PUBLIC SUBMISSION

As of: 8/10/21 9:38 AM
Received: August 10, 2021
Status: Pending_Post
Tracking No. ks6-2b25-4ffn
Comments Due: August 11, 2021
Submission Type: API

Docket: PBGC-2021-0003
Special Financial Assistance by PBGC

Comment On: PBGC-2021-0003-0001
Special Financial Assistance

Document: PBGC-2021-0003-DRAFT-0046
Comment on FR Doc # 2021-14696

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General Comment

August 10, 2021

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Re: PBGC Proposed Regulations 29CRF Parts 4000 and 4262

Thank you for your efforts providing proposed regulations related to the multiemployer relief provisions of ARPA. I appreciate the significant amount of effort required to produce the proposed regulations in a relatively short amount of time.

I am an actuary for numerous multiemployer pension plans, primarily in Pennsylvania, New York, and West Virginia and I have 2 primary comments.

In Section 4262(b)(1) of ERISA Congress provided a relatively specific list of criteria for plans to qualify for Financial Assistance which you accurately stated in your proposed regulation. Criteria 1, 2, and 4 of this list all generally require a plan to be either be insolvent, or in critical and declining status. In other words, it is very likely that any plan described in criteria 1, 2 or 4 would be projected to be insolvent within the next 20 years. However, projected insolvency is not an inherent component of Criteria 3. Criteria 3 is based on a modified funded status of less than 40% and a ratio of active to inactive of 2 to 3.

Although your proposed regulations recognize that all 4 criteria exist, the way you have chosen to interpret how the Financial Assistance is determined essentially excludes many plans in the third category. Under the proposed regulations, although a plan may be eligible for assistance if it meets any of the criteria, it will only receive assistance if it is projected to be insolvent before 2051. I do not believe this was the intent of Congress. If Congress had intended only plans that were projected to be insolvent before 2051 to be eligible for financial assistance, they would have stated it directly. There would have been no need to create the 3rd criterion to the list of eligible plans.

The definition of the financial assistance in the legislation 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”. There is no specific reference to solvency, or to the value of the plan’s assets, or to future contribution rates. Congress provided a 3rd criterion which is not related to the timing of insolvency, and they did not mention any solvency test when defining the amount of the financial assistance. Therefore, I believe they fully intended for plans to receive assistance even if they were not projected to be insolvent before 2051. The PBGC’s current interpretation will result in simply “kicking the can” to 2051. Essentially, all plans that are projected to be insolvent before 2051 will now receive sufficient assistance so that they all become insolvent in 2051. Again, if this was Congress’s intention, they would have stated it.

In addition, because the present value of future contributions includes the current contribution rate and any future rates specified in the current bargaining agreement, fund trustees that have been proactive in addressing their issues are essentially penalized relative to less prudent trustees who may not have been as diligent in addressing the issues facing their plans. In other words, many trustee groups and pension plans have been prudent and made difficult decisions to reduce future benefits and push contribution rates to the limit of member support and beyond in order to get their pension plans headed toward financial security in the future. While other trustee groups and plans have taken a more passive path and have not made the necessary changes either in plan benefits or contribution rates. Because future contribution rates are considered, those trustees that have worked hard to push up their rates will receive less assistance than plans who took little or no corrective action to improve the plan’s projected financial status. Two plans may be equal in funded status, but because one negotiated for higher rates and set those rates in the bargaining agreement, they will potentially receive less assistance than a plan who has not pushed for higher rates. The regulations as currently written will effectively benefit those plans and trustee groups who have not been prudent stewards and have neglected to take responsible actions to correct the plan’s financial position.

I would encourage you to examine a more equitable solution that would allow plans who meet the 3rd criterion to receive the financial assistance Congress intended, even if they may not be projected to be insolvent before 2051.

Thank you.
Keith Nichols