VIA ELECTRONIC DELIVERY

August 10, 2021

The Honorable Gordon Hartogensis
Director
Pension Benefit Guaranty Corporation
Washington, DC 20005

Re: Comments on the Interim Final Regulation for the Special Financial Assistance Program for Financially Troubled Multiemployer Plans

Director Hartogensis:

The undersigned organizations that represent contributing employers commend the Pension Benefit Guaranty Corporation (PBGC) on its work in releasing the Interim Final Regulation (IFR) relating to the Special Financial Assistance (SFA) for troubled multiemployer plans that was part of the American Rescue Plan Act (ARPA). We are especially appreciative given the limited time and resources available for such an important issue. The IFR was published in the Federal Register on July 12, 2021, and comments are due on August 11, 2021.[1] On March 26, 2021, the Chamber sent you a letter outlining the Chamber's concerns with the SFA provisions in ARPA, a copy of which is attached. On behalf of these contributing employer organizations, our comments to the IFR are below.

Background

As contributing employers, our members are the contribution base that makes these plans possible because without contributing employers, these plans do not exist. Unfortunately, the contribution base has declined over time because of a confluence of events, such as changes in industries, technology, aging demographics, and shrinking unionization. The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) was meant to address employers that exit these plans through the creation of withdrawal liability, which requires an employer to pay its proportionate share of any unfunded vested benefits when it leaves the plan. However, because of these events and various exceptions, withdrawal liability did not fix this problem. Instead, those liabilities are shifted to the remaining employers by virtue of what is commonly referred to as the last man-standing rule. The MPPAA withdrawal liability structure remains one of the key impediments to attracting new employers to multiemployer plans and to job growth for current contributing employers.

Because of changing demographics, many of these plans have few active employees relative to retirees, requiring increased employer contributions on behalf of current employees to keep these plans afloat. These increased contributions are unsustainable for both the contributing employers and employees, who are sacrificing current wages to pay for past liabilities.

Although we appreciate PBGC's work on the IFR, as outlined below, our members and other contributing employers are concerned that PBGC's interpretation of the amount of SFA and the conditions on withdrawal liability will lead to more employers exiting theses plans. Current active employees will continue to sacrifice wages, but they are unlikely to receive full benefits during retirement because of plan insolvency. Further, under the IFR, for employers remaining in these plans, contributions will continue to garner accrual rates for current employees far below the value of those contributions because current contribution levels have been paying for underfunding that the SFA provisions in ARPA were intended to remediate.

[1] 86 Fed. Reg. 36598 (July 12, 2021).

Analysis

Section 4262.4: amount of special financial assistance.

Law

Section 4262(j) provides that:

> 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 the participant's or beneficiary's accrued benefit as of the date of enactment of this section, …..

Regulation

PBGC interpreted this language to mean that the amount of SFA is equal to the value of all SFA-eligible plan obligations that exceeds the value of all SFA-eligible plan resources.[2] Plan obligations include the present value of benefits and administrative expenses expected to be paid during the SFA coverage period (including reinstated benefits).[3] Plan resources include the fair market value of all current plan assets and future contributions, withdrawal liability payments and other payments expected to be made to the plan during the SFA coverage period.[4]

PBGC Explanation

In the preamble to the IFR, PBGC states that "If Congress had contemplated the exclusion of these resources [current assets and other income] in the calculation of the amount of SFA 'required for the plan,' it would have done so explicitly."[5] Further, with respect to other interpretations suggested in comments, PBGC 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)."[6]

Concerns

PBGC's interpretation all but ensures plan insolvency and incentivizes employer withdrawals. As explained by one prominent actuarial firm, the "amount of special financial assistance allowed by the PBGC regulations minimizes the amount of assistance that a plan can receive and practically ensures that the plan will be insolvent by 2052. This is because, in part, contributions [both past and future] meant to be used for benefits payable after 2051 will be used to offset the SFA amount." [7]

The result of PBGC's interpretation is that current active employees will be required to sacrifice wages to pay higher contributions to their troubled plans. When these employees retire, however, they will receive the bare minimum benefits at the PBGC guarantee level because by their retirement date, it is almost certain that these eligible plans will be insolvent (notwithstanding the SFA). As noted in the Chamber's March 26, 2021 comments, as employer contributions dramatically increase at the expenses of wage increases and active employees' retirement benefits simultaneously decrease, active employees will almost

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[2] 29 C.F.R. § 4262.4(a).
[3] 29 C.F.R. § 4262.4(b).
[4] 29 C.F.R. § 4262.4(c).
[5] Id. at 36601.
[6] Id.
[7] See "PBGC Issues Regulations on Special Assistance for Troubled Multiemployer Plans," Cheiron, *available at https://cheiron.us/cheironHome/viewArtAction.do?artID=352*

certainly vote to walk away from these plans, instead preferring a defined contribution plan or a single-employer defined benefit plan.[8] If the SFA is only going to extend solvency to 2051, and permit these plans to go insolvent and reduce benefits to the PBGC guarantee levels, there is also no incentive for unions to support the continuation of these plans. Even if the unions were to continue to support participation in these plans, employees can negotiate out through decertification.

