**United Association** of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

Three Park Place • Annapolis, Maryland 21401
(410) 269-2000 • Fax (410) 267-0262 • http://www.ua.org

Founded 1889

Mark McManus
*General President*

Patrick H. Kellett
*General Secretary-Treasurer*

Michael A. Pleasant
*Assistant General President*

General Office File Reference: GP

*Submitted by e-mail to [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.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 on Pension Benefit Guaranty Corporation Interim Final Rule
Special Financial Assistance by PBGC
RIN 1212-AB53

Dear Ladies and Gentlemen:

These comments are filed by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("United Association") in response to the request by the Pension Benefit Guaranty Corporation ("PBGC") for public comments concerning its Interim Final Rule on Special Financial Assistance by PBGC ("IFR"). 86 Fed. Reg. 36598 (July 12, 2021). The United Association appreciates the opportunity to participate in this rulemaking to raise issues of concern and offer specific recommendations for consideration by PBGC in its administration of Special Financial Assistance and in the preparation of the Final Rule.

The United Association is an international labor organization representing over 359,000 plumbers, pipe fitters, sprinkler fitters, service technicians and welders. It is the leading trade union for all plumbing and pipe fitting trades. The United Association has 241 affiliated local unions in the United States. There are more than 140 United Association multiemployer defined benefit plans in the United States covering approximately 475,000 active, retired and terminated vested participants. Approximately 17,000 employers contribute to these plans. Of these United Association plans, only a very few may be eligible for Special Financial Assistance ("SFA").

The United Association has chosen to focus its comments on plan merger; however, several withdrawal liability comments unrelated to mergers are also raised. The American Rescue Plan Act of 2021 ("ARPA") provides much needed support to plans, but it did not and cannot affect changing industries. Plans in such industries that are unable to sustain themselves may be able to protect participant benefits

through merger. Merger of plans has long been a way to realize operational efficiencies and cost savings that benefit participants. The Preamble to the IFR recognizes the importance of merger in preserving benefits. Preamble p. 36599, 1st column. Therefore, the United Association believes it is vital that the SFA merger provisions[1] both encourage merger and be workable.

These comments address the provisions of the IFR regarding merger of SFA-eligible plans (also referred to as "SFA-plans") and, perhaps more significantly, what the IFR does not say. The United Association has questions about the merger provisions of the IFR and how other aspects of the IFR interact with the merger provisions. The United Association believes clarifications are required to improve this portion of the IFR and to make it more useful for stakeholders and beneficial for participants and beneficiaries. We have also reviewed the PBGC Final Rule on Mergers and Transfers between Multiemployer Plans, 83 Fed. Reg. 46642 (September 14, 2018). Not surprisingly, these do not answer the questions arising from the IFR as they were designed primarily to update the merger rules following the Multiemployer Pension Relief Act of 2014 ("MPRA").

Many of the merger provisions in the IFR address the concern of PBGC that merger might be used to manipulate the amount of SFA for which a plan is eligible. While this is an appropriate concern for PBGC, it should not be the only issue addressed in detail. It is apparent that mergers of SFA-eligible plans are permitted and that such a plan may retain SFA post-merger; very little else is clear from the IFR, however. The IFR should include more information on how a plan into which an SFA-eligible plan has been merged must address a variety of issues related to SFA post-merger.

The United Association, and likely other plans and unions, are interested in the IFR's application to the merger of an SFA-eligible plan into a larger healthy non-SFA-eligible plan. Some plans that may accept smaller plans in their industry are quite large and may involve hundreds of participating groups; others may involve one larger healthy plan willing, under the right circumstances, to accept a smaller, SFA-plan. Consequently, it is important to provide guidance that will apply to all such mergers. The expense and time associated with proper due diligence for any plan merger is so substantial that larger healthy plans are unlikely to consider accepting SFA-plans unless more guidance is provided concerning such mergers. It will not encourage mergers if these issues are simply left until the merger is filed with PBGC. In that case, it is likely that many fewer such mergers will be considered. This result will not benefit participants and beneficiaries of SFA-plans that might decline without merger nor will this result benefit the PBGC.

The United Association has considered issues that typically arise in merger transactions and how such issues would be affected by the IFR in a merger of a smaller SFA-eligible plan into a larger healthy non-SFA-eligible national or regional plan. The IFR did not resolve most of the questions that arose. In fact, there were more questions than answers as a result of the exercise. These comments present the issues that arose during the United Association's review for PBGC's consideration along with our analysis and comments.

