

United States Senate

WASHINGTON, DC

August 11, 2021

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

Dear Director Hartogensis:

For years, millions of Americans have faced an economic crisis not of their own making. Our nation's multiemployer pension system has been teetering on the brink of collapse due to a variety of factors.^{1 2} Such a collapse would have been catastrophic for workers and their families and devastated communities throughout our nation.³ We have worked for years to enact into law a bipartisan, bicameral solution that would address this crisis given its urgency.^{4 5 6}

Earlier this year, under the leadership of President Biden, Congress passed the American Rescue Plan Act of 2021 (ARP). This legislation made transformational investments to support hardworking Americans, including the provision of special financial assistance (SFA) to multiemployer pension plans. Congress designed this program to be a bold investment that stabilized the multiemployer pension system and shored up the benefits of workers and retirees through 2051. Unfortunately, after a careful review of the interim final rule, we do not believe that it as currently written will accomplish these goals. Three major substantive deficiencies make the rule unlikely to achieve the ARP's clear intent of providing solvency through 2051: 1) flawed assumptions and incompatible investment restrictions, 2) a failure to provide plans with benefit suspensions with the SFA to cover even the value of the benefits they are obligated to restore, and 3) a lack of consideration for active worker attrition in the face of an insolvency cliff in 2051. As you receive comments and work to craft a final rule, we ask that you carefully consider and address these three deficiencies. Failure to remedy these shortcomings will result in a rule that fails to meet the clear congressional intent.

¹ Jim Tankersley & Alan Rappaport, *1.5 Million Retirees Await Congressional Fix for a Pension Time Bomb*, NEW YORK TIMES, February 18, 2018, <https://www.nytimes.com/2018/02/18/business/multiemployer-pension-crisis.html>.

² LADD PREPPERNAU & GRANT CAMP, MILLIMAN, UNDERSTANDING THE MULTIEMPLOYER PENSION CRISIS (2020), https://us.milliman.com/-/media/milliman/pdfs/articles/3124meh_understanding-the-multiemployer-pension-crisis_20200429.ashx.

³ THE MULTIEMPLOYER PENSION PLAN CRISIS: BUSINESSES AND JOBS AT RISK (2018), U.S. Chamber of Commerce, https://www.uschamber.com/sites/default/files/multiemployer_report_businesses_and_jobs_at_risk_final.pdf.

⁴ BROWN SECURES OHIO WITNESS TO TESTIFY AGAINST PENSION CUTS BEFORE SENATE COMMITTEE, SEN. SHERROD BROWN (2016), <https://www.brown.senate.gov/newsroom/press/release/brown-secures-ohio-witness-to-testify-against-pension-cuts-before-senate-committee>.

⁵ BROWN ANNOUNCES PLAN TO PROTECT OHIO PENSIONS, KEEP PROMISES TO OHIO WORKERS, SEN. SHERROD BROWN (2017), <https://www.brown.senate.gov/newsroom/press/release/brown-announces-plan-to-protect-ohio-pensions-keep-promises-to-ohio-workers>.

⁶ BROWN SECURES PENSION FIX FOR OHIO WORKERS, RETIREES IN AMERICAN RESCUE PLAN, SEN. SHERROD BROWN (2021), <https://www.brown.senate.gov/newsroom/press/release/brown-pension-fix-ohio-workers-retirees-american-rescue-plan>.

Flawed Assumptions and Incompatible Investment Restrictions. The interim final rule’s flawed assumptions, taken together with incompatible investment restrictions, make it structurally unlikely to provide plans with funding sufficient to ensure solvency through 2051.⁷ This mistake is rooted in the interim final rule’s reliance upon section 4262 of the Employee Retirement Income Security Act (ERISA) to justify the prescription of a single discount rate on all plan assets over the next thirty years.^{8 9} Such an interpretation ignores subsection (l) of the same statute, a provision designed to ensure the stability and longevity of the SFA, which PBGC relied upon when restricting the investment of SFA to investment grade bonds.¹⁰ An interpretation which assumes that Congress intended for the PBGC to assume a 5.5% return on a class of assets that typically yield about 2% on average is illogical and inconsistent.^{11 12} It is an assumption that has failure baked in the cake and repeats the very mistakes that have undermined pensions for decades – insufficient capital and the pursuit of outside returns to compensate for this lack of capital. As a result, the troubled plans – those who receive the largest SFA allocations – will be required to take greater risks with their assets not subject to investment restrictions, or risk insolvency before 2051. Neither outcome is prudent nor consistent with congressional intent.

This problem is particularly acute for those funds that either are insolvent or are projected to go insolvent in the near-term, as outlined in the comments submitted by the Road Carriers Local 707 Pension Fund on August 4, 2021.

Contrary to the PBGC’s assertion in the interim final rule, Congress empowered the agency with the discretion to write the implementation rules in a way that ensures consistency with its intent to maintain plans’ solvency through 2051.¹³ This includes using a bifurcated discount rate to value assets when determining the amount of SFA a plan receives, based upon foreseeably smaller returns on SFA due to investment restrictions. For these reasons, we urge you to utilize a bifurcated discount rate when determining the amount of SFA a plan receives, and to provide enough SFA to plans so that they remain solvent through 2051 while investing in relatively low risk, stable assets.

