



Fund

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By E-mail

Pension Benefit Guaranty Corporation
1200 K Street NW, Washington, DC 20005-4026
Reg.comments@pbgc.gov

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

To Whom It May Concern:

The American Federation of Musicians and Employers' Pension Fund (the "AFM-EPF") respectfully submits these comments on the Pension Benefit Guaranty Corporation's interim final rule ("IFR") regarding the special financial assistance ("SFA") for eligible multiemployer plans. As described in detail below, the purpose of this letter is to respectfully request that PBGC (i) reconsider its interpretation of the statute with respect to the methodology and interest rate assumption used to calculate the SFA amount; (ii) expand the scope of permissible investments for SFA in a manner that would permit the SFA to earn additional investment return while taking on similar levels of volatility risk; (iii) permit plans to explicitly include their investment expenses in the calculation of their future obligations, even if the zone certifications issued prior to January 1, 2021 included such expenses in the investment return assumption; and (iv) include in an earlier priority group plans with over 40,000 participants that have in the past submitted an application to suspend benefits under the Multiemployer Pension Relief Act of 2014 ("MPRA"), whether or not the application is pending.

By way of background, the AFM-EPF is a multiemployer pension plan to which more than 5,500 employers in the film, recording, symphonic, television, theater and live entertainment industries contribute on behalf of their employees. The AFM-EPF, which is in critical and declining status, supports 50,000 active workers, retirees and beneficiaries from across the country who rely on their pension benefits as a vital part of their retirement security. The existence of that retirement security depends heavily on PBGC's interpreting and implementing the American Rescue Plan Act of 2021 ("ARPA") consistent with both its language and its overriding purpose to restore the solvency of deeply troubled plans.

We very much appreciate PBGC's solicitation and careful consideration of the comments it has received thus far and will continue to receive throughout its rulemaking.

Methodology for Calculating Amount of SFA

The AFM-EPF respectfully requests that PBGC reconsider its interpretation of the manner in which the SFA is calculated because the current interpretation in the IFR is inconsistent with legislative intent to restore the solvency of troubled plans and the statutory language is ambiguous and does not require the current interpretation.

Specifically, Section 4262.4 of the IFR states that the amount of relief is the amount by which the present value of all benefit payments and administrative expenses through the plan year ending in 2051 exceeds the market value of plan assets and the present value of future contributions, withdrawal liability payments and other payments expected to be made to the plan through the plan year ending in 2051. In the preamble to the IFR (the "Preamble"), PBGC indicated that this was based in part on its conclusion that the statute's plain meaning is that the amount of SFA "is the amount by which a plan's resources fall short of its obligations, taking all plan resources and obligations into account." The Preamble further states that a plan does not require SFA to the extent it has other assets. The effect of this interpretation is that, if the assumptions used in calculating the amount of the SFA were realized, plans receiving SFA would be projected to become insolvent immediately after the end of the plan year ending in 2051.

We respectfully disagree with this interpretation of the statute and encourage PBGC to reconsider its position on this issue. Section 4262(j) of ERISA states that the SFA 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 under this section and ending on the last day of the plan year ending in 2051. . . ."

The statute makes no reference to other assets, suggesting that a reasonable alternative interpretation is that the statute actually provides that the SFA amount equals the present value of the benefits and expenses that the plan must pay through the plan year ending in 2051, with no offset for existing assets or other plan resources. While we are not advocating for that interpretation, as it would result in a windfall and go beyond the statutory purpose, it is clear that the statute is ambiguous and, therefore, PBGC has the authority to interpret it in a reasonable manner.

While PBGC concluded that the use of the word "required" meant that other assets had to be taken into account, an alternative reading is equally plausible – "required" means that the calculation should take into account other assets, contributions and investment returns, but only to the extent they are not otherwise being utilized for benefits and expenses beyond 2051.