As a practical matter, PBGC's interpretation will make it more difficult for our members to hire unionized employees. Many of our employers need to hire immediately to fill the void of retired or soon- to-be-retired employees. However, our members cannot attract talent when all they can offer are decreased wages and greater diversion of compensation in support of a failing pension plan. Remaining in a multiemployer pension plan is not an effective recruiting tool.[9] Instead, many of these workers will opt to work for employers with higher wages and guaranteed benefits (either in the form of a single-employer defined benefit pension plan or a 401(k) plan).[10]

Recommendations

For all of the considerations in the Chamber's March 26, 2021 letter and those outlined above, PBGC should reconsider its interpretation of the amount of SFA to ensure not only that these plans are viable

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[8] . See a Testimony of Josh Shapiro, MAAA, FSA, EA Vice President, Pension, American Academy of Actuaries Submitted for the Record, United States House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, Hearing: "The Cost of Inaction: Why Congress Must Address the Multiemployer Pension Crisis" Mar. 7, 2019 ("The data suggest that employers and employees agreed to increase the average negotiated contribution rate by more than 50 percent over that four-year period [between 2009 -2013], while the benefits that participants earned remained unchanged. These figures are for all multiemployer plans, and it is likely that among highly distressed plans, the average contribution rate increases were even greater and that the benefits earned by participants in those plans tended to decrease.") available at
https://www.actuary.org/sites/default/files/files/publications/Testimony-Josh-Shapiro.pdf

A real-life example comes from the testimony of Mr. Brian Sloan:

> To put it in dollar terms, since the 2000 recession, the Fund has repeatedly cut back the benefits received by the members who were active at that time. Because of these cuts, a Fund participant who has accrued benefits can now expect a pension that is around 30% less than a similar person who retired in 2000. For example, a participant with 30 years of service working 1,500 hours a year would have contributed approximately $85,000 over their working years and received a monthly benefit of about $3,130. A participant retiring in 2016 would have contributed approximately $153,000 and received a monthly benefit of about $2,210 per month. A participant retiring in 2030 will have contributed approximately $290,000 and receive a monthly benefit of approximately $1,640. This participant will contribute 3.5 times more than the 2000 retiree and receive 40% less in monthly benefit, 30 years later, not adjusted for inflation.

Testimony available at
https://www.pensions.senate.gov/sites/default/files/Brian%20Slone%20testimony%20v3%20Final.pdf.

[9] As noted in the legislative history to the 1980 MPPAA amendments, "In financially distressed plans, a shrinking number of employers may be required to pay increased contributions in order to sustain in a very modest level of benefits. Active employees may have little reason to support a financially troubled plan that absorbs an increasing portion of their pay package but that offers them very little in return. Under these circumstances, employers have great incentives to terminate the plan." 126 Cong. Rec. 20192 (1980).

[10] According to the Bureau of Labor statistics, in 2020, 17 percent of transportation and warehouse workers, who are in many of the troubled plans, were unionized. The availability of non-unionized jobs in this sector makes it much easier for employees to walk away from employers in multiemployer plans, and, instead work for employers that offer 401(k) plans. See "Union Members – 2020", January 22, 2021, Bureau of Labor Statistic available at https://www.bls.gov/news.release/pdf/union2.pdf.

beyond 2051, but to also ensure that current active employees and new hires want to participate in such plans and remain in the unions that represent them.

<u>Section 4262.16: conditions for special financial assistance: withdrawal liability.</u>

Law:

ERISA Section 4262(m) provides that PBGC:

> <u>May</u> impose …. reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to increases in future accrual rates and any retroactive benefit improvements, allocation of plan assets, reduction in employer contribution rates, diversion of contributions to, and allocation of expenses to, other benefit plans, and withdrawal liability (emphasis added).

Regulations

The IFR mandates that a plan that receives SFA must use the interest assumptions used for mass withdrawal for the later of 10 years after the plan receives SFA or the date the plan no longer holds SFA (or any earnings thereon). The mass withdrawal rates for July–September 2021 are 2.13% (1–25 years) and 2.23% (>25 years).

PBGC Explanation

PBGC determined that a reasonable condition on a plan that receives SFA is to require specified interest assumptions to be used for purposes of determining withdrawal liability. PBGC's rationale is that mass withdrawal liability "approximate[s] the market price insurance companies charge to assume a pension-benefit like liability."[11] PBGC states this was reasonable because "withdrawal liability is the final settlement of the withdrawing employer's obligation to pay for unfunded vested benefits. Doing so is particularly important for plans that have developed an adverse demographic structure, with a small contribution base relative to their unfunded vested benefits, which is the condition of many of the plans that are or will become eligible for SFA."[12]

PBGC determined that these are reasonable conditions because SFA does not result from employer contributions, and, without such conditions, the receipt of SFA could substantially reduce withdrawal liability owed by a withdrawing employer. PBGC reasoned that "the reduction could cause more withdrawals in the near future than if the plan did not receive SFA, which would reduce plan income and be an additional burden for these plans."[13]

Concerns

Section 4262(m) is permissive and does not require PBGC to impose any conditions, However, as noted in the Chamber's March 26, 2021 comments, although Section 4262(m) allows the PBGC to impose reasonable conditions on plans that receive SFA, including withdrawal liability, those conditions 1) must be reasonable; and 2) must be within the current restraints of the law.

