NOVARA Tesija Catenacci McDonald & Baas

Paul M. Newcomer
pmn@novaralaw.com

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Via Electronic Mail: reg.comments@pbgc.gov

Regulatory Affairs Division
Office of the General Counsel
1200 K Street, NW
Washington DC 20005-4026
Attention: Daniel S. Liebman, Esq. – Deputy General Counsel

Re: Comments on PBGC Interim Final Rule – Special Financial Assistance by the PBGC, RIN 1212-AB53, on behalf of the Board of Trustees of the Sheet Metal Worker Local 33 Pension Fund

Dear Mr. Liebman:

On behalf of the Board of Trustees of the Sheet Metal Workers Local 33 Pension (Pension Fund or Plan), we write to provide the following comments to PBGC's above-referenced Interim Final Rule (IFR or Rule), implementing Subtitle H of the American Rescue Plan Act of 2021 (ARP).

Background.

On January 6, 2020, the Pension Fund received final approve from the U.S. Department of Treasury (Treasury) to suspend benefits under the Multiemployer Pension Plans Amendment Act of 2014 (MPRA). The Pension Fund then adopted necessary plan amendments to implement the suspension, in 2020, reducing benefits by 25% to 35% depending on a given Plan participant's status. The implementation of the suspensions in 2020 has served to permit the plan to avoid its then-projected insolvency, but at the very painful cost of severely reducing the retirement income of participants who earned that income under the terms of the Plan.

At the outset, the Plan is grateful to observe that application for and approval of special financial assistance (SFA) under ARP and the IFR will allow the plan to repay to participants the value of their suspended benefits, and to preserve future retirees from experiencing the suspension. From the plain language of ARP it was the expectation of the Plan that SFA would both restore suspended benefits and would provide an adequate infusion of funds to provide a long term solution to the Plan's funding problems. As written, however, SFA may not be adequate for the Plan to avoid insolvency before PYE 2051.

It is important to note that a suspension of benefits under MPRA is the result of a delicately balanced set of calculations intend to ensure that the suspension does not exceed the value necessary merely to avoid insolvency. A suspension does not, and is not designed to, return a plan (and has not returned the Plan) to full or even PPA "green zone" funding. As a result, the Plan remains in a precarious funded position, so that even under the suspension the continued avoidance of insolvency is largely dependent on meeting the Plan's investment return assumption. Indeed, in the initial Covid-19 period of early 2020, depressed returns caused the Plan - even with the suspension in place - to briefly project a future insolvency. Returns that are even modestly below the Plan's assume rate of return will cause projections of future insolvency, again.

Under these circumstances, in order for SFA to provide for promised plan benefits through PYE 2051, and to permit the plan to avoid insolvency long-term, it is necessary that the SFA relieve the Plan from burning through its non-SFA assets during the SFA funding period. Unfortunately, it is presently (preliminarily) estimated that calculating SFA in the manner described in the IFR results in a value that will not allow the Plan to avoid insolvency after PYE 2051.

The reasons why SFA as calculated under the Rule is inadequate are a function of several factors, significant among them – (1) defining "plan resources" as "all" assets of the Plan, including assets and contributions that are associated with benefits that will accrue post-PYE 2051; and (2) using a present value discount factor that is disconnected from the expected rate of return on segregated SFA assets.

1. To address the long-term solvency of the Plan, the calculation of SFA should provide a carve-out from the definition of "plan resources" for plan assets and contributions that are associated with benefits accrued beyond PYE 2051.

Section 4262(j) of ERISA provides:

> The amount of special 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 through and on the last day of the plan year ending in 2051 . . . .

Considering this language PBGC has written in the IFR that it believes Section 4262(j) should mean that "SFA 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 at 36601 (emphasis added). We disagree with PBGC's interpretation, and note in application to the Plan the utilization of "all plan resources" ensures that SFA will not only fail to pay promised benefits through PYE 2051 (although the Plan actuary has not arrived at a formal estimate as of this writing, preliminary review suggests SFA will pay for less than 10 years of current plan benefits) and will likely not be adequate to permit the Plan to avoid insolvency after PYE 2051. This result is attributable to other elements of the IFR in conjunction with the "all plan resources" definition, and we address them separately.

We urge PBGC to consider the following and revise the IFR accordingly. [1]

Among the purposes Congress had in enacting ARP were to permit financially troubled multiemployer plans to restore their solvency, to protect participant's benefits in those plans, and to lessen the financial impact of those plans on the PBGC's multiemployer plan program. *See*, The Report of the Committee on the Budget, House of Representatives, H.R. 1319, February 24, 2021 (https: www.congress.gov/117/crpt/hrpt7/CRPT-117hrpt7.pdf). There is no reference in ARP to a definition of "all plan resources" for purposes of crafting a regulation that will serve these purposes. By creating the "all plan resources" definition in the IFR, and constructing that definition as narrowly as possible, the IFR ensures that none of the Congressional purposes described above will be achieved with regard to the Plan.

If receipt of SFA as calculated under the IFR will result in Plan insolvency before, at, or after PYE 2051 we urge PBGC to recognize that the IFR's method of calculating SFA cannot possibly be reconciled with Congressional intent. Additionally, the commentary from the House Budget Committee is suggestive of an intention to "restore plan solvency" and "protect participants' benefits" without any temporal limitation. If resources attributable to post-2051 obligations were carved out of the "plan resources" definition that amount of SFA (all else being static) would necessarily increase to the extent that it could foreseeably enable the plan to avoid insolvency post PYE 2051.

