required". Instead, it should utilize the discretionary authority where contemplated by the statute and set terms and conditions which further the probability that the program can achieve its primary goals.

A single word does not define a statute. This is poignantly illustrated in Chief Justice Roberts' decision upholding the Affordable Care Act against constitutional challenges. The ACA's use of the word "penalty" was the basis of constitutional challenges facing the Court. In the majority opinion in the 2012 decision, National Federation Of Independent Business et al., v. Sebelius, 567 U.S. 519, 568 – 572, Chief Justice Roberts explained that the plain meaning of this one word was not determinative. In upholding its constitutionality, the majority paid homage to the purpose and intent of the ACA. Viewing the purpose of the statute as well as ACA language which labeled the individual mandate as a "penalty", the majority held that while Congress had used the word "penalty" in providing for the individual mandate, the constitutional infirmity was overcome by interpreting the provision to be a "tax". The dissenting opinion called that analysis a "strained statutory interpretation" – a sentiment PBGC echoes in the Preamble to the IFR.

The point we make is the interpretation and undue emphasis PBGC placed on the word "required" should be reconsidered. We urge PBGC to reconsider its reliance on word "required" and instead interpret ERISA 4262(j) in accord with the SFA program's major goal of restoring suspended benefits, while not putting plans in a worse position. PBGC can expand its view of the statutory language by considering what Congress means by including in section 4262(j) a condition that the determination of the amount of SFA is to be "with no reduction in a participant's or beneficiary's accrued benefit" Obviously, if plans are projected to go insolvent, there will be a reduction in benefits.

³ A consistent approach Congress could have used in requiring the retroactive rescission of MPRA would have been to allow MPRA plans to calculate the amount of SFA by replacing their on-going assumptions with a "glide path" interest assumption which would have been appropriate if it had not adopted a MPRA suspension and faced insolvency in the near term.

Specific changes which mitigate the risk that SFA will render plans insolvent in 2052 are explained in the following sections.

Interest Rate Mismatch – SFA Investment Parameters.

The statute gives PBGC unrestrained discretionary authority to expand permissible investments under ERISA section 4262(l). This authority should be used to counteract the mismatch between the interest rate limit required by ERISA section 4262(e)(3) for determination of the SFA amount (currently approximately 5.5%) and the fixed income investment-grade benchmark under ERISA section 4262(l) (currently around 2% net of the fees). However, PBGC did not take the opportunity to permit plans to invest in vehicles promising slightly greater returns which are still conservative. Instead, the IFR provides an insignificant expansion, simply permitting plans to invest in investment-grade bond mutual funds and group trusts.

The interest rate mismatch is not a subtle problem. Although 30-year projections are esoteric and generally perceived as unlikely to predict obligations and resources with absolute precision, the general business and labor community has quickly grasped that the numbers do not add up, particularly considering the widening funding gaps accruing over a 30-year period. Furthermore, the perception of insolvency creates a disincentive for employers and unions to continue support for a plan.

The mismatch could easily be alleviated by allowing SFA funds to be invested in financial vehicles which are designed to replicate the third segment rate of the 24-month average corporate bond yield curve (i.e., the rate defined in ERISA section 303(h)(2)(c)(iii), plus 200 basis points) established on the same date used for the determination of the SFA amount.

Non-SFA Investment Allocation Conditions.

The SFA program calls for SFA assets to be segregated from other plan assets and invested as discussed above. To some extent, the IFR seems to allow plans to adjust their existing investment guidelines to compensate for lower expected returns on SFA assets. We urge PBGC to clarify that the trustees of a plan, consistent with their fiduciary obligation to maintain a diversified portfolio allocation, be allowed to reduce or eliminate the plan's existing fixed income allocation for non-SFA assets in light of the fact that it will have SFA assets which are conservatively invested.

The statute allows, but does not require, PBGC to impose conditions on asset allocation. PBGC appears to have largely rejected the need to impose asset allocation limitations. However, one limitation which is not mandated by the statute, 29 CFR section 4262.16(c), hamstring plans by requiring that throughout the period ending 2051, assets equal to one year's benefit and administrative expenses must be invested in permissible investments as described in section 4262.14 (i.e., conservative investment-grade vehicles). This condition applies to all assets – SFA and non-SFA assets, as well as assets attributable to contributions which create benefit obligations payable beyond the 2051.

This condition is essentially a glide path for expected insolvency, and telegraphs PBGC's view that plans will go insolvent on or before 2052.

We urge PBGC to remove this limitation on asset allocation and instead trust that plan fiduciaries will make prudent investment decisions to preserve assets if and when a glide path towards insolvency actually arises towards the end of the projection period.

Assumptions Concerning Plan Expenses.