The legislative history of MPPAA shows that Congress viewed regular withdrawal liability differently from mass withdrawal liability. Specifically, Congress felt the need to require a "withdrawing

[11] 86 Fed. Reg. at 36611.
[12] <u>Id</u>.
[13] <u>Id</u>.

employer [to] continue funding a proportional share of the plan's unfunded benefit obligations. The purpose is to relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers."[14] Given Congress' determination that the two types of withdrawal serve different purposes, it is reasonable that each would have different assumptions. The purpose of regular withdrawal liability is to ensure the burden of a plan's unfunded vested benefit liabilities do not solely fall on the remaining employers. It is also meant to incentivize employers to continue participation in the plan. On the other hand, because there technically are no employers remaining after a mass withdrawal, the more stringent rules for mass withdrawal are applied to protect participants, beneficiaries and the PBGC. If Congress had meant for PBGC to treat mass withdrawal and regular withdrawal the same, it would not have provided for two different withdrawal liability rules.

Several courts have held that a plan's use of a lower rate (for example the Segal blend or the PBGC mass withdrawal interest rates) to calculate withdrawal liability while using a higher rate to calculate the plan's funding violates ERISA.[15] As such, if it is unreasonable for these plans to use a rate that does not reflect the experience of the plan, it is equally unreasonable for a plan that receives SFA to use a rate that does not reflect the experience of the plan.[16]

PGBC's rationale for using a lower rate (i.e. it approximates the market price that insurance companies would charge to assume such liabilities) fails to adjust for the profit element inherent in the pricing of insurance annuities. Moreover, withdrawal liability payments typically are not used to purchase annuities for participants. Unlike a single employer termination which often results in the purchase of a commercial annuity contract, upon mass withdrawal, the multiemployer plan continues to pay benefits until such time as it becomes insolvent, and, at such time, the PBGC provides enough financial assistance to the plan to pay guaranteed benefits.[17]

As a practical matter, given the investment limitations that Congress and PBGC imposed on SFA amount in ERISA 4262(l) and the IFR, plans will be forced to invest non-SFA amounts, including any

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[14]H.R. Rep No. 96-869, at 67 (1980).

[15] See Sofco Erectors, Inc. v. Trs. of the Ohio Operating Eng'rs Pension Fund, No. 2:19-cv-2238 (S.D. Ohio May 19, 2020). (finding that because ERISA required the fund to apply the rate that took "into account the experience of the plan and reasonable expectations," and based on the fund actuary's admission that the 7.25% rate was in fact the reasonably expected return, the use of a different rate, the lower Segal Blend rate, was unlawful and the fund was required to refund the employer based on the higher rate); New York Times Co. v. Newspaper & Mail Deliverers'-Publishers' Pension Fund, 303 F. Supp. 3d 236 (S.D.N.Y. 2018) (finding that the arbitrator's decision in favor of the Fund was in error where the Fund's actuary stated that the 7.5% assumption was her "best estimate of how the Pension Fund's assets ... will on average perform over the long term, which was lower than the Segal Blend, and further, the actuary admitted that she had used the Segal Blend as her best estimate ."regardless of the particular pension plan's actual portfolio of assets."); Bd. of Trs., Mich. United Food & Commercial Workers Unions v. Eberhard Foods, Inc., 831 F.2d 1258 (6th Cir. 1987) (holding that ERISA § 4213(a) requires that plan actuaries make interest rate assumptions based upon the plan's actual assets and anticipated performance and not upon hypothetical scenarios).

[16] In footnote 18 to the IFR, PBGC states that it intends to propose a separate rule of general applicability under section 4213(a) of ERISA to prescribe actuarial assumptions which may be used by a plan actuary in determining an employer's withdrawal liability. Although ERISA Section 4213 (29 U.S.C. §1393) provides that PBGC may prescribe assumptions that may be used by a plan actuary in determining the unfunded vested benefits for purpose of withdrawal liability, it also provides that each plan must use actuarial assumptions that, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan. In coming up with its assumptions, PBGC should keep in mind that such assumptions also must be reasonable in reflect the plan's experience.

