

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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Ms. Hilary Duke
Assistant General Counsel for Regulatory Affairs
Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, D.C. 20005-4026

Submitted Electronically through www.regulations.gov

Re: Final Rule with Request for Comment: Special Financial Assistance by PBGC, RIN 1212-AB53

Dear Ms. Duke:

The National Coordinating Committee for Multiemployer Plans (“NCCMP”) appreciates this opportunity to comment on the Pension Benefit Guaranty Corporation’s (“PBGC”), Final Rule with Request for Comment: Special Financial Assistance by PBGC, published at 87 Fed. Reg. 40968 (July 8, 2022) (“Final Rule”). The Final Rule implements the Special Financial Assistance (“SFA”) program provided as part of the American Rescue Plan (“ARP”) Act of 2021. The Final Rule revises, in part, PBGC’s previously issued Interim Final Rule, 86 Fed. Reg. 36598 (July 12, 2021) (“IFR”). In the Final Rule, PBGC specifically has asked for comments on the condition in the Final Rule requiring a phased recognition of SFA in a plan’s determination of withdrawal liability. The NCCMP is pleased to provide its comments.

The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans, unions and the job-creating employers of America that sponsor them, and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP’s purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America’s working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. Those segments include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking industries. Multiemployer plans are jointly trusted by labor and management trustees.

Summary of Comments

The IFR required that SFA-recipient plans immediately include SFA in plan assets for purposes of determining withdrawal liability. The Final Rule took a different approach. Under the Final Rule, plans that receive SFA are required to phase-in recognition of SFA over the projected SFA payout period when determining a withdrawn employer's withdrawal liability ("Phase-In Rule"). The NCCMP supports the Phase-In Rule as an effective means to account for the interests of the various stakeholders.

The NCCMP also has identified areas for which additional guidance is needed regarding withdrawal liability, the absence of which, in effect, undercuts the long-term solvency of SFA-recipient plans, as well as the entire multiemployer system.

Specific Comments

As discussed in more detail below, we offer specific comments on the issues related to the Phase-In Rule as posed in the preamble to the Final Rule.

Expected Impact of the Phase-In Rule

Under the IFR, the immediate inclusion of SFA in SFA-recipient plan assets for purposes of determining withdrawal liability would have created a short-term withdrawal window for employers in some plans, especially those plans that currently use rates as provided under appendix B to 29 C.F.R. part 4044 ("mass withdrawal rates") or a blended rate to calculate withdrawal liability. As applied to such plans, despite use of the relatively low interest rates to discount benefit liabilities, the influx of SFA into the plans' assets would initially lower the plans' unfunded vested benefits ("UVBs") for a time until plan assets, including SFA assets, are spent down. This would result in lower withdrawal liability assessments and may serve as an incentive for employers to withdraw immediately or shortly after receipt of the SFA proceeds.

Further, as PBGC acknowledged in the Final Rule, the current interest rate environment highlights that the IFR-prescribed interest rate condition alone, as applied to SFA-recipient plans, was insufficient to prevent the SFA from, in effect, subsidizing employer withdrawals.

As illustrated in the 3-year projection below, the Final Rule, which combines the use of mass withdrawal rates (applicable for the later of 10 years or the projected SFA payout period) with the Phase-In Rule, is expected to be more effective than the IFR in disincentivizing withdrawals at least until the end of the SFA projected payout period. The example below assumes a projected SFA payout period of six years.

		PRE-SFA ¹	YEAR 1	YEAR 2	YEAR 3
1	Present value of vested benefits using funding assumptions	\$2.00 ²	N/A	N/A	N/A
2	Present value of vested benefits using mass withdrawal rates ³	\$4.00	\$4.00	\$3.80	\$3.55
3	Non-SFA market value of assets	\$1.00	\$1.00	\$1.15	\$1.35
4	SFA market value of assets ⁴	N/A	\$2.40	\$2.10	\$1.70
Interim Final Rule (IFR)					
5	Present value of vested benefits for withdrawal liability	\$2.50	\$4.00	\$3.80	\$3.55
6	Market value of assets for withdrawal liability (3+4)	\$1.00	\$3.40	\$3.25	\$3.05
7	Unfunded Vested Benefits under IFR (5-6)	<u>\$1.50</u>	<u>\$0.60</u>	<u>\$0.55</u>	<u>\$0.50</u>
Final Rule					
8	Present value of vested benefits for withdrawal liability	\$2.50	\$4.00	\$3.80	\$3.55
9	SFA Phase-in fraction	n/a	6/6	5/6	4/6
10	SFA to exclude due to phase-in (\$2.40 x 9)	N/A	\$2.40	\$2.00	\$1.60
11	Market value of assets for withdrawal liability (3+4-10)	\$1.00	\$1.00	\$1.25	\$1.45
12	Unfunded Vested Benefits under Final Rule (8-11)	<u>\$1.50</u>	<u>\$3.00</u>	<u>\$2.55</u>	<u>\$2.10</u>

¹ "PRE-SFA" assumes that the plan uses a blend based on the funding and mass withdrawal rates for determining withdrawal liability, as if the plan did not receive any SFA in Year 1 for illustrative comparison.

² For illustration purposes, all amounts are shown in millions.

