August 11, 2021

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

Re: Comments on PBGC Interim Final Rule – Special Financial Assistance by PBGC, RIN 1212-AB53

To Whom it May Concern:

We respectfully submit this public comment with regard to the Interim Final Rule the Pension Benefit Guaranty Corporation (the "PBGC") promulgated on July 9, 2021 under the American Rescue Plan Act of 2021 ("ARPA," and such Interim Final Rule, the "Interim Rules"). The first issue we address is the misalignment between the interest rate the PBGC proposes to use to calculate the amount of special financial assistance ("SFA") to which a plan is entitled and the investment return a plan is projected to receive on its SFA. We also address the nature of proof the PBGC appears to require on the assumptions used to project the amount of contributions a plan will receive in the next thirty years.

## Misalignment of Interest Rates

ARPA was designed, and specifically requires the PBGC, to provide financial assistance to eligible plans in an amount projected to enable those plans to remain solvent through the plan year ending in 2051.[1] ARPA requires an eligible plan to use the interest rate it used in its most recent certification of plan status, completed before January 1, 2021, provided that such interest rate does not exceed the interest rate limit set forth in Section 4262(e)(3) of ERISA.[2] Under ARPA, plans cannot propose changes to the interest rate assumption in their

[1] *See* Section 4262(j)(1) of ERISA, American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9704(b), 135 Stat. 4, 190 (2021).

[2] *See* Section 4262(e)(2)(A) of ERISA, American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9704(b), 135 Stat. 4, 189 (2021).

application for SFA.[3] As a practical matter, to remain solvent through 2051, plans must invest SFA and non-SFA assets such that the plans' investments, in the aggregate, will yield returns that equal or exceed the interest rate assumption used to calculate the amount of SFA each plan receives. The Interim Rules, as drafted, however, do not enable plans to do so because the interest the PBGC proposes to use to calculate SFA is significantly higher than the investment return plans can earn under the investment limitations the PBGC has imposed. Many plans therefore will not be able to remain solvent through the plan year ending in 2051 under the Interim Rules.

The interest rate limit set forth in Section 4262(e)(3) of ERISA is 200 basis points above the third segment rate of return for single employer plans specified in Section 303(h)(2)(C)(iii) of ERISA (the "Third Segment Rate").[4] The Third Segment Rate, which represents returns on long-term investment grade corporate bonds, is calculated on a monthly basis. It was 3.42% in July 2021.[5] Accordingly, the interest rate limit in July 2021 was an interest rate of approximately 5.5% (3.42% plus an additional 200 basis points).[6] Using the Third Segment Rate as a guide post for calculating the amount of SFA to which a plan is entitled, however, creates a misalignment between what a plan will actually receive in investment returns over the next thirty years and what the plan is projected to receive in investment returns over the next thirty years in its SFA application. The Third Segment Rate only includes long-term investments that will mature over a period of more than 15 years.[7] Over the next thirty years, plans will need to make investments that include a combination of short, medium, and long-term investments with their SFA. Short and medium term investments yield significantly lower rates of return than their long-term counterparts.[8] The interest rate misalignment is exacerbated by the fact that the discount rate used to calculate SFA is 200 basis points higher than the Third Segment Rate.

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[3] *See* Section 4262(e)(4) of ERISA, American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9704(b), 135 Stat. 4, 189 (2021).

[4] *See* Section 303(h)(2)(C)(iii) of ERISA, 29 U.S.C. § 1083(h)(2)(C)(iii).

[5] *See Funding Yield Curve Segment Rates*, INTERNAL REVENUE SERVICE (last updated July 20, 2021), https://www.irs.gov/retirement-plans/funding-yield-curve-segment-rates.

[6] The PBGC has stated that the interest rate limit "currently is around five and a half percent." *Special Financial Assistance Program for Financially Troubled Multiemployer Plan (Section 9704 of ARP) Webinar*, Pension Benefit Guaranty Corporation (July 12, 2021), available at https://www.youtube.com/watch?v=8T5BaKye8Fk.

[7] *See* Section 303(h)(2)(C)(iii) of ERISA, 29 U.S.C. § 1083(h)(2)(C)(iii).

[8] *See Funding Yield Curve Segment Rates*, INTERNAL REVENUE SERVICE (last updated July 20, 2021), https://www.irs.gov/retirement-plans/funding-yield-curve-segment-rates.

The Interim Rules restrict plans' investment options for SFA assets to investments in investment grade corporate bonds.[9] Currently, investments permitted by the Interim Rules are projected to produce an investment return of less than 2.5%, 3% less than the rate used to calculate SFA. As a general rule, actuaries estimate that a plan's liability increases 13-15% per each 1% decrease in the discount rate. If the discount rate was decreased by 3% so that it aligned with the expected rate of return on the SFA, a plan's liability would increase by approximately 39-45%. Consequently, many plans will miss the goal of remaining solvent through their 2051 plan year by approximately 39-45% unless the proposed investment limitations are modified.