[17] 29 U.S.C. § 1431(a); ERISA §4261(a).

withdrawal liability payments, in higher risk investment (not annuities) to try to obtain the return assumptions under 4262(e)(3) of ERISA.[18]

Although it is understandable that PBGC is concerned with employers withdrawing after a plan receives SFA, its interpretation could encourage employers in certain plans to withdraw before a plan receives SFA. For example, if a plan is projected to receive a relatively small amount of SFA, the amount will not significantly impact the unfunded vested benefits. However, the use of a significantly lower rate could double or triple an employer's withdrawal liability, and such employers may choose to exit the plan before the provision of SFA.[19]

By allowing the use of the mass withdrawal interest rates until the later of 10 years or the date the plan no longer holds SFA or any earnings, plans could inequitably manipulate the system by holding a very small amount of SFA indefinitely. For example, plans could elect to spend down the SFA to a nominal amount, and thus, use a much lower rate for withdrawal liability purposes, but use a much higher rate for funding purposes indefinitely (which, as noted above, a number of courts have found to be inconsistent with ERISA).

Recommendations

For many plans, the SFA amount will not be significant enough to eliminate or even substantially reduce withdrawal liability. Given the limited amount of SFA, many employers will likely not be able to withdraw, even if they wanted to, and no additional conditions are needed.[20]

If PBGC keeps a limitation, it should either eliminate the "later of" and mandate the use of the mass withdrawal interest rates for 10 years (similar to MPRA and prior legislation) or mandate an ordering rule

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[18] In determining the amount of SFA, plans are required to use the assumed rate of interest which is the lesser of the interest rate used for funding standard account projections in the most recent zone status certification completed before 2021 or 200 basis points plus the third segment rate interest rate in the last four months before filing of the application. However, the statute requires that SFA can only be invested in investment grade bonds or other investments as provided by the PBGC. The IFR defines investment grade as "publicly traded securities for which the issuer has at least adequate capacity to meet the financial commitments under the security for the projected life of the asset or exposure." Permissible investments include individual fixed-income securities (including dollar-denominated foreign securities) and commingled vehicles (e.g., exchange traded funds, mutual funds, pooled trusts, etc.) that invest in investment-grade bonds. Given the unlikelihood that the investment returns on SFA amounts will generate the assumed interest rate of return because of the limited investment options, the viability of plans receiving SFA will depend in part on the investment returns of the non-SFA assets in the plan's portfolio (including withdrawal liability payments), which will need to be more aggressive to make up for the SFA investment limitations. However, PBGC could broaden its interpretation of permitted investments to alleviate this issue.

[19] According to Milliman, the plans in its survey used a discount rate of approximately 7 percent, although the rate may now be slightly lower because of the reporting lag time. See "Multiemployer Pension Funding Study: December 2020" Nina M. Lantz, Rex Barker, Timothy L. Connor, and William Wade, 17 February 2021 available at https://www.milliman.com/en/insight/multiemployer-pension-funding-study-december-2020. The difference in interest rates can have a significant impact on the amount of withdrawal liability. "As a rule of thumb, a 100-basis point change in the interest rate can swing the liability by 10-20%, depending on the length of the payment stream. A 400- or 500-basis point decrease can have an enormous effect…" See "Multiemployer Plan Withdrawal Liability Assumptions Under Attack", The Wagner Law Group, July 8, 2020 available at https://www.wagnerlawgroup.com/resources/erisa/multiemployer-plan-withdrawal-liability-assumptions-under-attack.

[20] PBGC's interpretation also will have a negative impact on an employer's financial statements, which, as noted in our other public comments on this topic, will limit an employer's ability to obtain credit or banking at reasonable rates. See U.S. Chamber of Commerce and Association of Food and Dairy Retailers, Wholesalers and Manufacturers Comments on Proposed Multiemployer Pension Recapitalization and Reform Plan available at https://www.uschamber.com/comment/comments-proposed-multiemployer-pension-recapitalization-and-reform-plan.

that SFA funds must be used first and eliminate the reference to earnings.

Funding Standards

Law

ARPA added Internal Revenue Code Section 432(k)(2)(D) that provides that “Special financial assistance received by the plan shall not be taken into account for determining contributions required under section 431.”

Concerns

Some plans have been using the threat of (or an actual) accumulated funding deficiency to increase the amount a withdrawing employer must pay by assessing the employer’s share of any potential accumulated funding deficiency when the employer withdraws, even though a funding deficiency has not occurred (and may never occur). If a plan may not include the SFA amount within determining the funding status, it is possible that some plans may treat the accumulated funding deficiency as additional withdrawal liability.

Recommendations

The PBGC should clarify any accumulated funding deficiency (actual or potential) is not part of withdrawal liability, and such liability should not be assessable as an additional penalty for withdrawn employers.

Conclusion

As noted, we appreciate the work and effort that went into the IFR, guidance and instructions and the ongoing work that PBGC will face as it implements this extremely important program. We look forward to working with PBGC as this program progresses.

Sincerely,

American Bakers Association
Associated General Contractors of America
Association of Food and Dairy Retailers, Wholesalers and Manufacturers
Food Industry Association
The Minnesota Auto Dealers Associations
National Association of Wholesaler-Distributors
The National Auto Dealers Associations
The National Beer Wholesalers Association
U.S. Chamber of Commerce

About the American Bakers Association

The American Bakers Association (ABA) is the Washington D.C.-based voice of the wholesale baking industry. ABA's membership has grown to represent more than 300 companies with a combined 1600+ facilities.

