American Federation of Labor and Congress of Industrial Organizations

815 Black Lives Matter Plaza NW
Washington, DC 20006

202-637-5000

aflcio.org

August 8, 2022

Submitted via email to: reg.comments@pbgc.gov.

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

Re: Special Financial Assistance by PBGC
RIN: 1212-AB53

Ladies and Gentlemen:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I appreciate the opportunity to comment on the withdrawal liability provisions in the final rule, published in the Federal Register on July 8, 2022[1], part of the Special Financial Assistance ("SFA") Program for financially troubled multiemployer pension plans.[2]

The AFL-CIO is a voluntary democratic federation of 57 national and international labor unions that collectively represent 12.5 million working people. By coming together in unions, working people negotiate with their employers for fair pay and benefits including the ability to retire with dignity. Our core mission is to ensure that working people are treated fairly and respectfully, that their hard work is rewarded, and that their workplaces are safe. We also provide a voice for working people in politics and in the legislative process.

The AFL-CIO has much at stake in the successful implementation of the SFA program. By definition, a multiemployer pension plan covers workers represented by one or more unions, and the active and retired members of many AFL-CIO-affiliated unions participate in these plans. We appreciate the PBGC's work in producing the final rule and, overall, we are pleased with the withdrawal liability provisions as set out in section 4262.16(G)(2) and with the agency's reaffirmation that "[t]he purpose of SFA is . . . not to indirectly subsidize employers and encourage them to exit [their] plans."[3]

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[1] 87 FR 40968.

[2] The SFA Program is part of the American Rescue Plan Act of 2021 (Pub. L. 117-2) which President Biden signed into law on March 11, 2020.

[3] 87 FR 41001.

We view the final rule's phase in recognition of SFA funds as a plan asset for the determination of a plan's unfunded vested benefits, the basis for withdrawal liability calculations, an improvement over the interim rule that required an SFA plan immediately to recognize its SFA as a plan asset for liability calculation purposes.[4] This phase in approach will help ensure that a plan's receipt of SFA funds will not result in the unintended consequence of encouraging participating employers' plan withdrawal. We also, however, note the following issues embedded in the final rule withdrawal liability provisions that warrant your further consideration.

The impact on the assessment of withdrawal liability when a plan is "deemed" critical should be reviewed. Any plan that receives SFA is "deemed" to be in critical status until the last day of the plan year ending in 2051. Under the Multiemployer Pension Reform Act of 2014 (MPRA),[5] plans with this status must ignore contribution increases required under a rehabilitation plan when calculating a withdrawing employer's unfunded vested benefits and withdrawal liability payment schedule. After it exits critical status, a plan's previously disregarded contribution increases are included in the allocation of unfunded vested benefits as of the expiration of the collective bargaining agreement ("CBA") in effect upon this exit and in the withdrawal liability payment schedule when a new CBA with a higher contribution rate is negotiated.

Under the final rule, however, an SFA plan that would otherwise be certified not to be in endangered or critical status (i.e. in the "green zone"), with generally higher contribution rates, appears to be required to continue to exclude these higher rates when calculating withdrawal liabilities because of their deemed critical status. As a result, a withdrawing employer will more likely be subject to the 20-year cap on withdrawal liability payments, and the plan may therefore collect a lesser amount of withdrawal liability that otherwise would be due. This unintended consequence is not consistent with the goal of ensuring that the final SFA rule enhances the retirement security of working people who participate in multiemployer plans receiving SFA.

Second, the final rule makes two major changes to how SFA plans must calculate withdrawal liability that will influence contributing employers' behavior: 1) the change in the required interest rate to value withdrawal liability; and 2) the interest rate "cliff" resulting from the requirement that plans use the mass withdrawal interest rates, in most cases, for no more than 10 years (which generally results in higher withdrawal liability) before reverting to individual plan assumptions (which generally result in lower withdrawal liability). We urge PBGC to give deference to pension plan trustees and their industry experts in forecasting the impact of these two major changes on employer behavior and the associated contribution base unit ("CBU") projection assumptions that are required for the plan's application.

[4] 86 FR 36598 (July 12, 2021).
[5] MPRA was enacted as part of the 2015 omnibus budget package.

In its assumption guidance, PBGC points to the "average rate of change in actual CBUs over the most recent 10 plan years … as the basis for its review." PBGC further states that it generally will not accept a change to a plan's CBU assumption if the changed assumption includes year-to-year changes that are not "adequately supported by the plan's historical data," because it "is important that the CBU assumption be supported by historical data and informed by recent trends." The two final rule changes to the calculation of withdrawal liability, however, are unique to this rule and, therefore, are inherently not reflected in any plan's historical experience. Accordingly, we believe that the PBGC should allow SFA plans to provide support for CBU assumption changes that reflect expectations and experience outside of the direct 10-year history of plan experience, including broader industry and macro-economic trends.

Last, we underscore the need for the PBGC to give careful consideration to the interaction between this rule and the anticipated PBGC regulation which will affect the withdrawal liability rate for SFA plans after the later of 10 years of their receipt of SFA or the expected SFA payout period. To calculate withdrawal liabilities plans, generally, have used mass withdrawal interest rate assumptions, their own funding rate or a blend of the two rates, but, as the agency is well aware, recent court decisions have injected uncertainty into that practice.[6] This uncertainty is particularly acute for SFA plans because a higher interest rate requirement will create an incentive window for employers to exit the plan prior to 2051—an incentive the final rule sought to eliminate. Accordingly, we urge prompt PBGC regulatory action.

Thank you for your consideration of our views.

Sincerely,

William Samuel
Director, Government Affairs

[6] See *United Mine Workers of America 1974 Pension Plan v Energy West Mining Company* (No. 20-7054) (D.C. Cir. July 8, 2022) and *Sofco Erectors, Inc. v. Trustees of the Ohio Operating Engineers Pension Fund* (No. 20-3639/3671) 6th Cir. September 28, 2021.