The misaligned interest rates pose a particularly serious problem for plans that are projected to become insolvent near the time such plans receive their SFA. The majority (if not all) of such plans' assets will be the SFA they receive. These plans will not have significant, if any, plan assets to invest at higher rates of return to lessen the impact of the interest rate assumption misalignment described above. Plans with modest assets, in addition to the SFA they receive, will be incentivized to take more risk with such assets to attempt to remain solvent through their 2051 plan year. They will do so by investing their non-SFA assets at a higher and riskier rate of return. Presumably, Congress selected the Third Segment Rate plus 200 basis points because it is a reasonably conservative interest assumption. The increased risk that plans will assume by investing its non-SFA assets at a higher rate of return will be greater than the increase in risk these plans would assume if they invest SFA assets in investments with a projected rate of return of the rate the PBGC uses to calculate the plans' SFA. That is because increasing projected investment returns from 2.5% creates less risk than increasing projected investment returns from, for example, 7%.[10] The latter will require plans to invest more assets in investments with significant additional risk.

The PBGC has recognized the interest rate misalignment as an issue, but asserts it "does not have authority to provide a different rate or bifurcate the statutorily mandated interest rate."[11] We respectfully suggest, instead of changing the interest rate assumption, the PBGC amend the Interim Rules to permit plans to invest SFA with the specified objective of earning the discount rate the PBGC uses to calculate the amount of SFA it provides to plans. This approach would not increase the cost of SFA. Instead, it will permit plans to make investments that will enable them to realize returns that meet the interest rate assumption used by the PBGC to provide SFA and will increase the likelihood that plans are able to remain solvent through 2051.

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[9] *See* Special Financial Assistance by PBGC, 86 Fed. Reg. 36,627 (July 12, 2021).

[10] The PBGC has stated "the vast majority of multiemployer plans use an assumption that is between six and a half and seven and a half [percent]." *Special Financial Assistance Program for Financially Troubled Multiemployer Plan (Section 9704 of ARP) Webinar*, Pension Benefit Guaranty Corporation (July 12, 2021), available at https://www.youtube.com/watch?v=8T5BaKye8Fk.

[11] Special Financial Assistance by PBGC, 86 Fed. Reg. 36,603 (July 12, 2021).

## Contribution Assumptions

As mentioned above, ARPA requires that a plan use the same assumptions the plan used to certify the plan's zone status before January 1, 2021 to determine eligibility and the amount of SFA for which a plan may apply.[12] ARPA specifies that other than the interest rate assumption, a plan may propose to change an assumption in its application to the PBGC if such assumption in the plan's zone certification is unreasonable.[13] Pursuant to Section 4262(e)(1) of ERISA, the PBGC is required to accept a change in an assumption unless the PBGC determines the change is unreasonable.[14] The PBGC's guidance for assumption changes (the "Guidance"), however, appears to require proof in support of such changes that may be impermissibly difficult for plans to provide. The Guidance suggests that the PBGC expects plans to provide data based on historical information.[15] This deviates from, and goes beyond, the reasonableness standard set forth in ARPA. It also departs from the Interim Rules which, consistent with the reasonableness standard in ARPA, permit plan actuaries to select assumptions concerning contributions based on information provided by a plan's trustees in good faith.[16] The reasonableness standard in ARPA, and the Interim Rules, must be applied to the proof required by the PBGC to change contribution assumptions.

A plan's contribution assumption is calculated by multiplying the assumed rate of contributions by the assumed amount of contribution base units ("CBUs"). Plan actuaries, however, determine contribution assumptions for a plan's zone status certification with the knowledge that the zone status certification will be revisited every year. The actuary's contribution assumption is based on information provided by a plan's trustees because the trustees are more familiar with contribution requirements in existing collective bargaining agreements and potential changes in CBUs.[17] Most collective bargaining agreements do not

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[12] *See* Section 4262(e)(2)(B) of ERISA, American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9704(b), 135 Stat. 4, 189 (2021).

[13] *See* Section 4262(e)(4) of ERISA, American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9704(b), 135 Stat. 4, 190 (2021).

[14] *See* Section 4262(e)(4) of ERISA, American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9704(b), 135 Stat. 4, 190 (2021) ("The corporation shall accept such changed assumptions unless it determines the changes are unreasonable, individually or in the aggregate.").

[15] *See Special Financial Assistance Assumptions Guidance*, PBGC SFA 21-02, PENSION BENEFIT GUARANTY CORPORATION (July 9, 2021).

[16] *See* Special Financial Assistance by PBGC, 86 Fed. Reg. 36,623 (July 12, 2021) ("The actuary's selection of assumptions about future covered employment and contribution levels (including contribution base units and contribution rates) may be based on information provided by the plan sponsor, which must act in good faith in providing the information.").

[17] *See* Section 305(b)(3)(B)(iii) of ERISA, 29 U.S.C. § 1085(b)(3)(B)(iii); 26 U.S.C. § 432(b)(3)(B)(iii).

exceed three years and very few exceed five years.[18] Consequently, it is very unlikely that an actuary would attempt to project contribution rates for use in a zone certification for more than five years; twenty-five years less than the PBGC will need to project. It is therefore likely that plans will need to propose changes to the contribution assumptions in their SFA applications.