Zone certification assumptions concerning plan administration expenses typically will not include investment fees. Instead, the assumed investment return will be net of investment fees. The statute expressly requires use of an interest rate with great specificity – the third segment rate of the 24-month average corporate bond yield curve, without the 25-year corridor for the month the application is filed or the preceding 3 months (i.e., the rate defined in ERISA section 303(h)(2)(c)(iii), plus 200 basis points). However, the statute does not expressly require that the interest rate by which assets are projected over the 30-year period be on a “net of fees” basis.

Since the projection of investment income using the interest required by ERISA section 4262(e)(3) (presently estimated at approximately 5.5%) is an important factor in determining the amount of SFA, the IFR's apparent exclusion of investment fees from the definition of plan obligations unnecessarily widens the gap between ERISA section 4262(e)(3) and ERISA 4262(l). PBGC should not make the interest gap a bigger problem than it might otherwise be.

The IFR does not allow plans to consider investment expenses as a plan obligation even though these are real and unavoidable obligations. Typically, plans pay investment fees of 0.5% to 1.5% (sometimes more). By not allowing plans to include investment fees based on its view that standard actuarial practice does not consider investment fees to be an “administrative expense”, PBGC reduces the amount of SFA available by adding the word “administrative” to the statutory term “plan expenses”.

ERISA section 4262(l) refers to “plan expenses”, not “administrative” expenses. The impact of the IFR's exclusion of investment fees is that while plans will continue to incur these fees on both SFA and non-SFA assets, none of these expenses are included in the determination of the amount of SFA. The logic of the IFR's treatment is contradicted by ERISA section 4262(l) (Restrictions On The Use Of Special Financial Assistance). That section limits use of SFA with these words - “make benefit payments and pay plan expenses.” If plan expenses are construed as exclusive of investment fees, this would prohibit plans from paying investment fees in the investment of SFA assets.

Since a plan will clearly be obligated to pay investment expenses, it is unreasonable for the IFR to exclude them. We urge PBGC to change the IFR so that plans can include investment expenses in determining the amount of SFA.

Carve Out Of Future Assets And Contributions In Determination Of SFA Amount.

PBGC should clarify that the statute's prohibition against contribution decreases does not require plans to include in the determination of the SFA amount any contribution rate increases for periods beyond the terms of current collective bargaining agreements. Inclusion of contribution increases which have not yet been negotiated is unsupportable, speculative and would increase the likelihood that plans will hit insolvency on or before 2052.

Virtually all SFA eligible plans have adopted rehabilitation plans calling for annual contribution increases since 2008. ERISA clearly establishes negotiated agreements as the essential feature of the obligation to contribute. For instance, ERISA section 305(e)(B)(iii) entitles bargaining parties to rely on the schedule of contribution rates provided in the most recently updated rehabilitation plan.

Many critical status plans have, without challenge, determined that the cumulative effect of prior contribution increase requirements rendered future required increases to be no longer sustainable and that continuation of required increases in whole or part would be counterproductive and would likely reduce support for maintenance of their plans. In particular, plans facing projected insolvency have concluded that employees are less likely to continue negotiating for increased contributions when insolvency is being projected and that reducing the level of required increases was necessary.

We urge PBGC to recognize that a MPRA plan which has demonstrated long-term solvency by suspending benefits, but would now be required to project insolvency under the IFR, can reasonably be expected to see bargaining parties negotiate for a withdrawal from the plan.

We suggest that PBGC clarify that the statute's prohibition against contribution decreases does not require that contribution rate increases occurring beyond the term of existing collective bargaining agreements are to be included as one of the resources used in determining the amount of SFA available.

On an ongoing basis, employers who pay contributions, and employees who collectively bargain for those contributions, expect that the promised benefit will be provided. If this expectation is not possible, employers and employees will have no incentive to continue providing for contributions to the plan. The IFR's zero-asset end-point principle laid out in our earlier discussion should be abandoned. Instead, the final rule needs to provide that a carve out of assets and contributions sufficient to fund post-2051 benefits is necessary. This suggestion is particularly important for MPRA plans so that they are no worse off by virtue of accepting a SFA grant.

Conclusion.

We can appreciate that Congress gave PBGC a very limited timetable to devise regulations potentially assisting over 200 severely distressed plans. Since Congress included an unlimited financial appropriation, it is understandable that PBGC would include terms preventing the other

1,500 multiemployer plans which do not truly need assistance from gaming the system to reap a windfall. However, PBGC fails to address the fiduciary conundrum its interpretation of the statute presents for plans which have implemented benefit suspensions under MPRA. If anything, it has compounded the matter by citing that a major goal of the law is the resumption of benefits suspended under MPRA, and designing a program which discourages achievement of that major goal.

Although we know the most direct method to fix the issues we have highlighted is for Congress to enact technical corrections, we hope our suggestions will be reflected in the final rule so that plans have the ability to honor all past and future promised benefits.

Respectfully Submitted,

Board of Trustees of the Western
Pennsylvania Teamsters and Employers
Pension Fund