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

Re: Special Financial Assistance by the PBGC
Regulation Identifier Number: RIN 1212-AB53

Dear Sir or Madam,

On July 12, 2021, the Pension Benefit Guaranty Corporation's interim final rule ("IFR") regarding Special Financial Assistance for struggling multiemployer pension plans was published in the Federal Register. Macala & Piatt, LLC welcomes the opportunity to comment on the IFR with the hopes that final regulations will be more consistent with the plain language and intent of Section 9704 of the American Rescue Plan Act of 2021 ("ARPA").

Macala & Piatt, LLC ("M&P") represents a substantial number of multiemployer defined benefit, defined contribution, welfare, and apprenticeship plans in Ohio, West Virginia, and Michigan. Nearly all of those plans are in the building and construction trades. With that breadth, M&P sees the different issues affecting plans of all different funding levels. While some of M&P's defined benefit plans never suffered greatly from the financial crisis of 2008 and others have battled their way back to stable footing, there are still several plans who have never recovered. These troubled plans have had no choice but to consider, and in some cases successfully pursue, benefit suspensions pursuant to the Multiemployer Pension Reform Act of 2014.

Boards of Trustees take their fiduciary responsibility and dedication to the participants and beneficiaries of the various plans very seriously. Incurring the incredible expense of going through a MPRA application, not to mention the emotional struggles involved in reducing benefits of the Trustees colleagues, friends, and often family members, was not something that was entered into lightly. But Trustees understand that long-term solvency of the plans is of utmost importance. It was with this in mind that they went down the MPRA application road.

But there was always a hope that, at some point soon, legislation would be passed that would help those plans and their members that didn't involve cutting anyone's benefit. We all hoped ARPA was that legislation. Everything rode on the regulations, though. And the IFR was a step backwards.

It is our opinion that the IFR does not accomplish ARPA's goals and in fact may lead to even greater assistance being required in the future. Luckily, the Pension Benefit Guaranty Corporation ("PBGC") has the opportunity to remedy those issues and make the Special Financial Assistance as robust as was intended.

<u>The IFR Puts Trustees in an Impossible Position</u>

Pursuant to the IFR, an eligible multiemployer plan can apply for Special Financial Assistance ("SFA") which is "the amount by which a plan's resources fall short of its obligations, taking all plan resources and obligations into account." 86 Fed. Reg. 36,601 (July 12, 2021). A plan's future obligations are required to be calculated at a rate which will yield a 5.5% return.

Using that investment rate, though, means that plans will be required to earn more than 5.5% in investments in the future in order to meet their benefit promises. Returns of less than 5.5%, which are not rare, will mean that a plan will move toward insolvency sooner than 2051.

Due to those investment constraints as well as the constraints placed by the IFR on the amount of SFA, discussed below, trustees of some troubled plans will have to make an impossible choice: receive SFA and possibly doom the plan long-term, or reject SFA and force retirees to live with large benefit cuts? In other words, should trustees risk a breach of fiduciary claim from future retirees or a breach of fiduciary claim from current retirees?

A Board of Trustees cannot show preference for one class of participants over another.

> In addition to reinforcing the prohibition against self-dealing provided by [29 U.S.C. 1104(a)(1)](A), the lead line of [29 U.S.C. 1104](a)(1) is construed to require that in the discharge of his duties with respect to a plan (referring to the administration of a plan rather than to its establishment) the fiduciary is forbidden from granting preference as between a plan's participants or as between a plan's beneficiaries.

<u>Winpisinger v. Aurora Corp. of Illinois, Precision Castings Div.</u>, 456 F.Supp. 559, 566 (N.D.Ohio 1978).

The plain language of ERISA §404 (29 U.S.C. 1104) is also instructive:

> ...[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan[.]

With the restrictions placed on the amount of SFA and the limits on investment options available pursuant to the IFR, trustees will be forced to decide which class of participants and beneficiaries to assist. Applying for SFA and restoring benefit suspensions will help participants and beneficiaries who are currently receiving benefits or will be receiving benefits in the near future. But the investment strings attached to SFA could cause the plan to go insolvent before 2051. At that time, the plan will need to apply for PBGC assistance at a lower guarantee rate than that guaranteed by MPRA. It is not a stretch to imagine a court finding that such an action constitutes a breach of fiduciary duty.

But the opposite approach treads on breach territory as well. Should the trustees forego SFA since MPRA benefit suspensions help ensure long-term solvency? Should the trustees say "sorry retirees, you'll just have to live with your 60% (or more) benefit cut so the plan doesn't fail in 20 years"?

The Department of Labor has issued a statement regarding MPRA suspensions and SFA. It says in relevant part:

> In the Department of Labor's view, ARP's inclusion of plans that suspended benefits under MPRA and the prohibition against a future MPRA suspension for a plan receiving SFA reflects a clear legislative objective to allow plan fiduciaries to restore benefits that were previously suspended and to encourage all eligible plans to apply for SFA without raising potential fiduciary liability concerns about undoing current or precluding future MPRA suspensions.