In the face of ambiguous language, PBGC should consider the intent of Congress in drafting the statute. Such intent is clear in the Report of the Committee on the Budget House of Representatives to Accompany H.R. 1319, where, in describing the reason for the change, it

states that “The Committee believes that implementing a special financial assistance program for the most financially troubled plans . . . will . . . permit these plans to *restore* their solvency” (emphasis added).¹

The Budget Committee’s reference to restoring solvency, rather than forestalling insolvency, indicates that PBGC should interpret the statute in a manner that does not result in plan insolvency at (or, as discussed below, before) the end of the plan year ending in 2051.²

For these reasons, we believe that PBGC had the authority and responsibility to adopt an alternative interpretation that protects the long-term solvency of plans receiving SFA, such as one that disregards assets and projected income needed to pay benefits after the plan year ending in 2051.

Interest Rate Assumption

The AFM-EPF respectfully requests that PBGC reconsider its rejection of the proposal to bifurcate the interest rate used to calculate the amount of SFA. The current interpretation in the IFR is inconsistent with legislative intent because it will result in many plans becoming insolvent prior to or immediately after the plan year ending in 2051. As with the methodology, the statutory language regarding the interest rate assumption is ambiguous and allows for an alternative interpretation that is consistent with the legislative intent to restore the solvency of troubled plans.

Section 4262(e) of ERISA requires that, in calculating the amount of financial assistance, a plan use the interest rate it used in its most recently completed zone certification prior to 2021, subject to the interest rate limit of the third segment rate for the month of application or the prior three months plus 200 basis points. For other assumptions, the plan must use assumptions in that last pre-2021 zone certification unless the assumptions are unreasonable.

In the IFR, PBGC interpreted this to mean that the plan must use a single discount rate assumption and it rejected requests to use a bifurcated discount rate, whereby the interest rate set forth in the pre-2021 zone certification (subject to the interest rate limit) would be used for assets other than the SFA and a different discount rate would be used for the SFA. In the Preamble, PBGC reasoned that based on the statute, the discount rate used to calculate the amount of SFA need not be reasonable and PBGC does not have authority to bifurcate discount rates.

¹ H.R. Rep. No. 117-7, p.850 (<http://www.congress.gov/117/crpt/hrpt7/CRPT-117hrpt7.pdf>).

² The fact this interpretation may cause the relief to exceed the cost estimated by the Congressional Budget Office (“CBO”) is not relevant in the face of the Budget Committee’s clear statement of intent. The statute has no cap on the total amount of relief, CBO estimates are non-binding and, historically, there are many examples of where relief programs have far exceeded or fallen short of CBO estimates.

We respectfully disagree with that narrow reading of the statute, as we believe that the statute is silent on – and certainly does not preclude -- the modification of assumptions to reflect situations in which there was no assumption in the last zone certification issued prior to January 1, 2021.

While all plans had an interest rate assumption that applied to their current and projected asset pool, no plans had a discount rate assumption that applied to a restricted pool of assets that can only be invested in investment grade bonds and other investments permitted by PBGC, as is the case with respect to SFA. There could not have been an assumption as to the investment return of a restricted asset pool because no such pool existed. Accordingly, plans using a bifurcated discount rate would not be changing their discount rate assumption as long as they continued to use that assumption with respect to non-SFA assets.

Since the statute is, at best, ambiguous on the issue of assumptions that did not exist in the last pre-2021 zone certification, we believe that, in interpreting the statute, PBGC should consider the legislative intent, which is, as described above, to restore the solvency of multiemployer plans. Were the IFR to remain unchanged, the mismatch between the discount rate assumption required by the IFR and the expected investment return of the SFA due to the restrictions set forth in Section 4262(l) of ERISA (discussed below), could result in many plans becoming insolvent prior to 2051. Such a result is clearly contrary to the intent of the statute, and, therefore, a bifurcated approach is the best interpretation of an ambiguous statute to carry out its stated purpose.

