

BAKERY AND CONFECTIONERY UNION AND INDUSTRY INTERNATIONAL PENSION FUND

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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: Interim Final Regulation for Special Assistance by PBGC
RIN 1212-AB53.**

The Bakery & Confectionery Union & Industry International Pension Fund (“the Bakery Fund” or “Fund”) writes to you in response to your request for comments on the Interim Final Regulation for Special Assistance, RIN 1212-AB53 (“IFR”).

The Bakery Fund is one of the largest “critical and declining” multiemployer plans in the country, with over 100,000 participants and approximately \$4 billion in unfunded liability. The financial assistance provided under PBGC’s Special Financial Assistance (“SFA”) Program is a lifeline for many thousands of Bakery Fund participants who otherwise would face the loss of the hard-earned benefits on which their retirement security depends.

After reviewing the IFR, we recommend the following revisions or additions which we believe will best achieve the legislative intent of the American Rescue Plan (“ARP”) in creating the SFA program:

1. Prioritize plans that will need larger amounts of SFA and/or freeze interest rates as of July 2021;
2. Make certain that eligible plans will receive funding through 2051 by permitting plans to use actuarial interest rate assumptions that reasonably can be projected to allow the plan to pay benefits through 2051, or, in the alternative, allow plans to test the validity of mandated assumptions by submitting a “backstop” projection;
3. Permit plans to invest SFA funds in equities, consistent with fiduciary goals of protecting fund assets and permitting payments of benefits and expenses when due; and
4. Allow paid-for benefit improvements to include credit accrued prior to the improvement.

1. PRIORITIZE PLANS WITH HIGH UNDERFUNDING, FREEZE INTEREST RATES AS OF JULY 2021, OR BOTH.

ARP provides that the following plans should be awarded priority: (1) plans that become insolvent within the next five years; (2) plans that have a present value of financial assistance payments that exceeds \$1,000,000,000; (3) plans that have suspended benefits under §1085(e)(9); and (4) other categories that the corporation determines appropriate based on other similar circumstances. 29 U.S.C. §1432 (d). With the IFR, PBGC has created priority groups that differ from the priority in the statute. PBGC added new groups, split large plans into two different categories, and placed plans that have suspended benefits before the remaining large plans with a high underfunding. **We recommend PBGC revise their priority system so that all large plans that will require large amounts of SFA receive funds as soon as possible.**

We encourage PBGC to complete its review of all applications as quickly as possible to get needed funds to eligible plans as soon as possible. To the extent PBGC needs to prioritize plans for review, PBGC has asserted it “has designed this mechanism to prioritize the most impacted plans and participants first” and that the priority categories it has created are intended to limit the harm to plans, but we believe that this prioritization may cause harm to certain larger plans and may increase the overall cost of the SFA program.

First, the bond rate will likely change over the next two years and, if it increases, could result in significant changes in the amount of assistance provided to plans using PBGC’s method of calculating the SFA. Since PBGC is not permitting plans to apply prior to their category period, the assistance amount is likely to differ depending on when a plan applies, as the “interest rate limit” is determined based on the bond rates for the month of or the three months preceding the plan’s application for SFA. This is especially acute when dealing with large plans with over \$1 billion in underfunding. A 0.5% change in the bond rate could result in millions of dollars less in SFA funds. As a result, we would recommend PBGC at least freeze the interest rate to the rate at the time of the final regulation’s publication so that all plans that apply may use the same rate for their application.

Second, allowing the larger plans that will require a larger amount of SFA to apply sooner is likely to result in an overall lower cost of the SFA program, as many of these plans are spending down their legacy assets each year in order to meet benefit obligations. PBGC appears to recognize this issue, as the IFR allows the single plan that has 350,000 or more participants to apply as early as April 1, 2022, while requiring other large plans such as the Bakery Fund to wait until February 2023. In particular, there does not seem to be any rationale for allowing those plans projected to go insolvent after March 11, 2023, but before March 11, 2026, to submit applications prior to large funds such as the Bakery Fund, and therefore we recommend that, at a minimum, PBGC move the priority category 6 up above category 5.

2. ALLOW PLANS TO USE INTEREST ASSUMPTIONS THAT REASONABLY CAN BE PROJECTED TO MEET STATUTORY MANDATE OF BENEFITS PAID THROUGH 2051, OR PROVIDE A “BACKSTOP” PROJECTION TO ENSURE THAT IT IS REASONABLY LIKELY THAT BENEFITS WILL BE PAID THROUGH 2051

The clear mandate of ARP, as stated in §1432 (j), requires PBGC to provide eligible plans with “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... and ending on the last day of the plan year ending in 2051.” Subsection (e)(2), sets forth certain restrictions on the actuarial assumptions used by a plan in determining the amount of financial assistance requested, and specifically requires that a plan use “the interest rate used by the plan in its most recently completed certification of plan status before January 1, 2021, provided that such interest rate may not exceed the interest rate limit...” In interpreting this provision regarding the valuation of assets over the assistance period, it is important to take into account that Subsection (l) requires that “[s]pecial financial assistance shall be invested by plans in investment-grade bonds or other investments as permitted by the corporation.” In the IFR, PBGC declined to exercise its authority to permit plans to invest the SFA funds in “other investments” and, at least for the time being, limits plans to investing SFA funds to investment grade bonds. Currently, investment-grade bonds grow at a rate of about 2-3%.

