VIA ELECTRONIC DELIVERY

August 10, 2021

The Honorable Gordon Hartogensis
Director
Pension Benefit Guaranty Corporation
Washington, DC 20005

Re: Comments on the Interim Final Regulation for the Special Financial Assistance Program for Financially Troubled Multiemployer Plans

Director Hartogensis:

The undersigned organizations that represent contributing employers commend the Pension Benefit Guaranty Corporation (PBGC) on its work in releasing the Interim Final Regulation (IFR) relating to the Special Financial Assistance (SFA) for troubled multiemployer plans that was part of the American Rescue Plan Act (ARPA). We are especially appreciative given the limited time and resources available for such an important issue. The IFR was published in the Federal Register on July 12, 2021, and comments are due on August 11, 2021.[1] On March 26, 2021, the Chamber sent you a letter outlining the Chamber's concerns with the SFA provisions in ARPA, a copy of which is attached. On behalf of these contributing employer organizations, our comments to the IFR are below.

Background

As contributing employers, our members are the contribution base that makes these plans possible because without contributing employers, these plans do not exist. Unfortunately, the contribution base has declined over time because of a confluence of events, such as changes in industries, technology, aging demographics, and shrinking unionization. The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) was meant to address employers that exit these plans through the creation of withdrawal liability, which requires an employer to pay its proportionate share of any unfunded vested benefits when it leaves the plan. However, because of these events and various exceptions, withdrawal liability did not fix this problem. Instead, those liabilities are shifted to the remaining employers by virtue of what is commonly referred to as the last man-standing rule. The MPPAA withdrawal liability structure remains one of the key impediments to attracting new employers to multiemployer plans and to job growth for current contributing employers.

Because of changing demographics, many of these plans have few active employees relative to retirees, requiring increased employer contributions on behalf of current employees to keep these plans afloat. These increased contributions are unsustainable for both the contributing employers and employees, who are sacrificing current wages to pay for past liabilities.

Although we appreciate PBGC's work on the IFR, as outlined below, our members and other contributing employers are concerned that PBGC's interpretation of the amount of SFA and the conditions on withdrawal liability will lead to more employers exiting theses plans. Current active employees will continue to sacrifice wages, but they are unlikely to receive full benefits during retirement because of plan insolvency. Further, under the IFR, for employers remaining in these plans, contributions will continue to garner accrual rates for current employees far below the value of those contributions because current contribution levels have been paying for underfunding that the SFA provisions in ARPA were intended to remediate.

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[1] 86 Fed. Reg. 36598 (July 12, 2021).

Analysis

Section 4262.4: amount of special financial assistance.

Law

Section 4262(j) 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, …..

Regulation

PBGC interpreted this language to mean that the amount of SFA is equal to the value of all SFA-eligible plan obligations that exceeds the value of all SFA-eligible plan resources.[2] Plan obligations include the present value of benefits and administrative expenses expected to be paid during the SFA coverage period (including reinstated benefits).[3] Plan resources include the fair market value of all current plan assets and future contributions, withdrawal liability payments and other payments expected to be made to the plan during the SFA coverage period.[4]

PBGC Explanation

In the preamble to the IFR, PBGC states that "If Congress had contemplated the exclusion of these resources [current assets and other income] in the calculation of the amount of SFA 'required for the plan,' it would have done so explicitly."[5] Further, with respect to other interpretations suggested in comments, PBGC concluded that "the approaches recommended in these comments could be supported only by a strained reading of the clear language of section 4262(j)(1)."[6]

Concerns

PBGC's interpretation all but ensures plan insolvency and incentivizes employer withdrawals. As explained by one prominent actuarial firm, the "amount of special financial assistance allowed by the PBGC regulations minimizes the amount of assistance that a plan can receive and practically ensures that the plan will be insolvent by 2052. This is because, in part, contributions [both past and future] meant to be used for benefits payable after 2051 will be used to offset the SFA amount."[7]