About the Associated General Contractors of America

The Associated General Contractors of America is the largest national commercial construction trade association, representing more than 27,000 firms including America's leading general contractors, specialty contractors, service providers, and suppliers.

About the Association of Food and Dairy Retailers, Wholesalers and Manufacturers

The Association of Food and Dairy Retailers, Wholesalers and Manufacturers is a coalition of 14 employers representing various sectors in the food industry. Collectively, these companies employ over one million associates and contribute to over 90 multiemployer pension plans.

About the Food Industry Association

As the Food Industry Association, FMI works with and on behalf of the entire industry to advance a safer, healthier, and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain, from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services, to amplify the collective work of the industry. More information about our organization is available www.FMI.org.

About the Minnesota Auto Dealers Association

The Minnesota Auto Dealers Association is a statewide trade association representing 375 dealerships that employs over 19,000 dealership professionals.

About the National Association of Wholesaler-Distributors

The National Association of Wholesaler-Distributors (NAW) is composed of wholesaler-distributors and a federation of international, national, regional, state and local associations and their member firms, which total more than 30,000 employers that have locations in all 50 states and the District of Columbia. NAW's constituency is at the core of our economy—a vital link in the supply chain between manufacturers, retailers, and commercial, institutional and governmental end users.

About the National Auto Dealers Association

The National Automobile Dealers Association represents over 16,000 dealers who sell new and used motor vehicles and engage in service, repair, and parts sales, including 1,800 who commercial trucks. Together they employ approximately 1,000,000 people nationwide, the majority of whom are small businesses as defined by the Small Business Administration.

About the National Beer Wholesalers Association

The National Beer Wholesalers Association (NBWA) represents America's 3,000 independent beer distributors who service every state, congressional district and media market across the country. Licensed at the federal and state levels, beer distributors get bottles, cans, cases and kegs from a brewer or importer to stores, restaurants and other licensed retail accounts through a transparent and accountable regulatory system.

Distributors build brands of all sizes – from familiar domestic beers to new startup labels and imports from around the world – and generate enormous consumer choice while supporting more than 140,000 quality jobs in their home communities. Beer distributors work locally to keep communities safe by sponsoring programs to promote responsible consumption, combat drunk driving and reduce underage drinking.

About the U.S. Chamber of Commerce

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

CHANTEL SHEAKS
VICE PRESIDENT
EMPLOYMENT POLICY DIVISION

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VIA ELECTRONIC DELIVERY

March 26, 2021

The Honorable Gordon Hartogensis
Director
Pension Benefit Guaranty Corporation
1200 K St NW
Washington, DC 20005

Re: Special Financial Assistance Program for Financially Troubled Multiemployer Plans

Director Hartogensis:

On behalf of the U.S. Chamber of Commerce (the Chamber), we appreciate the opportunity to work with the Pension Benefit Guaranty Corporation (PBGC) as it issues guidance and regulations and implements the Special Financial Assistance Program for Financially Troubled Multiemployer Plans (Program) enacted as Section 9704 of the American Rescue Plan Act (ARPA).

Background

Millions of workers rely on multiemployer pension plans for their retirement security. However, because of a confluence of events, over one million retirees are in danger of losing benefits because they participate in multiemployer plans that are facing insolvency. The pension funding crisis is bigger than these plans and retirees. The crisis negatively impacts employers, active workers, and the economy. It limits an employer's ability to grow its business and expand its workforce. Without a solution, billions of dollars in retirement benefits could be lost, which would not only severely harm current retirees, but also would inevitably hurt current employees, employers, their communities and the overall economy.

In your December 2019 appearance before the Senate Finance Committee, you prioritized three goals for a long-term solution to the multiemployer crisis:

1) Protect retirees and prevent the collapse of distressed plans;
2) Save the Federal backstop (PBGC); and
3) Prevent a future crisis.[21]

The Program is the first step in solving this problem by creating a special fund within PBGC to pay special financial assistance (SFA) as a one-time lump sum payment to eligible plans. In implementing the Program, it is imperative that any guidance or regulations ensure the financial security of the plans, the participants (both retirees and active employees) and the contributing employers.

[21] Statement of the Honorable Gordon Hartogensis, Director of the Pension Benefit Guaranty Corporation, before the Senate Committee on Finance, December 11, 2019, at pp. 8-9, available at https://www.pbgc.gov/sites/default/files/pbgc-director-statement-senate-finance-committee-12-11-2019.pdf

This letter addresses perhaps the most important aspects of the Program: the amount of the SFA and the conditions on plans that receive SFA.

Analysis

The Amount of Special Financial Assistance

The ARPA amends the Employee Retirement Income Security Act of 1974, as amended (ERISA), to add Section 4262(j). This section provides that:

> 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 the participant's or beneficiary's accrued benefit as of the date of enactment of this section, ….. (Emphasis added).