The IFR’s interpretation of these three provisions in the statute, when taken together, means that many plans cannot reasonably be expected to be able to pay all benefits due through 2051. Depending on the ratio of the plan’s current assets to the SFA it will receive, it may be simply impossible for the plan to reach the interest assumption used in the plan’s 2020 certification or the “interest rate limit” (currently about 5.5%) across all assets, if the plan is required to invest the SFA funds in investment grade bonds earning only 2-3%. PBGC appears to recognize that its rule, in many cases, may not be reasonable as the IFR takes the position that “[t]hese provisions [of the law] do not require the interest rate used under the certification of plan status to be reasonable for purposes of eligibility or determining the amount of SFA.” It is our position that requiring plans to use an assumption that is patently unreasonable for the purpose for which it will be used (i.e., valuing all plan assets through 2051) is not consistent with the statute and results in a violation of the mandate of §1432(j) for at least some subset of eligible plans. The statute is unequivocal in requiring that the SFA be calculated based upon projections that would allow the eligible plans to be solvent through 2051. An unreasonable assumption does not meet this requirement.

In the IFR, PBGC opined that it “does not have authority to provide a different rate or bifurcate the statutorily mandated interest rate” in order to allow plans to recognize the reality that the SFA will not earn anything similar to the “interest rate limit” or the interest that plan actuaries assumed would be earned through a diverse investment strategy. We disagree that

PBGC lacks this authority. The rule in the IFR—requiring plans to use the interest assumption from the 2020 certification or the “interest rate limit” to project the value of all plan assets (including the SFA) through 2051—is not consistent with the statute, much less compelled by it. §1432(e)(2) states that the plan shall use “the interest rate used by the plan in its most recently completed certification of plan status before January 1, 2021 provided that such interest rate may not exceed the interest rate limit” but the statute does not specify for what calculations the plan must use that rate, does not state that it is the only interest rate that may be used in calculating the amount of SFA, and certainly does not specify that rate must be used to value the SFA assets.

A reasonable interpretation of the statute is that the rate specified in §1432(e)(2) applies to the valuation of the plan’s legacy assets (those on which the plan actuary based the 2020 assumption) through 2051, but not the SFA assets (which were not contemplated in the 2020 certification). Such an interpretation would allow plans to make reasonable and realistic projections that would entitle plans to receive sufficient SFA to pay benefits through 2051. Because the 2020 certification did not contemplate SFA funds, nor the impact of the SFA funds invested at bond rates on the overall investment returns of the plan, it’s not reasonable to conclude that Congress intended to mandate that these rates be used to value both the SFA assets and the plan’s legacy assets, particularly where this conclusion frustrates the over-riding intent of the statute to ensure solvency through 2051.

As an alternative to allowing plans to use a separate interest assumption to value the SFA assets, we recommend PBGC permit plans to use a two-part test to ensure that plans are reasonably projected to remain solvent through 2051 without reducing benefits, as required by ARP. The two-part method would act as a “backstop” to ensure plans can remain solvent through 2051 with a voluntary sensitivity test, which would work as follows.

First, the plan would calculate the amount of SFA required to pay benefits through the end of the plan year ending in 2051, using the lesser of the 2020 certification interest rate or the interest rate limit to value all assets including the SFA. If the plan’s actuaries determined that, using reasonable actuarial assumptions, this amount would result in a projected insolvency prior to the end of the plan year ending in 2051, the plan could, at its discretion, provide PBGC with a second calculation of the SFA that used interest rates that would more reasonably project actual returns over the relevant period for the legacy assets and SFA assets. For ease of use and to comply with the requirement of 29 U.S.C. §1432 (j)(2) that projections be deterministic, we recommend PBGC set these rates, establishing a rate that is a reasonable anticipated rate of return for legacy assets (third segment bond rate plus 200 basis points) and one for SFA funds (second segment bond rate). This projection would be a “backstop” that would only be used to determine the difference between the amount of assistance provided using the dictated assumptions and what amount is reasonably projected to be necessary for a plan to survive through 2051. If there is a discrepancy, PBGC would provide a dollar amount that would make

up that discrepancy as part of the SFA. If there is no discrepancy, PBGC would not be required to provide any additional funds. This “backstop” sensitivity testing would allow PBGC and the plans to have some level of confidence that the SFA provided would actually meet the statutory mandate of allowing the plans to pay promised benefits through the plan year ending in 2051.