The result of PBGC's interpretation is that current active employees will be required to sacrifice wages to pay higher contributions to their troubled plans. When these employees retire, however, they will receive the bare minimum benefits at the PBGC guarantee level because by their retirement date, it is almost certain that these eligible plans will be insolvent (notwithstanding the SFA). As noted in the Chamber's March 26, 2021 comments, as employer contributions dramatically increase at the expenses of wage increases and active employees' retirement benefits simultaneously decrease, active employees will almost

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[2] 29 C.F.R. § 4262.4(a).
[3] 29 C.F.R. § 4262.4(b).
[4] 29 C.F.R. § 4262.4(c).
[5] Id. at 36601.
[6] Id.
[7] See "PBGC Issues Regulations on Special Assistance for Troubled Multiemployer Plans," Cheiron, *available at https://cheiron.us/cheironHome/viewArtAction.do?artID=352*

certainly vote to walk away from these plans, instead preferring a defined contribution plan or a single-employer defined benefit plan.[8] If the SFA is only going to extend solvency to 2051, and permit these plans to go insolvent and reduce benefits to the PBGC guarantee levels, there is also no incentive for unions to support the continuation of these plans. Even if the unions were to continue to support participation in these plans, employees can negotiate out through decertification.

As a practical matter, PBGC's interpretation will make it more difficult for our members to hire unionized employees. Many of our employers need to hire immediately to fill the void of retired or soon- to-be-retired employees. However, our members cannot attract talent when all they can offer are decreased wages and greater diversion of compensation in support of a failing pension plan. Remaining in a multiemployer pension plan is not an effective recruiting tool.[9] Instead, many of these workers will opt to work for employers with higher wages and guaranteed benefits (either in the form of a single-employer defined benefit pension plan or a 401(k) plan).[10]

Recommendations

For all of the considerations in the Chamber's March 26, 2021 letter and those outlined above, PBGC should reconsider its interpretation of the amount of SFA to ensure not only that these plans are viable

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[8] . 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 ("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.") available at https://www.actuary.org/sites/default/files/files/publications/Testimony-Josh-Shapiro.pdf

A 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.

[9] As noted in the legislative history to the 1980 MPPAA amendments, "In financially distressed plans, a shrinking number of employers may be required to pay increased contributions in order to sustain in a very modest level of benefits. Active employees may have little reason to support a financially troubled plan that absorbs an increasing portion of their pay package but that offers them very little in return. Under these circumstances, employers have great incentives to terminate the plan." 126 Cong. Rec. 20192 (1980).

[10] According to the Bureau of Labor statistics, in 2020, 17 percent of transportation and warehouse workers, who are in many of the troubled plans, were unionized. The availability of non-unionized jobs in this sector makes it much easier for employees to walk away from employers in multiemployer plans, and, instead work for employers that offer 401(k) plans. See "Union Members – 2020", January 22, 2021, Bureau of Labor Statistic available at https://www.bls.gov/news.release/pdf/union2.pdf.

beyond 2051, but to also ensure that current active employees and new hires want to participate in such plans and remain in the unions that represent them.

Section 4262.16: conditions for special financial assistance: withdrawal liability.

Law:

ERISA Section 4262(m) 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).

Regulations

The IFR mandates that a plan that receives SFA must use the interest assumptions used for mass withdrawal for the later of 10 years after the plan receives SFA or the date the plan no longer holds SFA (or any earnings thereon). The mass withdrawal rates for July–September 2021 are 2.13% (1–25 years) and 2.23% (>25 years).

PBGC Explanation

PBGC determined that a reasonable condition on a plan that receives SFA is to require specified interest assumptions to be used for purposes of determining withdrawal liability. PBGC's rationale is that mass withdrawal liability "approximate[s] the market price insurance companies charge to assume a pension-benefit like liability."[11] PBGC states this was reasonable because "withdrawal liability is the final settlement of the withdrawing employer's obligation to pay for unfunded vested benefits. Doing so is particularly important for plans that have developed an adverse demographic structure, with a small contribution base relative to their unfunded vested benefits, which is the condition of many of the plans that are or will become eligible for SFA."[12]

PBGC determined that these are reasonable conditions because SFA does not result from employer contributions, and, without such conditions, the receipt of SFA could substantially reduce withdrawal liability owed by a withdrawing employer. PBGC reasoned that "the reduction could cause more withdrawals in the near future than if the plan did not receive SFA, which would reduce plan income and be an additional burden for these plans."[13]

Concerns

Section 4262(m) is permissive and does not require PBGC to impose any conditions, However, as noted in the Chamber's March 26, 2021 comments, although Section 4262(m) allows the PBGC to impose reasonable conditions on plans that receive SFA, including withdrawal liability, those conditions 1) must be reasonable; and 2) must be within the current restraints of the law.

