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OF THE
UNITED STATES OF AMERICA

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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.¹

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.

¹ 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...”²
- 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 taken 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.

² ARPA § 9704(a). By stabilizing eligible plans with SFA, ARPA in turn stabilizes the overall PBGC multiemployer program by making it less likely that these plans will need regular financial assistance in the future.

- 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).
- 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...”³
- 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.⁴
- 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.

³ ERISA § 4262(i)(1).

⁴ 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.⁵ 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).⁶ 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.⁷ 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.⁸ Statutory provisions should be read as

⁵ ERISA § 4262(m)(4).

⁶ ERISA §305(e); 29 U.S.C. §1085(e).

⁷ ERISA §305(f)(3); 29 U.S.C. §1085(f)(3).

⁸ 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

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).⁹ 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."¹⁰

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."¹¹ The regulation only defines plan assets with respect to a plan's investment in another entity.¹² 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."¹³

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."¹⁴ Nonforfeitable benefits are

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

⁹ ERISA §4201(b); 29 U.S.C. §1381(b)

¹⁰ ERISA §4213(c); 29 U.S.C. §1393(c);

¹¹ 29 U.S.C. 1103(3)(42); ERISA Section 3(42)

¹² See 29 C.F.R. § 2510.3-101.

¹³ Advis. Opin. 1993-14A.

¹⁴ 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.¹⁵

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.¹⁶

Unlike the MPRA amendments, nothing in the ARPA specifically addresses how SFA should be applied with respect to the methods for determining withdrawal liability.¹⁷ As such, PBGC should proceed cautiously in exercising its discretion under ERISA Section 4262(m).¹⁸

¹⁵ ERISA § 305(g); 29 U.S.C. §1085(g)

¹⁶ 29 C.F.R. § 4233.15

¹⁷ 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>

¹⁸ 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,

Chantel L Sheaks

Chantel L. Sheaks
Vice President, Retirement Policy

Cc: Kristin Chapman
Andrew Banducci