The statutory language is subject to different interpretations which could result in more or less amounts of SFA. In interpreting and applying this language, PBGC should keep in mind the following principles:

- A reasonable interpretation of the statutory language would be to provide sufficient SFA to assure every eligible plan remains solvent through 2051 so that PBGC will not be required to pay SFA now and regular financial assistance to each plan starting in 2052, which would be the inevitable result if the ARPA only provided the minimum SFA necessary to maintain plan solvency through 2051.
- The overall solvency of the current PBGC multiemployer program will not be directly impacted by the amount of SFA because ARPA creates an eighth fund that will be credited with amounts from Treasury "necessary for the cost of providing financial assistance...."[22]
- If Congress only intended for the SFA to extend plan solvency until 2051, Congress could have simply allowed these plans to go insolvent and establish a temporary increase in the PBGC guarantee through 2051 and allow PBGC to pay insolvent plans financial assistance on a monthly or quarterly basis in the amount necessary to pay plan level benefits when those plans became insolvent.
- A plan that meets the eligibility requirements for SFA, should be eligible for some amount of SFA.
- Some of a plan's current assets are needed to pay current accrued benefits beyond 2051 and should not be take into account in determining the amount of SFA.
- Comparing the Program to PBGC's existing financial assistance to determine the amount of the SFA is not a reasonable comparison. The current financial assistance program provides ongoing financial assistance that PBGC adjusts monthly or quarterly to take into consideration the ebbs and flows of plan assets and the plan's needs. However, the SFA is a one-time lump sum payment, which must account for the fact that a plan may not have certain assets and PBGC does not have the authority to make a second payment.
- In determining the SFA amount, a reasonable approach would be for PBGC to provide some flexibility for the use of assumptions consistent with the reasonable expectations of the bargaining parties (e.g. adjusted contribution assumptions that encourage plan participation).

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[22] ARPA § 9704(a). By stabilizing eligible plans with SFA, ARPA in turns stabilizes the overall PBGC multiemployer program by making it less likely that these plans will need regular financial assistance in the future.

- The ARPA recognizes that it is the plan sponsor that determines the amount needed by stating that the amount is the "amount as demonstrated by the plan sponsor on its applications…."[23]

- To keep contributing employers in these plans, PBGC should consider giving the plans flexibility to alleviate the current financial strain on employers who are now paying for past service obligations of employers that left these plans years ago, in many cases without paying any amount toward their share of the underfunding of these liabilities.

- If the SFA is only going to extend solvency to 2051, and then leave these plans to go insolvent and reduce benefits to the PBGC maximum, there is also no reason for unions to push for the continuance of these plans.

- The SFA should reduce any perceived future insolvency risk and allow employers to cater to younger active employees who can accrue meaningful benefits and anticipate that the plan's assets will be able to support their benefits through retirement age.[24]

- If future anticipated contributions on behalf of active employees are included in determining the amount of SFA, current and future active employees will be discouraged from plan participation, especially if each eligible plan projects insolvency in 2052. Moreover, if those anticipated contributions do not actually occur, a decision made now to factor such contributions into the SFA may result in an amount that is not large enough to meet a plan's need.

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[23] ERISA § 4262(i)(1).

[24] As employer contributions dramatically increase but active employees' benefits decrease, the data suggests that there is a very real possibility of active employees voting to walk away from these plans, instead preferring a defined contribution plan or a single-employer defined benefit plan. See a Testimony of Josh Shapiro, MAAA, FSA, EA Vice President, Pension American Academy of Actuaries Submitted for the Record United States House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, Hearing: "The Cost of Inaction: Why Congress Must Address the Multiemployer Pension Crisis" Mar. 7, 2019 available at https://www.actuary.org/sites/default/files/files/publications/Testimony-Josh-Shapiro.pdf ("The data suggest that employers and employees agreed to increase the average negotiated contribution rate by more than 50 percent over that four-year period [between 2009 -2013], while the benefits that participants earned remained unchanged. These figures are for all multiemployer plans, and it is likely that among highly distressed plans, the average contribution rate increases were even greater and that the benefits earned by participants in those plans tended to decrease."). A very real life example comes from the testimony of Mr. Brian Sloan:

> To put it in dollar terms, since the 2000 recession, the Fund has repeatedly cut back the benefits received by the members who were active at that time. Because of these cuts, a Fund participant who has accrued benefits can now expect a pension that is around 30% less than a similar person who retired in 2000. For example, a participant with 30 years of service working 1,500 hours a year would have contributed approximately $85,000 over their working years and received a monthly benefit of about $3,130. A participant retiring in 2016 would have contributed approximately $153,000 and received a monthly benefit of about $2,210 per month. A participant retiring in 2030 will have contributed approximately $290,000 and receive a monthly benefit of approximately $1,640. This participant will contribute 3.5 times more than the 2000 retiree and receive 40% less in monthly benefit, 30 years later, not adjusted for inflation.