SFA Permissible Investments

The AFM-EPF respectfully requests that PBGC expand the list of permissible investments in a manner that would produce an expected return that is as close as possible to the interest rate assumption required to be used in calculating the amount of SFA. Not only is this consistent with the legislative intent to restore solvency (by addressing the mismatch between the interest assumption and actual achievable returns), but it also can be done in a manner that allows plans to achieve higher returns with no, or limited, additional volatility risk and without increasing the amount of SFA awarded to plans.

As PBGC noted in the Preamble, Section 4262(l) of ERISA allows SFA to be invested in investment grade bonds or other investments permitted by PBGC. There is no statutory restriction on the types of investments PBGC can approve. The Preamble states that SFA should be invested in relatively safe vehicles to ensure that short-term benefit and expense obligations can be satisfied. Recognizing and agreeing with concerns about harm to plans if SFA is invested too conservatively, the Preamble also notes that PBGC is seeking comment in an attempt to find a more appropriate balance between safety of investments and the opportunity for plans to decide on an appropriate overall investment policy.

We applaud PBGC's recognition that an overly restrictive investment requirement for SFA could endanger the solvency of plans and, therefore, the retirement security of millions.³ We agree that

³ PBGC also recognized this issue in another section of the Preamble, where it discussed the appropriately rejected alternative of requiring all plan assets to be invested in accordance with the restrictions imposed on

there needs to be an appropriate balance between the security of these investments and the need to earn a sufficient return to protect the solvency of plans.

The need for this is exacerbated by the IFR's requirement that the amount of assistance be calculated using a discount rate/investment return assumption that, for virtually all plans, will be far higher than the expected return on investment grade bonds. As discussed above, PBGC thus far has not addressed this mismatch in its rules regarding the calculation of the amount of assistance because it concluded that the statute restricted its ability to allow plans to use a lower discount rate/investment return assumption to reflect the SFA investments.⁴ Since no similar statutory restriction applies with respect to the investment of SFA – and, in fact, the statute explicitly contemplates that PBGC will add to the list of permissible investments – PBGC has the flexibility to adopt a reasonable approach that eliminates, or at least mitigates, the effect of the mismatch.

That being the case, we respectfully request that PBGC expand the definition of permissible investments so that a plan can modestly increase its investment return expectations without taking on significant additional risk. In fact, permitting plans to modestly diversify their investments into other asset classes (even ones that, standing alone, are more volatile than investment grade bonds) should allow those plans to produce modestly higher projected returns with even less projected volatility risk. This is because the interaction between the two or more asset classes – or correlation – provides for a smoother return profile.

By way of just one example, PBGC could permit SFA to be allocated up to 15% in non-investment grade bonds and up to 15% in public domestic equities. Such an allocation, which would still have a minimum of 70% in investment grade bonds, provides a reasonable and balanced tradeoff between risk and return, and would actually produce less volatile projected returns than a portfolio consisting solely of investment grade bonds.

This is evidenced by the following chart showing return projections prepared by the AFM-EPF's outsourced chief investment officer. As you can see, the 70%/15%/15% portfolio is projected to have an expected return of 3.5% vs. 2.8% for a portfolio of 100% investment grade bonds, but at the same time to reduce the projected volatility risk (measured as standard deviation) from

investments of the SFA. In that discussion, the Preamble explicitly acknowledged that limiting investments in that manner "would severely restrict a plan's attainable investment returns and thus potentially accelerate the insolvency of the plan. Because available fixed income yields are expected to be lower than the interest limit defined under section 4262(a)(3), plans could generally become insolvent before the 2051 plan year." The irrefutable logic of this observation applies equally to the investment of SFA assets, which for at least some plans will constitute a major portion of the plan's assets after the SFA money is received. PBGC's acknowledgement of the consequences of the investment restrictions militates strongly in favor of PBGC loosening those restrictions.

⁴ As noted above, we respectfully disagree with that conclusion.