The legislative history of MPPAA shows that Congress viewed regular withdrawal liability differently from mass withdrawal liability. Specifically, Congress felt the need to require a "withdrawing

[11] 86 Fed. Reg. at 36611.
[12] Id.
[13] Id.

employer [to] continue funding a proportional share of the plan's unfunded benefit obligations. The purpose is to relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers."[14] Given Congress' determination that the two types of withdrawal serve different purposes, it is reasonable that each would have different assumptions. The purpose of regular withdrawal liability is to ensure the burden of a plan's unfunded vested benefit liabilities do not solely fall on the remaining employers. It is also meant to incentivize employers to continue participation in the plan. On the other hand, because there technically are no employers remaining after a mass withdrawal, the more stringent rules for mass withdrawal are applied to protect participants, beneficiaries and the PBGC. If Congress had meant for PBGC to treat mass withdrawal and regular withdrawal the same, it would not have provided for two different withdrawal liability rules.

Several courts have held that a plan's use of a lower rate (for example the Segal blend or the PBGC mass withdrawal interest rates) to calculate withdrawal liability while using a higher rate to calculate the plan's funding violates ERISA.[15] As such, if it is unreasonable for these plans to use a rate that does not reflect the experience of the plan, it is equally unreasonable for a plan that receives SFA to use a rate that does not reflect the experience of the plan.[16]

PGBC's rationale for using a lower rate (i.e. it approximates the market price that insurance companies would charge to assume such liabilities) fails to adjust for the profit element inherent in the pricing of insurance annuities. Moreover, withdrawal liability payments typically are not used to purchase annuities for participants. Unlike a single employer termination which often results in the purchase of a commercial annuity contract, upon mass withdrawal, the multiemployer plan continues to pay benefits until such time as it becomes insolvent, and, at such time, the PBGC provides enough financial assistance to the plan to pay guaranteed benefits.[17]

As a practical matter, given the investment limitations that Congress and PBGC imposed on SFA amount in ERISA 4262(l) and the IFR, plans will be forced to invest non-SFA amounts, including any

[14] H.R. Rep No. 96-869, at 67 (1980).

[15] See Sofco Erectors, Inc. v. Trs. of the Ohio Operating Eng'rs Pension Fund, No. 2:19-cv-2238 (S.D. Ohio May 19, 2020). (finding that because ERISA required the fund to apply the rate that took "into account the experience of the plan and reasonable expectations," and based on the fund actuary's admission that the 7.25% rate was in fact the reasonably expected return, the use of a different rate, the lower Segal Blend rate, was unlawful and the fund was required to refund the employer based on the higher rate); New York Times Co. v. Newspaper & Mail Deliverers'-Publishers' Pension Fund, 303 F. Supp. 3d 236 (S.D.N.Y. 2018) (finding that the arbitrator's decision in favor of the Fund was in error where the Fund's actuary stated that the 7.5% assumption was her "best estimate of how the Pension Fund's assets ... will on average perform over the long term, which was lower than the Segal Blend, and further, the actuary admitted that she had used the Segal Blend as her best estimate ."regardless of the particular pension plan's actual portfolio of assets."); Bd. of Trs., Mich. United Food & Commercial Workers Unions v. Eberhard Foods, Inc., 831 F.2d 1258 (6th Cir. 1987) (holding that ERISA § 4213(a) requires that plan actuaries make interest rate assumptions based upon the plan's actual assets and anticipated performance and not upon hypothetical scenarios).