Testimony available at
https://www.pensions.senate.gov/sites/default/files/Brian%20Slone%20testimony%20v3%20Final.pdf

Conditions on Plans

The ARPA added ERISA Section 4262(m) which provides that PBGC

> **May** impose …. reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to increases in future accrual rates and any retroactive benefit improvements, allocation of plan assets, reduction in employer contribution rates, diversion of contributions to, and allocation of expenses to, other benefit plans, and withdrawal liability. (Emphasis added).

Although Section 4262(m) allows PBGC to impose reasonable conditions, any conditions must be consistent with other provisions of law.

Critical status and employer contributions and diversion of contributions

Under ARPA, a plan that receives SFA will be considered to be in critical status through the 2051 plan year.[25] A plan that is in critical status must have a rehabilitation plan that provides for a reduction in future benefit accruals and/or an increase in contributions so that the plan may emerge from critical status by the end of the rehabilitation period (i.e. 10 years or longer if a plan cannot emerge within 10 years).[26] Special rules apply between the period the plan is certified as critical and before the rehabilitation plan is adopted by an employer in a collective bargaining agreement (CBA). During this time, the trustees cannot accept a CBA that provides for a reduction in the level of contributions for any participant, a suspension of contribution with regard to any period of service or any new or indirect exclusion of younger or newly hired employees from plan participation.[27] These restrictions do not apply after the rehabilitation plan is adopted. After the first year, the trustees must annually update the rehabilitation plan, including updating the schedule of contributions rates to reflect the plan experience.

Congress clearly delegated the responsibility of setting employer contribution rates to the plan trustees of a plan in critical status, not PBGC. As such, although ARPA states that PBGC may impose a reasonable condition on employer contributions for plans receiving SFA, because these plans are also considered critical, such a condition should not interfere with the trustees' authority to set the contribution rate under the rehabilitation plan, including considering how the SFA impacts the rehabilitation plan and the economic impact the rate will have on the contributing employers.[28] Statutory provisions should be read

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[25] ERISA § 4262(m)(4).
[26] ERISA §305(e); 29 U.S.C. §1085(e).
[27] ERISA §305(f)(3); 29 U.S.C. §1085(f)(3).
[28] This is particularly important because both the current contributions rates under most rehabilitation plans (which often include also the auto-escalation clauses) are not sustainable and significantly put these employers at an economic disadvantage to their non-unionized competitors. See Testimony of Burke Blackman, President, Egger Steel Company, Joint Select Committee on Solvency of Multiemployer Pension Plans, Hearing on Employer Perspectives on Multiemployer Pension Plans, June 13, 2018, available at https://www.pensions.senate.gov/sites/default/files/Burke%20Blackman%20Written%20Testimony.pdf ("Every time the pension imposes higher contribution rates to make up for its funding shortfall, my costs rise, it becomes more difficult for me to compete in the marketplace and I grow more concerned about whether or not my company will be able to survive the next recession."); Testimony of Mary Moorkamp, on behalf of Schnucks Markets Inc., Joint Select Committee on Solvency of Multiemployer Pension Plans, available at https://www.pensions.senate.gov/sites/default/files/Moorkamp.pdf (stating that the pension contribution rate of $342 per week for 2018 is between 19% and 21% of the total compensation package, as compared to a compensation

as a harmonious whole and should not unnecessarily be construed as being in conflict with one another. Specific statutory provisions also trump more general ones, meaning that Congress's specific treatment of employer contribution rates should control.

With respect to "diversion of contributions to other benefits plans", under current law, there is nothing that limits the parties' bargaining power after the rehabilitation plan is accepted with respect to new hires. Given that Congress knew how to limit a plan's ability to accept a CBA that limits new hire participation, but it chose not to do so once a rehabilitation plan is in place, PBGC should not place any such limitation on plans receiving SFA that are beyond those requirements that otherwise apply to plans that are in critical status.

Withdrawal liability

Withdrawal liability is a contributing employer's allocable share of unfunded vested benefits (UVB).[29] To determine withdrawal liability, a plan must first determine the amount of UVBs. The term "unfunded vested benefits" means "an amount equal to - (A) the value of nonforfeitable benefits under the plan, less (B) the value of the assets of the plan."[30]

Although PBGC has authority to implement rules relating to withdrawal liability, the ARPA did not change the definition UVBs or the definition of plan assets, terms that presumably mean the same under ERISA and ARPA because ARPA did not manifest an intent to redefine the terms. As such, because SFA is a plan asset and will be used to reduce nonforfeitable benefits, SFA should be taken into consideration in determining the amount of UVBs.

ERISA defines plan assets to mean "plan assets as defined by such regulations as the Secretary may prescribe."[31] The regulation only defines plan assets with respect to a plan's investment in another entity.[32] However, DOL has stated that "in situations outside the scope of the plan assets-plan investments regulation (29 C.F.R. § 2510.3-101), the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law."[33]

Although the SFA is required to be segregated from other plan assets under ERISA Section 4262(m), nothing in the statutory text of the ARPA or under ordinary notions of property rights would classify SFA as anything other than plan assets. For example, SFA would be subject to ERISA's fiduciary rules and prohibited transaction rules as well as ERISA's criminal provisions. Given that Congress did not specifically state that SFA assistance is not a plan asset for purposes of determining UVBs, PBGC should not determine otherwise.