10.3% to 9.9%.⁵ Not only is the portfolio far more efficient (as evidenced by the higher Sharpe ratio), but it provides a rate of return that is closer to what a plan will be assumed to make in the calculation of the amount of SFA.

Risk and Return*	Investment grade bonds only	80% inv. grade bonds, 10% US equity, 10% high yield bonds	70% inv. grade bonds, 15% US equity, 15% high yield bonds	“Traditional” 60% equity, 40% fixed income portfolio
Nominal arithmetic return (%)	2.8	3.3	3.5	5.0
Standard deviation (%)	10.3	9.9	9.9	12.8
Sharpe ratio	0.06	0.11	0.13	0.22

*Based on Cambridge Associates Steady State Assumptions as of 6/30/21. Inflation assumed to be 2.2%.

The above chart also demonstrates how such an asset allocation would be consistent with PBGC’s desire to avoid excessive risk in light of the nature of the SFA. Specifically, the 70%/15%/15% portfolio still has significantly less volatility risk than the “traditional” portfolio of 60% equity/40% fixed income. Of course, there are other asset allocation structures that could enhance return even further than the example provided above yet still provide a reasonable balance between risk and return.

For these reasons, we believe it both reasonable and consistent with the overriding goal of the statute to expand the definition of permissible investments to include a limited percentage of non-investment grade fixed income and public domestic equity investments, as described above. To address the impact on solvency of the mismatch between the interest rate assumption used to calculate the SFA amount and the actual returns that can be earned, we encourage PBGC to expand the permissible assets in a way that can produce an expected return that is as close as possible to the interest rate assumption required to be used.

Investment Expenses

The AFM-EPF respectfully requests that the IFR be modified to provide that investment expenses, whether or not netted against the interest rate assumption used in the pre-2021 zone certification, be explicitly included as a plan obligation.⁶

PBGC’s Special Financial Assistance Assumptions guidance (PBGC SFA 21-02) issued on July 9, 2021 states that PBGC generally will not accept a change to the plan’s investment expense

⁵ Also included in the chart are return projections for a portfolio consisting of 80% investment grade bonds, 10% other fixed income and 10% public domestic equity. While this is not as efficient of a portfolio as the proposed one, it provides an additional alternative if, for some reason, PBGC is not comfortable with the proposed one.

⁶ To avoid double counting, we propose that this only apply to a plan subject to the interest rate cap of the third segment rate plus 200 basis points.

assumption using a methodology for determining which classes of expenses are included in administrative expenses that is different from the methodology used in the last zone certification prior to January 1, 2021. We believe that, this general rule, while non-binding, is not appropriate and that, in contrast, PBGC should make clear that the present value of investment expenses should be explicitly included in the calculation of the present value of a plan's obligations in determining the amount of relief.

As described above, PBGC stated in the Preamble that the statute's plain meaning is that the amount of SFA "is the amount by which a plan's resources fall short of its obligations, *taking all plan resources and obligations into account*" (emphasis added). Since investment expenses are a clear obligation of the plan, their exclusion would result in the calculation failing to satisfy the statutory requirement (as interpreted by PBGC) that all plan resources and obligations be taken into account.

Generally speaking, investment expenses are ordinarily taken into account by netting them out of expected investment returns in the investment return assumption. However, that is not the case as it relates to ARPA because of the cap on the investment return assumption. Thus, for example, a plan with investment expenses of 0.25% and an expected return of 7.5% might use a net investment return assumption of 7.25%, thus taking into account investment expenses. However, under PBGC's interpretation of ARPA thus far, the discount rate would be capped at approximately 5.5% (based on current segment rates) without any reduction thereafter to account for investment expenses. There would be no difference between a gross of fees and net of fees approach because they both end up at a 5.5% interest rate. Since there is no further reduction to account for investment expenses, they are effectively excluded from the determination of the SFA amount.