---

[1] Guidance concerning merger of an SFA-eligible plan with another multiemployer plan could also be included in PBGC regulations regarding merger of multiemployer plans similar to the way in which MPRA issues involving merger were addressed.

## I. Merger Provisions

Although the IFR states that an SFA-eligible plan may merge (either with another SFA-eligible plan or a non-SFA-eligible plan), there is nothing in the IFR that directly addresses how the resulting merged or consolidated plan must manage the pre-merger SFA-plan post-merger. Must the assets and liabilities be held/invested separately? Must withdrawal liability be calculated separately for an extended period notwithstanding the provisions of current PBGC regulations? How do the benefit increase restrictions apply? What, if any, aspects of the pre-merger SFA-plan must continue to be administered or tracked separately? Do any of the restrictions on SFA affect the operation and administration of the larger healthy non-SFA-plan other than the portion that constituted the pre-merger SFA-plan?

The most crucial question above is to what extent the merger of an SFA-plan into a larger healthy non-SFA-plan might require that the larger plan (the portion of the merged plan other than the pre-merger SFA-plan) apply any of the restrictions in the IFR. For example, would a plan, including a large national or regional pension plan with many thousands of participants, be required to impose benefit restrictions on all participants following the merger of a small SFA-eligible plan? Would that plan, including a large national or regional plan, be required to apply mass withdrawal assumptions for purposes of calculating withdrawal liability of all of its employers and not just for withdrawals by employers that were obligated to contribute to the pre-merger SFA-eligible plan? Would a plan that accepts a merged-in SFA-plan be prohibited from ever seeking a benefit suspension?[2] If, in fact, these and other restrictions would apply to the larger healthy consolidated plan into which a smaller SFA-plan has merged, it is extremely unlikely that healthy plans will accept SFA-plans in mergers. The United Association does not believe this is a desirable result and urges that PBGC not take this position.

It is the view of the United Association that, to make mergers of SFA-plans with healthy partners viable, either applicable restrictions must no longer apply upon merger or the effect of the restrictions must be limited to the extent of the consolidated plan that constitutes the pre-merger SFA-plan with some specified adjustments for increases in assets and liabilities. If the latter is the case, more guidance and assistance from PBGC is required to advise plans regarding the post-merger administration of such plans.

When multiemployer plans merge, benefits accrued to the date of merger must be preserved and protected. Section 4231(b)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), requires that no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger than the benefit immediately before that date. *See also* 29 CFR §4231.3(a)(1). The Internal Revenue Service ("IRS") takes the position that benefit payment forms and other features are part of a participant's benefit that must be preserved. Therefore, to a certain extent, plans merging into larger plans are already treated somewhat as "frozen" plans if the benefit structure that applied to participants of the merged-in plan is different from the benefit structure of the receiving or consolidated plan. It is common for future accruals by participants of the merged-in plan to be subject to the benefit

---

[2] Although, the focus of these comments has been on larger healthy plans that could provide long term stability to SFA-plans, no one can predict the future. Industries decline, laws change, the effects of climate change and other forces beyond the control of plan trustees may impact plans that are, and are projected to be, healthy. Therefore, a consolidated plan should not be precluded from ever seeking a benefit suspension to protect its participants because it has accepted a merged-in SFA-plan.

formula of the consolidated plan, although in some cases the prior benefit structure may be preserved going forward.

In addition, ERISA §4211(f)[3] requires that for withdrawals in the first plan year following the merger of multiemployer plans, withdrawal liability is determined as if the plans remained separate. *See also* 29 CFR §§4211.31 and 4211.37, which discuss the allocation of unfunded vested benefits. Therefore, current rules require treating the merged-in plan as a separate portion of the plan for some purposes.

Additional issues arose from considerations regarding how certain of the requirements for SFA-plans would apply post-merger. There may be more issues than those identified in these comments.

**A. Benefit Increases**

The provisions in the IFR concerning benefit increases are inconsistent and confusing. This makes them difficult to implement in the case of a merger as well as in non-merger circumstances. In the case of a merger, existing plan benefits must be preserved, but the participants of the plan merging into a larger plan often participate prospectively in the benefits of the consolidated plan. Large plans could not operate efficiently if every merged-in group retained its own benefit design.