By its very nature, SFA also will be used to pay nonforfeitable benefits. In fact, the ARPA states that SFA may be used to "make benefits payments and pay out plan expenses."[34] Nonforfeitable benefits are

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percentage of around 4% to 6% for non-Teamster employees, and anything above that puts a company at a significant competitive disadvantage.)

[29] ERISA §4201(b); 29 U.S.C. §1381(b)

[30] ERISA §4213(c); 29 U.S.C. §1393(c);

[31] 29 U.S.C. 1103(3)(42); ERISA Section 3(42)

[32] See 29 C.F.R. § 2510.3-101.

[33] Advis. Opin. 1993-14A.

[34] ERISA § 4262 (l).

benefit payments, and, therefore, to the extent that SFA reduces nonforfeitable benefits, it should be considered in determining UVBs under a plan.

In the past when Congress created a special program for financially troubled plans, it also provided special rules for determining UVBs. Specifically, under the Multiemployer Pension Reform Act of 2014 (MPRA), Congress specifically provided that

> Any benefit reductions under subsection (e)(8) or (f) or benefit reductions or suspensions while in critical and declining status under subsection (e)(9)), unless the withdrawal occurs more than ten years after the effective date of a benefit suspension by a plan in critical and declining status, shall be disregarded in determining a plan's unfunded vested benefits for purposes of determining an employer's withdrawal liability under section 1381 of this title.[35]

In contrast, ARPA did not provide special treatment for SFA with respect to determining UVBs. As such, it should not be within PBGC's authority to change the definition of UVBs.

ERISA Section 4211 lays out the methods for computing withdrawal liability, and MPRA contained special withdrawal liability rules that apply to plans that take advantage of the partition program. Specifically, ERISA Section 4233(d)(3) contained a new withdrawal liability rule that applies for 10 years following the date of the partition order. Subsequently, PBGC issued regulations implementing this special withdrawal liability rule that was laid out in the MPRA amendments.[36]

Unlike the MPRA amendments, nothing in the ARPA specifically addresses how SFA should be applied with respect to the methods for determining withdrawal liability.[37] As such, PBGC should proceed cautiously in exercising its discretion under ERISA Section 4262(m).[38]

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[35] ERISA § 305(g); 29 U.S.C. §1085(g)

[36] 29 C.F.R. § 4233.15

[37] Other proposed legislation that would have provided financial assistance to troubled plans but that also limited the use of this assistance with respect to withdrawal liability contained specific provisions related to the limits, which recognizes that such changes are to be done through the legislative process not the administrative process. See Rehabilitation for Multiemployer Pension Act of 2019, Section 5, Coordination with Withdrawal Liability and Funding Rules, adding a new Internal Revenue Code Section 432(k)(1) that specifically would provide that for any employer in the plan on the date the financial assistance was provided that withdrawals during the 30 year loan period, withdrawal liability would be calculated as if there were a mass withdrawal as provided under ERISA Section 4219(c)(1)(D) available at https://www.congress.gov/116/bills/hr397/BILLS-116hr397pcs.pdf; H.R. 1319, Engrossed in House, Mar. 3, 2021 (specifically including Section 4261(l) that provided SFA was not taking into account in calculating withdrawal liability for 15 years, but also allowing PBGC to impose reasonable conditions on withdrawal liability suggesting that PBGCs authority may be limited) available at https://www.congress.gov/117/bills/hr1319/BILLS-117hr1319eh.pdf; and HR 6800, Passed House, May 15, 2020 (adding Section 4233A that provides for a special partition program for troubled plans, but specifically stating under 4233A(k) that an employer's withdrawal liability must be calculated taking into account any plan liabilities that are partitioned until the plan year beginning after the expiration of 15 calendar years from the effective date of the partition, but also stating under Section 4233A(j)(1) that PBGC could impose reasonable conditions relating to withdrawal liability on partitioned plans, which suggests that PBGC could not impose conditions beyond the 15 years) available at https://www.congress.gov/bill/116th-congress/house-bill/6800

[38] PBGC also may want to consider requiring plans receiving SFA to provide contributing employers newly revised withdrawal liability calculations and payment amounts within a set time of receiving SFA.

Conclusion

A narrow interpretation of the Program and overreaching conditions that negatively impact contributing employers will not help the long-term viability of these plans. If the amount of the SFA is interpreted narrowly such that the plans would otherwise become insolvent in 2051, employers will face the option of withdrawing now or waiting until 2051 when the plan inevitably goes insolvent. As many employers are at the point, or will be soon, where withdrawal liability now is the cheaper option, there is no incentive to remain in the plan when remaining in the plan will only extend the duration of future withdrawal liability payments. In addition, unions will have no reason to push for continuation of these plans when the retired or soon to be retired employees are protected until approximately 2051 by the SFA, and the younger active employees know they will receive little or nothing for their pension contributions because the plan is sure to be insolvent before or shortly after they retire.

Sincerely,

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