NOVARA \ Tesija Catenacci McDonald & Baas

Paul O. Catenacci
poc@novaralaw.com

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 Arizona Bricklayers Pension Trust Fund

Dear Mr. Liebman:

On behalf of the Board of Trustees of the Arizona Bricklayers Pension Trust Fund (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.

The Pension Fund has applied to PBGC for an order granting partition of the Plan, and has applied to the U.S. Treasury for an order permitting the plan to suspend benefits by reducing all benefits in pay status and all future benefits to 110% of the PBGC minimum amount as permitted under the Multiemployer Pension Plans Amendment Act of 2014 (MPRA). To our knowledge there are presently only two other multiemployer plans with pending applications to suspend benefits under MPRA. The Pension Fund's facts and circumstances are therefore somewhat unique and, in particular, imply a difficult fiduciary decision in order to ensure future plan solvency – whether to utilize MPRA/Partition, or to seek special financial assistance (SFA) under ARP.

From the plain language of ARP it was the expectation of the Plan that SFA would both remove the need to suspend benefits in order to avoid insolvency (projected to occur at PYE 2039), and would result in a long-term solution to the Plan's funding problems. As written, the IFR may provide a basis to avoid suspending benefits (although that may change between now and the time at which the Plan may apply for SFA under the IFR's priority application provision, which will be at or before March 2023). However, based on current estimates made by the Plan's actuary, SFA as calculated under the IFR may not be adequate for the Plan to avoid insolvency before PYE 2051.

The Plan's actuary provided a preliminary estimate of SFA and its impact on the Plan's future funding status as follows (summarized). The assumptions applied are those utilized by the Plan with regard to its applications to suspend benefits and for partition:

* * *

Projected Assets at 12/31/2022	PV Contributions	PV Benefits and Expenses	SFA Amount
$28.6 million	$0.9 million	$35.5 million	$6.0 million

Based on this current analysis, solvency projections indicate that the plan would become insolvent in 2048-2049 after receiving SFA if all assumption below are met.

The significant assumptions used in the analysis are as follows:

- Discount rate of 5.5% in determining present value of contributions, benefit payments and expenses.
- Annual rates of return on non-SFA assets of 8.7% for 2021, 4.98% for 2022-2029 and 5.88% after 2029.
- Annual rates of return on SFA assets of 3%.
- Annual contribution base units of 56,000 hours for 2021 and 2022 and 50,000 thereafter.
- 40% load on contributions for reciprocity.
- Contribution rate of $0.90 per hour.
- Annual administrative expenses of $400,000 for 2021, $250,000 for 2022, $290,700 for 2023 and 2% annual increases thereafter. We capped administrative expenses to 15% of expected benefit payments beginning in 2039 in accordance with PBGC's guidance on actuarial assumptions. Also, the significant increase in assumed expenses from 2022 to 2023 is due to the reversion to the expense assumption used in the 2020 PPA Actuarial Certification, which assumed $285,000 in expenses for 2022 and 2% annual increases thereafter.
- Demographic assumptions used in the January 1, 2020 PPA Actuarial Certification.

* * *

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 but will result in (as currently estimated, above) plan insolvency in 2048. 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 "plan resources" for purposes of crafting a regulation that will serve these purposes. By creating the "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.

[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.

If receipt of SFA as calculated under the IFR will result in Plan insolvency in advance of PYE 2051 we urge PBGC to accept that the method of calculation of 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 (or, in the Plan's specific case, 2048) 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 would foreseeably enable the plan to avoid insolvency post PYE 2051 (or 2048).

The Plan sought relief through MPRA and partition because, given its maturity, high percentage of deferred vested participants, and the substantial decrease in its contribution base, it simply has very few assets left to invest in order to provide for payment of accrued benefits. The IFR as written ignores this reality and serves only to slightly extend the Plan's projected insolvency date and leave it asset-less and in need of further assistance. Left as written, the IFR entirely fails to serve any of the stated Congressional purposes in enacting ARP as to the Plan (and similarly situated plans).

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 seek a partition and 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 may allow the Plan to avoid partition/suspension – now - but will leave the plan needing to utilize those tools as early as 2048. 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! We struggle to understand how such contradictory and self-defeating outcomes can possibly be thought consistent with the intent of Congress in passing ARP.

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 avoid partition and reduction by suspension of the benefits of plan participants (to 110% of the PBGC guarantee level). SFA will also (probably, if all assumptions outlined above are met) forestall the Plan's insolvency for a few more years. On the face of it, these are outcomes apparently in the best interest of plan participants and beneficiaries, but perhaps only those in pay status or who can be expected to receive their last benefit payment prior to 2048.

On the other hand, as designed and submitted to Treasury and PBGC, the Plan's partition and suspension are projected to avoid insolvency forever (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 2048 – by providing to them some level of benefit throughout their retired lives.

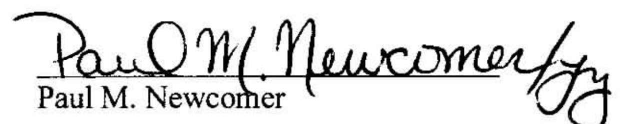
Arguably, either choice could be cast as a breach of fiduciary duty under Section 404 of ERISA. Under these circumstances, a prudent choice for the Plan may be to seek neither MPRA relief nor SFA, but instead continue to struggle to achieve investment returns that may earn the plan out of critical and declining status and, if that fails, resort to PBGC's existing assistance program under Section 4261. 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 tortured and ultimately destructive 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.

Very truly yours,

NOVARA TESIJA CATENACCI
McDONALD & BAAS, PLLC

Paul O. Catenacci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