The Plan sought and obtained relief through MPRA because, given its maturity, high percentage of deferred vested participants, and the substantial decrease in its contribution base, it simply has few assets left to invest in order to provide for payment of accrued benefits. The IFR as written ignores this reality (which is shared by most if not all plan's similar to the Pension Fund). Left as written, the IFR fails to serve the stated Congressional purposes in enacting ARP as to the Plan (and similarly situated plans).

[1] We note that other commenters have provided lengthy analyses of the IFR's (1) inconsistency with Congressional intent, and (2) the IFR's being written in a manner that exceeds PBGC's regulatory authority. With this letter we join in those comments submitted to PBGC by the International Brotherhood of Teamsters dated August 9, 2021.

2. ARP's requirement that SFA be invested in "investment grade bonds", while also mandating use of a specific discount rate to project future liabilities, will always result in inadequate SFA, and so will not forestall insolvency.

As other commenters have noted, the discrepancy between ARP's required discount rate for projected future liabilities (the Third Segment Rate + 200 bps, or, approximately 5.5%) and the anticipated rate of return on SFA assets invested in "investment grade bonds" (perhaps on the order of not more than 3%) guarantees that SFA cannot pay for promised benefits through PYE 2051. The current, preliminary, estimate of the Plan's actuary is that the SFA amount described above will pay for less than 10 years of current plan benefits. As a result, unchanged from the scenario that led the Plan to suspend benefits, once the SFA is "burned through" the Plan's remaining assets will be inadequate to avoid insolvency. In this sense SFA is at best a "band-aid" that allows the Plan to restore the suspended benefits, but may well leave the plan needing to utilize tools such as MPRA in order to avoid a future insolvency, including an insolvency that may arise during the SFA funding period. Of course, this creates another problem, because receipt of SFA will, under ARP, debar the Plan from filing an application for suspension of benefits under MPRA! This inconsistency is a product of the restrictive calculation of SFA, and we urge PBGC to correct it.

Given that use of the discount rate and the investment restriction are specific, plain directives of statutory language, regulatory action changing them cannot be expected. However, insofar as this structural defect in the statute reduces the effectiveness of SFA we urge PBGC to consider that *further* restricting its utility by using the "all plan resources" formulation of the IFR serves only to lessen SFA's utility, and mutate the Act into a form far from the Congressional intentions described above. The cumulative effect of the structural defect and the unnecessarily restrictive calculation of the SFA amount results in an assistance program that will not provide benefits through PYE 2051, will not allow the Plan to avoid insolvency, and thus is inconsistent with the purposes of ARP.

3. PBGC should stay the operation of the SFA program until such time as the fiduciary dilemma created by the IFR is resolved by either issuing a final regulation consistent with ARP, or the Department of Labor describes a "safe harbor(s)" for plan fiduciaries who apply for and receive SFA.

The Trustees of the Plan, and similarly situated plans, are confronted under the IFR with choices that can expose them to claims of fiduciary breach. If the Plan accepts SFA it will restore suspended benefits, a result apparently in the best interest of the Plan's participants and beneficiaries, but perhaps only for those in pay status or who can be expected to receive their last benefit payment prior to PYE 2051.

On the other hand, the Plan's suspension has so far served to prevent insolvency and is expected to continue to do so (again, assuming all assumptions are met), an outcome that protects the interests of all plan participants - including those who have and will accrue benefits payable beyond 2051 – by providing to them some level of benefit throughout their retired lives. This may argue in favor of not applying for SFA, but maintaining the suspension.

Arguably, either choice could be cast as a breach of fiduciary duty under Section 404 of ERISA. Under these circumstances, determining a prudent course of action is challenging. It may also be foreseeable under these circumstances that plans will face resignation by fiduciaries in advance of insolvency as an effort to avoid liability for making a MPRA/SFA decision.

We cannot perceive how such outcomes as described here serve the Congressional goal of lessening the financial impact of such plans on PBGC's multiemployer plan program. As written, with respect to the Plan and similar plans, the IFR does the opposite.

4. The restriction on future benefit improvements upon which acceptance of SFA is conditioned will reduce the likelihood of plans achieving their long-term contribution assumptions, and so reduce the likelihood that SFA will allow plans to avoid insolvency.

Currently, active participants in the Plan accrue 0% of their contribution rate toward a future benefit. In past years, consistent with the need to preserve deductibility, the Plan's accrual rates were significantly higher. For younger participants the cost of contributions (which go solely to funding existing liabilities) is very high in comparison to the benefit accrued on those contributions ($0). For potential new entrants and their employers, the Plan is simply not an attractive option for providing a retirement benefit. Plan actuaries and fiduciaries make best estimates about future participation but extending those estimates over the entire 30-year SFA period is a questionable exercise. With no possibility under SFA of improving benefit levels (absent "new money") the likelihood of employer withdrawals increases, and the likelihood of organizing new employers to take their place decreases. The adequacy of SFA to fund a plan is obviously sensitive to the assumptions used in its calculation. The inability of plans to improve benefits for 30 years essentially guarantees that plans' CBU assumptions will not be met.

Very truly yours,

NOVARA TESIJA CATENACCI
MCDONALD & BAAS, PLLC

Paul M. Newcomer
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