The first question is whether the benefit increase restrictions apply to any portion of the consolidated plan except the pre-merger SFA-plan and participants. In other words, are participants in the larger consolidated plan unrelated to the SFA-plan subject to the benefit increase restriction? <u>The answer should be no.</u> There is no benefit to a policy that would broadly restrict benefits for large plans. The result of such a restrictive policy would be to effectively prevent mergers of SFA-plans into healthy plans that would be able to help preserve participant benefits long term.

The remaining questions concern the definition of "benefit increase" and the way in which the restrictions on benefit increases might arise in a merger.

Multiemployer mergers in which the benefit of the merging plan is not continued post-merger will be referred to as either an A+B design or wear away design. In an A+B design merger, participant accruals are preserved under the pre-merger benefit structure, and benefits are calculated by adding the pre-merger benefits as of the date of the merger to the post-merger benefits accrued under the consolidated plan structure. The following questions arose as we considered mergers of this design under the IFR:

- If the prospective benefit under the consolidated plan based on the same contribution rate is greater than the pre-merger benefit of the SFA-plan, is this a benefit increase? If the answer is "yes," this would discourage merger in many cases, particularly where the participants from the SFA-plan are working side-by-side with participants from the healthy plan or are members of the

[3] **(f)Computations applicable in case of withdrawal following merger of multiemployer plans.**
In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

same union (consider a merger of two pension plans – one an SFA-plan – sponsored by two local unions, following the merger of the local unions by their international union).

- Would the certification that the contribution is sufficient to pay for the increase be made on the basis of only the segregated SFA-plan participants, assets and liabilities or on the basis of the participants, assets and liabilities of the consolidated plan as a whole since the accruals are under the consolidated plan benefit structure?

- If Past Service Credit was awarded to the participants in the SFA-plan at the time of merger, would this be considered a prospective benefit increase?[4]

In a wear away design merger, participant accruals are preserved under the pre-merger benefit structure and benefits are calculated by determining the greater of the accrued benefit under the pre-merger plan as of the date of merger or the accrued benefit under the post-merger consolidated plan based on total service. The following additional question arose as we considered mergers of this design under the IFR:

- If the current benefit of the consolidated plan is applied to all of a participant's service in a wear away design and that benefit later increases by plan design or otherwise, is this a retrospective benefit increase?

The definition of "benefit increase," both prospective and retrospective, is not clear in the IFR. Specifically, the IFR does not clearly state whether a benefit increase must be adopted by the plan trustees or may result from plan design and an increase in contributions. Both are suggested by various references. In one place, the IFR refers to a signed amendment. See the following references:

- Section 4262.16(b)(1) and (2) refer to retrospective and prospective benefit increases respectively <u>adopted</u> during the coverage period. The Preamble describing this provision of the IFR uses the same language. <u>Neither reference states by whom the benefit increase is adopted or in what manner.</u>

- However, the Preamble at p. 36614, 2d column, states that, during the SFA coverage period, plans that receive SFA "can only accept a <u>collective bargaining agreement (CBA) that increases future benefit accruals</u>"[5] if the actuary makes the required certification. This is different from the statement in §4262.16(b)(1) and (2) unless "adoption" refers to the acceptance of the CBA or the bargaining of the increase. However, plan trustees typically do not specifically act to accept a CBA as in a motion and record. Some plans have literally thousands of CBAs. Also, this could be read to

---

[4] IRS Information Letter dated March 21, 2011 to Roderick A. DeArment, Esq., applying the limitation on plan amendments increasing benefits for purposes of the funding relief in the Pension Relief Act of 2010 ("PRA") determined that "the application of a plan's long standing benefit formula, which provides for past service credit, to members of a collective bargaining unit being covered for the first time would constitute a plan amendment…."

[5] IRS Regulations provide that an amendment to the contribution rate in a CBA could be considered a plan amendment if all or part of a plan's rate of future benefit accrual, or an early retirement benefit or a retirement type subsidy under the plan, depends on provisions in the CBA. *See* 29 CFR §54.4980F-1, Q&A 7(2) and Example 2.

describe a benefit increase built into the plan design that increases when contributions increase but which is not adopted.

- The Preamble at p. 36614, 3rd column, states that the IFR would prohibit plans from implementing significant benefit increases that could accelerate insolvencies after receiving SFA. Increases built into the plan design that are not adopted would nevertheless be implemented. Increases, whether formally adopted by the trustees or resulting from previously adopted plan design and bargained contribution increases, could have the same financial impact on a plan.