The Guidance provides that the default assumption for contribution rate increases is the last contribution increase in the applicable collective bargaining agreement will apply each year through the plan year ending in 2051.[19] This default assumption is unreasonable because such contribution rates were not designed to last for thirty years. Contribution rate increases in collective bargaining agreements may be driven by contribution rate increases set forth in an applicable rehabilitation plan. Rehabilitation plans, however, pursuant to the Pension Protection Act of 2006, *as amended* (but not amended by ARPA), must be reviewed by plan trustees on an annual basis.[20] Assuming that these contribution rate increases will carry forward for thirty years is inconsistent with how rehabilitation plans work and what bargaining parties likely intended when they negotiated the contribution rate increase in the first place. It is unreasonable to assume that a contribution rate increase in the final year of a collective bargaining agreement can be reasonably applied as an assumption for thirty years.

With respect to CBUs, the Guidance states that the PBGC will not accept changes to a plan's CBUs assumption if, "[t]he changed assumption includes year-to-year changes that are not adequately supported by the plan's historical data."[21] Historical data is not necessarily predictive of future changes on their own. The labor force that is willing to engage in physical labor within the retail industry already has shrunk, and is projected to continue to shrink. In response to this reduction in the labor supply, employers in the retail industry are automating supply chain and in-store operations to reduce labor with technology that already exists. In fact, many of these changes will be implemented within the next ten years. There are numerous technological advances being considered in various industries today that will materially decrease CBUs well before thirty years.[22] Changes in the next thirty years have not yet fully materialized and are unlikely to be supported by a plan's historical data. Plans, as well as the PBGC, will

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[18] Due to the contract-bar doctrine, it is most common for collective bargaining agreements to have a duration of three years. *See generally In re General Cable Corp.*, 139 NLRB 1123 (1962).

[19] *See Special Financial Assistance Assumptions Guidance*, PBGC SFA 21-02, PENSION BENEFIT GUARANTY CORPORATION (July 9, 2021) § III.C.

[20] *See* Section 305(e)(4) of ERISA, 29 U.S.C. § 1085(e)(4).

[21] *Special Financial Assistance Assumptions Guidance*, PBGC SFA 21-02, PENSION BENEFIT GUARANTY CORPORATION (July 9, 2021) § V.A.

[22] For example, retail employers are already using technology on the supply chain that automate distribution functions previously performed by employees. Retail employers are also using technology that has reduced in-store staffing needs, such as expanding self-checkout options and using electronic shelf tags that would eliminate the need for employees to manually change printed shelf tags.

need to look further than historical data to identify future trends to project changes to contribution assumptions in a reasonable manner.

Research on automation in the next ten years suggests that automation will change the labor market far sooner than 2051.[23] With respect to the supermarket industry, "an assessment of available automation technologies shows that [employers] can already operate a typical retail grocery store with up to 55 to 65 percent fewer hours."[24] This is attributable to automated check-out processes, shelf scanning, and backroom unloading.[25] This projection of the reduction to CBUs in the supermarket industry stems from automation technology already in existence. There will be additional technological breakthroughs and advances over the next thirty years across many industries that significantly reduce CBUs and which will not be supported by a plan's historical data at the time the plan applies for SFA. Consistent with the reasonableness standard in ARPA, plans need to be able to propose reasonable changes to assumptions that account for future developments that will have an impact on plan experience regardless of whether such developments are apparent in the plans' historical data.

Although we understand that the discussion about contribution assumptions will occur at the time a plan applies for SFA, the PBGC should revisit the Guidance to align it with the reasonableness standard set forth in the Rules and ARPA for changing an assumption. The Guidance should reflect that the proof required to substantiate a plan's proposed assumption change must be reasonable, and that the Guidance should not limit such changes to those rooted in historical data.

Sincerely yours,

DocuSigned by:

Dan Dosenbach

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[23] The Guidance uses "self-driving trucks replacing all human drivers" as an example of an inappropriate projection that, according to the Guidance, would not support a reasonable change to the CBU assumption. *See Special Financial Assistance Assumptions Guidance*, PBGC SFA 21-02, Pension Benefit Guaranty Corporation (July 9, 2021) § V.A. We note, however, that this is inconsistent with, and does not account for, current research on the development of self-driving vehicles. In short, it is unreasonable to assume there will not be a material number of self-driving vehicles.

[24] Bryan Hancock et al., *Automation in retail: An executive overview for getting ready*, McKinsey & Company (May 23, 2019), https://www.mckinsey.com/industries/retail/our-insights/automation-in-retail-an-executive-overview-for-getting-ready.

[25] *See* Bryan Hancock et al., *Automation in retail: An executive overview for getting ready*, McKinsey & Company (May 23, 2019), https://www.mckinsey.com/industries/retail/our-insights/automation-in-retail-an-executive-overview-for-getting-ready.