Additional Guidance is Needed

Interest Rates for Purposes of Calculating Withdrawal Liability

While it is expected that the provisions in the Final Rule will provide a balanced approach to SFA-recipient plans and contributing employers regarding withdrawal liability, the NCCMP strongly encourages PBGC to take a broader view in conjunction with §4213 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). As mentioned above, SFA-recipient plans are required to use mass withdrawal rates in determining withdrawal liability until the later of 10 years or the expected SFA payout period. At the end of that period, in accordance with ERISA §4213, the interest rate used to calculate withdrawal liability reverts to the rate determined by the plan’s actuary as his or her best estimate of anticipated experience under the plan, or as prescribed by PBGC in its regulations. PBGC has not issued regulations but indicated in both the IFR and its most recent regulatory agenda its intention to do so.

In the absence of any PBGC guidance, actuaries have typically either used mass withdrawal interest assumption rates, the plan’s funding rate, a blend of the two rates, or some other intermediate rate to calculate withdrawal liability. However, recent decisions by the Courts of Appeal for the Sixth and District of Columbia Circuits have called that practice into question. This poses a problem for many plans, but especially SFA-recipient plans that, at the end of the later of ten years or the SFA payout period, would have applied a mass withdrawal or blended rate absent the constraints imposed by the courts. Use of a higher rate that is similar to the funding rate creates the withdrawal liability window that the Final Rule seeks to avoid. Employer withdrawals drain future contributions to plans and, as a result, SFA-recipient plans may not be projected to remain solvent until 2051 – a result that undercuts the stated goal in the ARP and the Final Rule, of providing solvency to troubled plans through 2051. We urge PBGC to follow through with immediate regulatory action in this regard.

Mandating the use of a higher rate that is similar to the funding rate creates the withdrawal liability window that the Final Rule seeks to avoid, and that the PBGC has previously and justly criticized. Employer withdrawals drain future contributions to plans and, as a result, SFA-recipient plans may not remain solvent until 2051 – a result that undercuts the stated goal in the ARP and the Final Rule, of providing solvency to troubled plans through 2051. We urge PBGC to follow through with immediate regulatory action in this regard, not just for the SFA-recipient plans, but for all multiemployer plans and the entire multiemployer system.

³ Mass withdrawal rates refer to the interest rates used to value benefits in appendix B to 29 C.F.R. part 4044. Under the IFR, the mass withdrawal rates must be used to determine withdrawal liability for the later of 10 years or the period the SFA-recipient plan retains SFA, including earnings. As provided under the Final Rule, use of mass withdrawal rates are required to be used for the later of 10 years or the projected SFA payout period.

⁴ Assumes that SFA is projected to be exhausted in six years.

Clarification Regarding Inclusion of Contribution Increases under a Rehabilitation Plan

Under §4262.17(c) of the Final Rule, plans that receive SFA are deemed to be in critical status within the meaning of ERISA §305(b)(2) until the last day of the last plan year ending in 2051. This deemed critical status rule for SFA-recipient plans coexists with the rule provided under ERISA §305(g)(3)(B). That rule states that if a contribution increase is deemed to be required to be made to enable the plan to meet requirements under a rehabilitation plan, such increase is disregarded for purposes of calculating withdrawal liability. These provisions, when read together, introduce ambiguity as to whether SFA-recipient plans are required to exclude contribution increases from withdrawal liability calculations through 2051.

As stated in the preamble to the Final Rule, the rules for critical status plans under ERISA §305 are under the jurisdiction of the Treasury Department. However, ARP provides explicit authority to PBGC to impose, by regulation or other guidance, reasonable conditions on SFA-recipient plans regarding, among other things, withdrawal liability. To clarify any ambiguity regarding contribution increases and SFA-recipient plans, the NCCMP urges PBGC to add to the conditions applicable to SFA-recipient plans that such plans are required to include contribution increases under a rehabilitation plan for purposes of calculating withdrawal liability. Alternatively, the condition imposed could require that the trustees of SFA-recipient plans determine whether contribution increases are required under a rehabilitation plan and therefore either included or excluded for purposes of calculating withdrawal liability.

Phased-In Recognition of SFA Over Projected Rather Than Actual SFA Payout Period

The NCCMP supports phased-in recognition over the projected payout period. The NCCMP agrees that, as stated in the preamble to the Final Rule, the projected payout period serves as a fixed and known period that precludes SFA-recipient plans from holding a de minimis amount of SFA in order to prolong the period during which the Phase-In Rule would apply.

Length of Phase-In Period

Although the phase-in period may vary based on characteristics of the SFA-recipient plan, the NCCMP believes that the phase-in period as described in the Final Rule is an appropriate amount of time that serves to protect the financial security of the plan yet does not place an undue burden on employers.

Partial Phase In

The NCCMP supports the approach taken in the Final Rule and does not believe that any other sort of partial phase-in is necessary.

Different Phase-In Rules Based on Relative Size of Amount of SFA Received Compared to non-SFA Assets

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The NCCMP does not believe that there is a basis for including different phase-in rules based on the amount of SFA received by a plan as compared to the plan's non-SFA assets. All plans, whether large or small, need the protections offered by a strong withdrawal liability regime to prevent employers from shifting plan funding responsibilities onto the remaining employers and, ultimately, the PBGC.

Summary and Conclusion

The NCCMP supports the approach taken in the Final Rule regarding the phased-in recognition of SFA for purposes of determining withdrawal liability as an effective means to address stakeholder interests. However, we urge PBGC to take immediate action to further secure the solvency of SFA-recipient plans, and to provide certainty to many other plans, participants and employers, by issuing regulations under ERISA §4213. The NCCMP also urges PBGC to take action to clarify the Final Rule regarding the potential exclusion of contributions made under a rehabilitation plan for purposes of calculating withdrawal liability.

Regards,

A handwritten signature in black ink, appearing to read "M. Scott", is centered within a light gray rectangular box.

Michael D. Scott
Executive Director