- The Preamble at p. 36610, 1st column, refers to the adoption date of an amendment for a benefit increase as does p. 36614, 3rd column.

- Finally, §4262.4(f)(3) defines "benefit increase" as the execution of a plan amendment increasing accrued or projected benefits under a plan.

Plans need to know with greater clarity what constitutes a "benefit increase," either prospective or retrospective, in connection with mergers and in the administration of SFA-plans. If increases by reason of previously adopted plan designs are permitted, as seems to be indicated by many of the references in the IFR, the inconsistent references in the Preamble should be clarified. Some plans do provide designs by which prospective and possibly retrospective benefits would increase by plan design upon an increase in contribution rate without the adoption of a plan amendment. If this is not permitted, the IFR should be clarified as it will affect mergers as well as the administration of plans.[6]

**B. Withdrawal Liability**

As mentioned above, ERISA §4211(f) requires that, for withdrawals in the first plan year following the merger of multiemployer plans, withdrawal liability is determined as if the plans remained separate. *See also* 29 CFR §§4211.31 and 4211.37, which discuss the allocation of unfunded vested benefits ("UVB").

These existing PBGC regulations provide direction as to the allocation method that will be used for all employer withdrawals occurring after the initial plan year following a merger of multiemployer plans. The initial plan year is the first full plan year that begins after the merger. *See* 29 CFR §4211.2. For withdrawals before the end of the initial plan year, the amount of UVBs allocable to the employer shall be determined as if each plan had remained a separate plan. *See* 29 CFR §4211.37.

Those existing regulations are focused on the allocation method that applies. They state that the consolidated plan shall adopt one of the statutory allocation methods or one of the allocation methods prescribed in the regulations or may adopt its own allocation method (subject to PBGC approval). If it doesn't adopt any of those, then it must use the presumptive method set forth in 29 CFR §4211.32. There is no discussion in the existing regulation about the interest rate assumption that must be used.

---

[6] Prior law definitions of "benefit increase" is not helpful because that too varies. *See* Code §431(b)(8)(D) (added by the Pension Relief Act of 2010; refers to plan amendment); Code §§432(d)(1)(B) and 432(f)(1)(B) (added by the Pension Protection Act of 2006; refers to plan amendment); Code §432(e)(9)(E)(vi) (added by the Multiemployer Pension Relief Act of 2014; does not refer to plan amendment).

By contrast, the IFR specifies that a plan must use the interest rate assumptions under 29 CFR §4281.13(a) (mass withdrawal assumptions) to determine withdrawal liability for withdrawals after the plan year in which the plan receives SFA and until the later of ten years after the end of the plan year in which the plan receives SFA or the last day of the plan year in which the plan no longer holds any SFA or earnings thereon in a segregated account as required by the IFR. *See* §4262.16(g).

The IFR doesn't make clear how this rule applies in the event of a merger. It seems easy enough for a withdrawal before the end of the initial plan year because, under the existing regulation, UVBs are allocated as if each plan had remained a separate plan. Presumably, then, the plan could apply the mass withdrawal interest rate only to determine the withdrawal liability owed to the SFA-eligible plan and apply the consolidated plan's usual best estimate rate for the withdrawal liability owed to the portion of the plan that was not SFA-eligible.

What's not clear is what happens for withdrawals after the initial plan year. Would the entire consolidated plan then be required to use the mass withdrawal rates for valuing the UVBs for the plan (which would then be the plan holding the SFA in a segregated account)? That would likely have the effect of substantially increasing the withdrawal liability of all contributing employers to the consolidated plan. This would undoubtedly have the effect of substantially discouraging such mergers.

An alternative would be for the requirement to use the mass withdrawal rates be limited to calculating the present value of vested benefits under the SFA-plan as of the merger. The United Association believes this would be a preferable approach because it would address the PBGC's stated reason for applying mass withdrawal rates (wanting to avoid the use of SFA assets to reduce the withdrawal liability of a withdrawing employer) without unduly increasing the withdrawal liability of other employers who were never contributing employers to the merged-in plan. Thus, it would not have the effect of discouraging potentially beneficial mergers. How this would work specifically and what valuation issues might arise requires further guidance from PBGC.

