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Submitted via http://www.regulations.gov

Pension Benefit Guaranty Corporation
Rulemaking:
Special Financial Assistance by PBGC
Regulation Identifier Number: RIN 1212-AB53

August 8, 2022

To Whom It May Concern:

The Pension Rights Center ("the Center") submits these comments in response to PBGC's request for comments on the withdrawal liability provisions of the final rule on special financial assistance ("FSA") to multiemployer plans. The Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees, and their families. While we support the revised conditions on the calculation employer withdrawal liability adopted in the final regulations, we also believe that further changes are necessary for the special financial assistance program to accomplish its purposes.

The American Rescue Plan Act of 2021 provides the PBGC (in consultation with the Secretary of the Treasury) with authority to impose certain reasonable conditions on multiemployer plans that receive special financial assistance, including conditions relating to withdrawal liability. The PBGC exercised this authority in the interim final rule issued last year by requiring plans to use certain specified conservative actuarial assumptions in calculating UVBs until the year that the special financial assistance is exhausted.

As we and other commentators indicated, and as the PBGC recognizes in the preamble to the final rule, this condition, on its own, would be insufficient in many situations to counter the artificial reduction in withdrawal liability that would result if special financial assistance was considered a plan asset in calculating UVBs. The purpose of the special financial assistance program is to assist a plan to pay benefits to participants and beneficiaries and not reduce an employer's costs of withdrawing from the plan. Thus, Congressional intent would be frustrated if a plan's receipt of special assistance incentivized employers to abandon the plan. It would also be patently unfair to the employers who stick with the plan and might perversely discourage employers so inclined from doing so.

The final regulations revise the final rules to ratably phase in consideration of the special financial assistance in the calculation of UVBs over the time period in which the plan is projected to exhaust its SFA. The amount of the SFA that a plan would exclude each year under the rule is determined by multiplying the SFA by a fraction, the denominator of which is the phase-in period and the numerator of which is the number of years remaining in the phase-in period. The revised condition only applies to plans that receive special financial assistance after August 8, 2022, unless the plan files a supplemental application under the revised final rule.

While the revision of the withdrawal liability conditions reflects a substantial improvement over the interim rule, we submit that the conditions are not robust enough. to mute the incentives for many contributing employers to withdraw from plans that receive SFA. We say this even though we agree that the new condition will be reasonably effective in the critical first several years following a plan's receipt of assistance.

The PBGC should consider the following revisions/addition to the withdrawal liability conditions to counter fully the incentives that receipt of SFA would otherwise have on contributing employers to abandon plans receiving assistance:

1. The rule should apply to all plans and not exclude those plans that have already applied for assistance (unless they file a supplemental application). The plan priority program, which has been the primary determinant of which plans have already received SFA, identified plans whose circumstances (financial or prior suspension of benefits) were most in need of immediate assistance. The contributing employers to these plans have no inherent right to be treated more favorably in calculation of withdrawal liability than the employers in plans that have not yet been able to apply for financial assistance and have no cognizable reliance interest that would be prejudiced by the final rules adjustments to how withdrawal liability is calculated. They played no role in deciding when the plan would apply for assistance and the decision to apply was made by the plan's trustees, whose principal fiduciary consideration was providing benefits to participants and their beneficiaries and defraying the reasonable administrative expenses of the plan.

In the alternative, a plan that received FSA prior to August 8th should have the option of adopting the additional condition on withdrawal liability.[1]

2. The phase-in period for exclusion of the FSA in calculating UVBs under the final rule is the period over which it is projected that the FSA (and interest thereon) will be exhausted, assuming that benefits are being drawn from FSA before drawing on other plan resources. The reduction in withdrawal liability by including FSA in the UVB calculation is, however, conceptually unrelated to when the FSA is in reality exhausted.

Under the actuarial assumptions embedded in the FSA program, a plan should have assets sufficient to pay benefits through 2051 and the amount of the plan's financial assistance should continue to benefit the plan during that period without regard to the

[1] An employer can receive such treatment if it files a supplemental application, but we believe that forcing a plan to file a supplemental application for this purpose is economically and administratively wasteful and that the condition should in any event be mandatory for all plans.

date on which the segregated FSA account is hypothetically exhausted. The conditions on withdrawal liability should reflect this and the phase-in of the FSA should thus in theory be no less than over that 30-year period. A compromise might be to amortize the FSA over no fewer than a stated period of years (we would suggest 20), given that in the absence of unanticipated plan resources (through post-FSA-application contribution increases or other positive deviations from actuarial assumptions), withdrawal liability would likely increase toward the end of the 30-year period regardless of the inclusion of FSA for purposes of calculating a plan's UVBs, and if didn't increase it would be because the plan's financial position had improved.

3. The rule's new withdrawal liability condition should specifically affirm that the amount of excluded FSA should include the investment return on the FSA for each year in the phase-in period.

In our 2021 comments on the interim final rule, we suggested that the PBGC make appropriate and necessary changes in to prevent further damage to local and regional construction industry plans. Under the special definition of a withdrawal in a construction industry plan a construction employer who ceases operations, or transfers operations outside the jurisdiction of its collective bargaining agreement, incurs no withdrawal liability.[2] Obviously, an employer who decides that benefit costs have become too burdensome can just close the shop and be done with pension headaches. In theory, such dropouts should not affect contributions, because all construction is local, so if Corporation A drops out, Corporation B will expand its operations, or a new Corporation C may enter the plan. The reality is otherwise. Contrary to popular belief, many construction industry plans actually cover a small, discrete geographic area: Pipefitters Local 1 Plan covers county A, Pipefitters Local 99 covers neighboring county B. As the PBGC well knows, in many crafts, an employer who contributes to the Local 99 Plan in County B is allowed to perform work in County A but contributes to Local 99 Plan instead of Local I. Thus, an employer can lawfully transfer operations to the next county, sign up to another plan with lower contribution requirements, and bid on the same work in his former abode, incurring no liability.[3] This phenomenon has already caused the demise of several plans and the rule will exacerbate the problem. We again suggest revising the conditions to take account of this phenomena.

In summary, the suggestions we have made, if adopted, will better conform the PBGC guidance to congressional intent and by using FSA for its intended purpose of allowing plans to pay benefits, will result in a healthier, more robust multiemployer system, a

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2 ERISA § 4203.

3 In other cases, nonunion employers have stepped in and captured the work formerly done by contributing employers.

system that can be counted on for the long-term. If you have any questions, we would be pleased to respond.

Sincerely yours,

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