M&P appreciates the DOL's statement so far as it goes. But it doesn't go far enough.

First, if participants or beneficiaries were to bring a breach of fiduciary claim, such a claim would be in U.S. District Court. While courts do look to DOL guidance for help, courts have been very clear that such guidance is not binding. "We next turn to DOL opinion letters. Though we have often relied on them, we are not bound by them any more than we are bound by DOL's interpretive rules." Hill v. Delaware N. Cos. Sportservice, 838 F.3d 281, 290 (2d Cir.2016). [internal citations omitted]

> The Supreme Court has held that DOL opinion letters "lack the force of law," and yet to the extent the DOL opinions are persuasive, they are entitled to respect. Even though the opinion letters are not binding on the Court, the Court holds that the letters cited by the parties are not dispositive of the issues presented and therefore are not persuasive.

Misewicz v. City of Memphis, 864 F.Supp.2d 688, 703 (W.D.Tenn.2012)

> The Court agrees that this case is fundamentally one about ERISA and that DOL's interpretation of ERISA should normally receive deference to the extent that interpretation is reasonable. However, the Court concludes that DOL has failed to reasonably interpret the statute

New York v. United States Dept. of Labor, 363 F. Supp. 3d 109, 128 (D.D.C.2019)

In other words, the DOL's statement will not prevent a breach of fiduciary claim and may also not be even persuasive to a court.

Second, the DOL's statement speaks only to undoing current suspensions or precluding future MPRA suspensions. What happens if a Board decides not to pursue SFA? Could a court twist the DOL's statement to say that a Board breaches its fiduciary duty if it *doesn't* apply for SFA? Or that such a decision is subject to heightened scrutiny since it goes against DOL "guidance"?

As with so many things in the ERISA world, the answer is "it depends." And trustees, who are personally financially responsible as fiduciaries for their funds, do not like to rely on "it depends" as an answer. We must also remember that, unfortunately, what "it depends" on are (1) the particular Judge hearing the case; and (2) any change in approach by a future administration or Congress. We are all familiar with a new administration or a new Congress drastically altering an approach to a sticky regulatory issue. One only needs to look at guidance on ESG investments to see how quickly administrations can flip the script.

This isn't just a theoretical exercise, though. There are real life implications.

A Real Life Example

M&P represents one client who successfully applied for a MPRA benefit suspension. The Plan's actuary has stated that without SFA, the plan will stay solvent. However, we must remember that this is possible only because of the large benefit cuts that were implemented. Some retirees saw pension cuts upwards of 80%. Many retirees had benefit reductions of 50% or more. The trustees would much rather obtain SFA and be able to restore all participants to their full pensions.

The actuary's estimate of SFA is about $29 million. This amount excludes any amounts immediately spent on MPRA back payment. **At the time the SFA is received it will account for about 80% of the total plan assets.** With 80% of assets in fixed income investments earning only 2.75%, the plan will earn less in early years than the 5.5% that is assumed when calculating the amount of SFA. The SFA share of assets is estimated to decrease to 30% (current investment policy target for bonds) by about May 1, 2029. For the seven-year period from May 1, 2022 to April 30, 2029 the plan is expected to earn between 3.5% and 5.5% per year on investments. After May 1, 2029 the plan is expected to earn 6.75% based on current investment policy. The early years of the projection period have a larger impact on long term solvency than the later years of the projection. **The net impact is that the plan will become insolvent during the plan year ending April 30, 2048 if it receives SFA even though the amount of SFA was calculated to keep the Plan solvent until April 30, 2051.** If the plan does not apply for SFA, the massive benefit cuts will remain in place but the plan is projected to remain solvent and potentially increase its funding status. Again, an impossible choice.

The MPRA suspension cut all members to 110% of the PBGC guarantee. With the restrictions imposed by ARPA on future MPRA applications, this means that in 2048 the plan's participants will only receive 100% of the PBGC guarantee.

In other words, applying for SFA under the current rules would put the plan and its participants and beneficiaries in an even worse place. No one could argue that was the intent of ARPA and the SFA.

The IFR can be strengthened, though, to either eliminate or greatly reduce these risks. This can be accomplished with any number of changes to the provisions on investment return assumptions. One such approach is a bifurcation method.

The use of a 5.5% interest (discount) rate to calculate present value of the difference between each year's contributions and benefit payments/expenses and then only being able to invest this amount in assets that earn approximately 2.0% per year has obvious pitfalls. This could be mitigated by reflecting the expected 2.0% return when calculating the amount of SFA. This could be done through the use of a bifurcated discount rate. The bifurcated discount rate would be calculated by multiplying each year's 5.5% present value factor by each year's expected SFA asset return of 2.0%. That way the resulting SFA will reflect the statutory 5.5% discount rate and the asset return that is expected to be earned on the SFA due to the statutory requirement that the SFA be conservatively invested.