As PBGC stated in the Preamble, the purpose of maintaining pre-2021 zone certification assumptions is that they "represent a neutral view of circumstances, unbiased by the prospect of receiving substantial sums of money based on those assumptions." Said differently, PBGC is wary of plans manipulating their SFA amounts by changing their otherwise reasonable assumptions to artificially inflate their liabilities or suppress their assets. However, modifying assumptions to include expenses in the calculation of plan obligations is not a manipulation of the situation or one that creates an unreasonable result.⁷ Rather, it is a recognition that failing to do so will exclude a significant obligation from the calculation of the SFA amount. As noted above, the failure to include all obligations would violate PBGC's view of the plain meaning of the statute.

For that reason, we believe that PBGC should establish a safe harbor assumption change that would permit plans to explicitly include their investment expenses in their obligations when

⁷ To the contrary, assuming PBGC continues not to permit a bifurcated interest rate assumption, it would actually move what is currently an unreasonable mandated interest rate assumption (as described above) closer to the range of reasonableness.

calculating the SFA amount, even if they did not include these as administrative expenses in the pre-2021 zone certification.

Priority Groups

The AFM-EPF respectfully requests that plans with over 40,000 participants that have in the past submitted an application for a suspension of benefits (whether or not such application is pending) under MPRA be included in an earlier priority group.

We understand the need for a priority scheme to ensure that PBGC is not overwhelmed by applications such that it cannot process them by the statutory deadline. Moreover, we appreciate PBGC's desire to focus in the earliest priority groups on plans that have reduced benefits or, due to impending insolvency, are about to do so. Given participant uncertainty and the potential for higher costs as time passes, we strongly encourage PBGC to move through the priority groups as quickly as possible.

Further, we believe that the including as a priority group plans with large numbers of participants who were in the past notified that the plan had filed a MPRA application achieves two important goals. First, PBGC can review the application for a plan with 40,000 or more participants in the same amount of time it takes to review the application for a smaller plan. For example, the median plan that is or may be eligible for relief appears to have a little under 1,100 participants.⁸ By prioritizing the plans that have almost 40 times the median number of participants, PBGC could address the uncertainty and anxiety of almost 39,000 more people more quickly than if a plan with 1,100 participants were reviewed first.

Second, this proposed prioritization is particularly important with respect to plans that have previously notified their participants of a possible benefit reduction under MPRA. Even if the MPRA application of such a plan was denied or withdrawn, participants in these plans have particularly heightened anxiety about the security of their benefits given that they were told that they would have reductions – often quite significant – in their pension benefits. Despite multiple plan communications explaining that ARPA relief will replace (and preclude) MPRA suspensions, many of these participants will continue to have grave fears about their retirement security until the ARPA relief is received.

In light of these issues, approving the ARPA application of large plans in this situation as soon as possible is critical in addressing the particularly heightened anxiety of a large number of participants and would utilize PBGC's limited resources far more efficiently. For that reason, we believe that PBGC should include in an earlier priority group plans with over 40,000 participants that have in the past submitted a MPRA application (whether or not such application is pending).

⁸ The median is an estimate based on a May 28, 2021 report produced by Congressional Research Service that included a list of multiemployer defined benefit plans that meet or might meet eligibility criteria for SFA. "Multiemployer Defined Benefit Pension Plans Potentially Eligible for Special Financial Assistance Under the American Rescue Plan Act," p. 7 (<https://crsreports.congress.gov/product/pdf/R/R46803>).

Pension Benefit Guaranty Corporation
August 11, 2021

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On behalf of AFM-EPF and its over 50,000 participants and beneficiaries whose retirement security depends on PBGC's approach to the SFA, we thank you for your consideration. If you have any questions regarding the foregoing, please do not hesitate to contact us.

Sincerely,



Christopher J.G. Brockmeyer
Employer Co-Chair, Board of Trustees



Raymond M. Hair, Jr.
Union Co-Chair, Board of Trustees

cc: The Honorable Nancy Pelosi
The Honorable Charles E. Schumer
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