### C. Plan Expenses

Section §4262.16(e) of the IFR prohibits the increase in the proportion of expenses allocated to an SFA-plan. While this appears to be intended to address the allocation of expenses among separate plans, it could also apply to the extent SFA-plan assets are segregated following a merger. It appears that none of the exemptions address this issue because the SFA-plan is not legally separate from the consolidated plan. It is the position of the United Association that it is inappropriate to apply this restriction to a single plan, provided nothing in the allocation would treat the SFA-plan differently than any other portion of the consolidated plan. This should be clarified.

## II. Other Questions on Withdrawal Liability Unrelated to Mergers

Additional questions involving withdrawal liability pertain to its role in the calculation of SFA under §4262.4. Section 4262.4(c)(2) requires SFA-eligible plans to determine their "SFA-eligible plan resources" by including the "present value of future . . . withdrawal liability payments . . . expected to be made to the plan . . . during the SFA coverage period." This calculation requirement presents at least one issue.

With respect to SFA-eligible plans that have experienced mass withdrawals, there is the distinct possibility that the plan will have "infinite payors" – withdrawn employers whose payment schedule extends into perpetuity. As a practical matter, many such employers may be small employers that will not be in existence for the entirety of the SFA coverage period. However, the IFR seems to require that the SFA-eligible plan consider the income from such infinite payors' withdrawal liability during the entire SFA coverage period. This will result in SFA-eligible plans receiving less in SFA than is needed to fulfill the purpose of the program. We assume that a plan may make reasonable assumptions regarding the length of time during which infinite payors will actually be able to make withdrawal liability payments when calculating the plan's "SFA-eligible plan resources."

Plans need clear guidance on how so-called infinite payors should be treated in calculating the plan's "SFA-eligible plan resources" so that SFA-eligible plans are not deprived of SFA that they, in fact, require.

**III. Reciprocity**

The United Association commends PBGC for excepting the good faith allocation of contributions pursuant to a reciprocity agreement from the restrictions of §4262.16(e) of the IFR. This is consistent with PBGC's recognition of Congressional intent to encourage reciprocity as stated in PBGC Opinion Letter 89-2. In that Opinion Letter PBGC stated that while discussing the provision that became ERISA § 4234(c), the House Committee on Education and Labor said:

> The committee has exempted written reciprocity agreements from asset transfer rules, except to the extent the corporation determines application of the rules is necessary. The committee believes that it is important to encourage expansion of reciprocals to enhance pension portability.

H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. I, at 70 (1980). The PBGC then stated its belief that this comment evidences a Congressional intent that ERISA not be applied to reciprocity agreements in a manner that would discourage their use as aids to pension portability. The position taken in the IFR is consistent with Congressional intent as recognized by PBGC.

**IV. United Association Recommendations**

Detailed consideration should be given to issues arising in the post-merger operation of consolidated plans that have accepted SFA-plans in a merger. While it is appropriate for PBGC to focus on the possible manipulation of SFA by merger, insufficient attention was given to large healthy plans that would accept SFA-plans in a merger to provide long term viability to participants and beneficiaries.

The Final Rule should not apply the restrictions applicable to SFA-plans to the portion of the consolidated plan other than the pre-merger SFA-plan. To do so would impose restrictions unnecessarily and too broadly to healthy plans and would discourage mergers of plans that could benefit.

Guidance may be provided in the Final Rule regarding SFA or in amendments to existing PBGC regulations such as the PBGC Final Rule on Mergers and Transfers between Multiemployer Plans, 83 Fed. Reg. 46642 (September 14, 2018), or 29 CFR §4211.31 – Allocation of Unfunded Vested Benefits Following Merger of Plans. Subregulatory guidance may also be provided to address some issues in the short term.

The Final Rule should clarify what constitutes a benefit increase, prospective and retrospective. Specifically, the Final Rule should clarify whether increases resulting from application of an existing plan formula as well as whether an increased contribution rate in a CBA that results in an increased plan benefit is a benefit increase subject to the restrictions.

The Final Rule should include a mechanism for PBGC to waive restrictions on the merger of an SFA-plan into another plan. Such waivers could be considered as part of the PBGC's review and approval of such mergers.

**V. Conclusion**

The United Association appreciates the obvious effort that went in to the IFR and the substantial provisions that support merger of SFA-plans. We hope that our comments and recommendations regarding the IFR and additional circumstances that must be addressed are helpful to PBGC as it finalizes its regulations.

Sincerely,

Mark McManus
General President

MM:ail