Recommendation: Plans receiving SFA should not be locked in to such low investment return assumptions. Plans should be permitted to build a specific diversified portfolio for the SFA which will not only protect the SFA but also achieve long-term solvency. Reputable investment managers and consultants have been crafting such prudent portfolios for decades, often with returns that exceed market benchmarks.

The bifurcated method described above could also be used to make sure the amount of SFA is high enough to accomplish ARPA's intent.

Abuse Concerns

The IFR also expresses a concern that plans could figure out a way to abuse the SFA program. Such a concern is certainly understandable and abuse and fraud must be prevented at every turn. But the protections already in place from the Pension Protection Act of 2006 ("PPA"), MPRA, and ARPA should help head off abuse in almost every case.

New Internal Revenue Code ("Code") §432(b)(7), added by ARPA, subjects any plans receiving SFA to the rules applicable to critical status plans:

> (7) Plans receiving special financial assistance
>
> If an eligible multiemployer plan receiving special financial assistance under section 4262 of the Employee Retirement Income Security Act of 1974 meets the requirements of subsection (k)(2), notwithstanding the preceding paragraphs of this subsection, the plan shall be deemed to be in critical status for plan years beginning with the plan year in which the effective date for such assistance occurs and ending with the last plan year ending in 2051.

The rules and limitations placed on critical status plans are well-established and the DOL and IRS are certainly well-versed in enforcing them. Plan professionals have been reiterating those limitations to trustees for many years now and trustees certainly understand them. ARPA and the IFR contemplated the potential for plans to try to change numbers to increase the amount of SFA. A great deal of time is spent describing proper actuarial assumptions, proper ways to change any assumptions (and the justifications needed for those changes), and general prohibitions on benefit increases or contribution decreases.

One could argue that if the amount of SFA was properly interpreted in the IFR (see discussion below), such abuses would likely be eliminated. Considering the amount of SFA available under the current IFR, it is possible plans may see no other alternative than to stretch their interpretations of numbers in order to maximize SFA, especially if SFA still won't be substantial enough to save the plan. In other words, the IFR as written may actually increase the chances of abuse.

Recommendation: The law is settled on what a critical status plan can and cannot do. Limiting SFA, or access to SFA, because of potential abuse is an answer in search of a problem. Abuse concerns should not factor into the PBGC's interpretation of the availability and amount of SFA.

The Amount of Special Financial Assistance

The IFR appropriately focuses a great deal on the amount of SFA a plan can request. This calculation is central to the entire matter. Unfortunately, the IFR falls short in its interpretation of the law. The law requires that the PBGC provide more assistance than formulated by the IFR.

> The amount of financial assistance provided to a multiemployer plan eligible for financial assistance under this **section shall be 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 under this section and ending on the last day of the plan year ending in 2051, with no reduction in a participant's or beneficiary's accrued benefit as of March 11, 2021, except to the extent of a

> reduction in accordance with section 1085(e)(8) of this title adopted prior to the plan's application for special financial assistance under this section, and taking into account the reinstatement of benefits required under subsection (k). [Emphasis added].

29 U.S.C. 1432(j)(1), ERISA § 4262(j)(1).

Obviously, we are cognizant of all the arguments described in the IFR and other comments pertaining to why SFA should be calculated as stated in the IFR and 29 C.F.R. § 4262.4. But the IFR's position, 86 Fed. Reg. 36,601 (July 12, 2021), that the "plain meaning of the statutory language is that SFA is the amount by which a plan's resource fall short of its obligations, taking all plan resources and obligations into account" is a stretch at best.

A "plain" reading of Section 4262(j)(1) would instead be that SFA should be enough to pay <u>all</u> benefits due. The statute did not say "all benefits due taking into account current assets."

The IFR sidesteps this position when it states "PBGC has concluded that the approaches recommended in these comments could be supported only by a strained reading of the clear language of section 4262(j)(1)[.]" 86 Fed. Reg. 36,601 (July 12, 2021). The IFR's calculation of SFA seems strained itself. It is unclear what particular policy goal or desired outcome the IFR is attempting to achieve. But what is clear is that a plain reading of Section 4262(j)(1) dictates a much broader interpretation of how much SFA a plan can request.

So how broad?

We understand the issues inherent in providing such a large amount of assistance. There must be a middle ground between providing a blank check and the approach taken by the IFR.

Recommendation: The amount of SFA should be based on the amount needed to pay <u>all</u> benefits and obligations (including administrative expenses) through 2051. But the plan should calculate how much of its current assets will be needed to provide post-2051 benefits and obligations. Only the amount of current assets as of the date of the application not needed for post-2051 benefit and obligation payments would be used to offset the amount of SFA.

We appreciate this opportunity and look forward to working with the PBGC and other interested parties in ensuring that the working men and women of this country receive the retirement benefits they were promised and deserve.

Sincerely,

Timothy P. Piatt, Esq.
Macala & Piatt, LLC