In order to further ameliorate this dynamic, we urge you also to consider allowing plans to invest their SFA in a wider class of assets. In its interim final rule, PBGC acknowledged that “the allowance ... for ‘other investments permitted by the corporation’ could provide some flexibility (as well as limited exposure to other assets), but PBGC in this interim final rule is reluctant to

⁷ Joe LoCicero & Jason Russell, PBGC GUIDANCE ON SPECIAL FINANCIAL ASSISTANCE PROGRAM BY SEGAL AFL-CIO RETIREMENT SECURITY WORKING GROUP (2021) (Appendix A).

⁸ 29 U.S.C. § 1432(e)(3). “The interest rate limit for purposes of this subsection is the rate specified in section 1083(h)(2)(C)(iii) of this title (disregarding modifications made under clause (iv) of such section) for the month in which the application for special financial assistance is filed by the eligible multiemployer plan or the 3 preceding months, with such specified rate increased by 200 basis points.”

⁹ Special Financial Assistance by PBGC, 86 Fed. Reg. 36598-01 (July 9, 2021).

¹⁰ 29 U.S.C. § 1432(l). “Special financial assistance shall be invested by plans in investment-grade bonds or other investments as permitted by the corporation.”

¹¹ Funding yield curve segment rates, INTERNAL REVENUE SERVICE, <https://www.irs.gov/retirement-plans/funding-yield-curve-segment-rates> (last visited Jul 27, 2021).

¹² Rebecca Moore, How multiemployer plan sponsors can manage relief payments, PLANSPONSOR (2021), <https://www.plansponsor.com/multiemployer-plan-sponsors-can-manage-relief-payments/> (last visited Jul 29, 2021).

¹³ Special Financial Assistance by PBGC, 86 Fed. Reg. 36598-01. “In addition, PBGC does not have authority to provide a different rate or bifurcate the statutorily mandated interest rate.”

allow for investment vehicles with fundamentally different characteristics without further input from the public.”¹⁴ It would be both prudent and consistent with Congressional intent to allow plans to invest SFA in liquid assets with characteristics similar to investment grade bonds that may also provide an opportunity for a higher return. This is not as a substitute for increasing the amount of SFA provided, but it is an additional tool clearly authorized by the law with the potential to help ensure that plans remain solvent through 2051.

Funding for Plans with Benefit Suspensions. Under the interim rule, insufficient assistance is provided to plans that have suspended benefits pursuant to the Multiemployer Pension Reform Act of 2014 (MPRA). The amount of SFA these MPRA suspension funds are projected to receive, in many instances, fails to cover the amount of benefits they would be required to restore on a present value basis. For example, the Southwest Ohio Regional Council of Carpenters Pension plan would be required to restore \$102.5 million in benefits, but would only receive \$68.3 million in SFA. Roofers Local 42 Pension plan would be required to restore \$21.4 million in benefits, but would only receive \$18.5 million in SFA. The New York State Teamsters Conference Pension and Retirement Fund similarly would receive less in SFA than the estimated \$1.1 to \$1.2 billion in benefits it would be required to restore.

Unless changes are made to provide more assistance to plans who have suspended benefits pursuant to MPRA, we are deeply concerned that the rule will fail to meet the congressional intent of enabling the restoration of benefits, ensuring that funds accepting SFA are not in a worse financial position than they are today, and providing solvency to all eligible plans through 2051. This dynamic also has the potential to place plan trustees in a position where they will be required to forgo the SFA or risk violating their fiduciary duty to participants who are depending on the long-term solvency of these funds. Writing the rules and providing SFA in a way that effectively would preclude plans with benefit suspensions from receiving assistance and restoring benefits would be another clear violation of the statute and congressional intent.

The problem of worker attrition. The third issue is the lack of consideration for the dynamic of active worker attrition in the face of an insolvency cliff in 2051. The ARP is designed to provide plans with solvency through 2051, however, the rule’s structure could result in a pernicious, unintended consequence: workers defecting from plans over concerns about solvency post-2051. Such behavior, while rational, would threaten plan solvency inside the 30-year window. The amount of aid provided to plans under the proposed rule will result in an insolvency cliff in 2051, if not earlier. This will become apparent to active workers that are contributing to the plan, creating a strong incentive for them to leave that plan inside the 30-year window. It does not appear that PBGC considered this dynamic when modeling projected contributions, a key variable in determining the amount of SFA a plan receives. Unless these dynamics are captured and addressed in the final rule, it is likely that the regulations will fail to meet the statutory requirement of ensuring plan solvency through 2051.

With the enactment of the ARP’s multiemployer pension provisions, Congress and the President took bold action to address the multiemployer pension crisis and the harm it has inflicted upon millions of hardworking Americans and small businesses. PBGC’s rule will shape the future and

¹⁴ Id.

livelihoods of millions. It is imperative that the rule be revised to meet the clear congressional intent and to care for all beneficiaries through 2051. We ask that as you craft the final rule, you address the issues raised above and revised the rule so that matches the bold investment intended by Congress. Thank you for your consideration.

Sincerely,



Sherrod Brown
United States Senator



Tina Smith
United States Senator



Charles E. Schumer
United States Senator



Tammy Baldwin
United States Senator



Gary C. Peters
United States Senator



Debbie Stabenow
United States Senator



Robert P. Casey Jr.
United States Senator