3. PERMIT PLANS TO INVEST SFA FUNDS IN EQUITIES

PBGC specifically asked for public comments regarding potential “other investments,” beyond investment-grade bonds, in which plans could invest SFA funds. **We strongly recommend PBGC permit plans to incorporate SFA funds into their existing investment strategies permitting plans to invest SFA funds in equities.**

All eligible plans are run by fiduciaries who are advised by investment professionals who are required to work in the best interest of participants. Thirty years is a long-term investment, and most investment professionals would advise an institutional investor to develop a diverse investment strategy when receiving a large influx of cash to be spent over many years; for any fiduciary, the over-riding goal is to pay full promised benefits. The IFR states that “PBGC understands that SFA funds should be invested in relatively safe vehicles that will help ensure that short-term needs to pay benefits and plan expenses can be met.” These goals can be met within a traditional fiduciary investment strategy.

There is no evidence that multiemployer plans have investment strategies that differ from other institutional investors. While other institutional investors have been able to rebound from the market crash of 2008 and continue to grow in the strong market that followed, critical and declining multiemployer plans largely have not. This is for one reason—their low assets and high cashflow meant that their losses had to be realized. The large influx of SFA funds, however, will resolve this issue. With the addition of SFA Funds, eligible plans will now be able to perform in the market like other institutional investors and should be able to invest like them.

Disproportionately weighting bonds within an institutional investor’s portfolio over a 30-year period contrasts with basic fiduciary expectations. The Department of Labor (DOL) page on fiduciary responsibility states that “[f]iduciaries must act prudently and must diversify the plan’s investments in order to minimize the risk of large losses.”¹ A 30-year investment tied disproportionately to investment-grade bonds, however, will guarantee losses over time factoring in inflation and even the most conservative expectations of market returns. Prudence demands more diversity.

¹ <https://www.dol.gov/general/topic/retirement/fiduciaryresp>

Multiemployer plans can and should be permitted to invest these funds prudently and with the purpose of giving their plan the best chance at long-term solvency. This step is particularly important if PBGC requires plans to use the 2020 certification interest rate, or (if lower) the interest rate limit, in determining the amount of assistance. If PBGC awards money based on assumed rates of return for a diverse portfolio, it would make no sense to then force the plans to invest those funds solely in bonds.

4. ALLOW PAID-FOR BENEFIT IMPROVEMENTS TO APPLY TO CREDIT EARNED PRIOR TO THE IMPROVEMENT

The IFR permits plans to increase benefits but provides that “a benefit or benefit increase must not be adopted during the SFA coverage period (defined in §4262.2 of the regulation) if it is in whole or in part attributable to service accrued or other events occurring before the adoption date of the amendment. This condition is needed because retroactive increases in benefits harm the funded position of the plan without improving expected future plan income.” We believe that PBGC’s conclusion that retroactive increases in benefits harm the funded position and that do not improve the expected future plan income is inaccurate. **We recommend PBGC permit benefit increases that are in part attributable to service accrued prior to the benefit increase if they are fully paid for by contribution increases.**

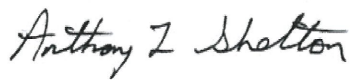
The Bakery Fund plan design has long used the benefit level in effect when the participant left covered employment to determine the participant’s monthly benefit. Therefore, under this longstanding plan design, a benefit increase purchased by a contributing employer would apply to all years of pension credit earned by the active employees before and after the date the benefit improvement is purchased. (It is not “retroactive” in that it does not apply to participants that have already left covered employment as of that date.) The cost of the benefit improvement includes this consideration (including a contribution rate “bend” that account for this “sweep-up” of previous credit²) and therefore such improvements do not harm the plan’s funded position. The rule set forth in the IFP would appear to prohibit this practice, which would make it difficult for the plan to allow--and much less attractive for employers to purchase--benefit improvements. This, in turn, makes the Fund a less attractive benefit for both of the bargaining parties, which increases the likelihood of withdrawals from the Fund and ultimately harms the Fund’s expected future plan income.

² Higher benefit levels result in higher incremental contribution rate increases so the plan can recoup the costs associated with prior service.

Benefit increases that apply to previous accruals do not harm a plan's funded position if that increase is reflected in the increased contribution rate. A plan actuary can certify that employer contribution increases are projected to be sufficient to pay for such benefit increases that have been adopted or agreed to. Similarly, such benefit increases that are supported by sufficient contributions can improve the expected future plan income by increasing the contribution base to the plan and by encouraging plan participation from the active work force. We believe that permitting such increases is not prohibited by the statute and is consistent with the overall statutory goal of enabling the long-term survival of these pension funds.

Thank you for your consideration.

Sincerely,



Anthony Shelton
Chairman



Lou Minella
Secretary



John Beck
Executive Director