[16] In footnote 18 to the IFR, PBGC states that it intends to propose a separate rule of general applicability under section 4213(a) of ERISA to prescribe actuarial assumptions which may be used by a plan actuary in determining an employer's withdrawal liability. Although ERISA Section 4213 (29 U.S.C. §1393) provides that PBGC may prescribe assumptions that may be used by a plan actuary in determining the unfunded vested benefits for purpose of withdrawal liability, it also provides that each plan must use actuarial assumptions that, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan. In coming up with its assumptions, PBGC should keep in mind that such assumptions also must be reasonable in reflect the plan's experience.

[17] 29 U.S.C. § 1431(a); ERISA §4261(a).

withdrawal liability payments, in higher risk investment (not annuities) to try to obtain the return assumptions under 4262(e)(3) of ERISA.[18]

Although it is understandable that PBGC is concerned with employers withdrawing after a plan receives SFA, its interpretation could encourage employers in certain plans to withdraw before a plan receives SFA. For example, if a plan is projected to receive a relatively small amount of SFA, the amount will not significantly impact the unfunded vested benefits. However, the use of a significantly lower rate could double or triple an employer's withdrawal liability, and such employers may choose to exit the plan before the provision of SFA.[19]

By allowing the use of the mass withdrawal interest rates until the later of 10 years or the date the plan no longer holds SFA or any earnings, plans could inequitably manipulate the system by holding a very small amount of SFA indefinitely. For example, plans could elect to spend down the SFA to a nominal amount, and thus, use a much lower rate for withdrawal liability purposes, but use a much higher rate for funding purposes indefinitely (which, as noted above, a number of courts have found to be inconsistent with ERISA).

Recommendations

For many plans, the SFA amount will not be significant enough to eliminate or even substantially reduce withdrawal liability. Given the limited amount of SFA, many employers will likely not be able to withdraw, even if they wanted to, and no additional conditions are needed.[20]

If PBGC keeps a limitation, it should either eliminate the "later of" and mandate the use of the mass withdrawal interest rates for 10 years (similar to MPRA and prior legislation) or mandate an ordering rule

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[18] In determining the amount of SFA, plans are required to use the assumed rate of interest which is the lesser of the interest rate used for funding standard account projections in the most recent zone status certification completed before 2021 or 200 basis points plus the third segment rate interest rate in the last four months before filing of the application. However, the statute requires that SFA can only be invested in investment grade bonds or other investments as provided by the PBGC. The IFR defines investment grade as "publicly traded securities for which the issuer has at least adequate capacity to meet the financial commitments under the security for the projected life of the asset or exposure." Permissible investments include individual fixed-income securities (including dollar-denominated foreign securities) and commingled vehicles (e.g., exchange traded funds, mutual funds, pooled trusts, etc.) that invest in investment-grade bonds. Given the unlikelihood that the investment returns on SFA amounts will generate the assumed interest rate of return because of the limited investment options, the viability of plans receiving SFA will depend in part on the investment returns of the non-SFA assets in the plan's portfolio (including withdrawal liability payments), which will need to be more aggressive to make up for the SFA investment limitations. However, PBGC could broaden its interpretation of permitted investments to alleviate this issue.

[19] According to Milliman, the plans in its survey used a discount rate of approximately 7 percent, although the rate may now be slightly lower because of the reporting lag time. See "Multiemployer Pension Funding Study: December 2020" Nina M. Lantz, Rex Barker, Timothy L. Connor, and William Wade, 17 February 2021 available at https://www.milliman.com/en/insight/multiemployer-pension-funding-study-december-2020. The difference in interest rates can have a significant impact on the amount of withdrawal liability. "As a rule of thumb, a 100-basis point change in the interest rate can swing the liability by 10-20%, depending on the length of the payment stream. A 400- or 500-basis point decrease can have an enormous effect…" See "Multiemployer Plan Withdrawal Liability Assumptions Under Attack", The Wagner Law Group, July 8, 2020 available at https://www.wagnerlawgroup.com/resources/erisa/multiemployer-plan-withdrawal-liability-assumptions-under-attack.

[20] PBGC's interpretation also will have a negative impact on an employer's financial statements, which, as noted in our other public comments on this topic, will limit an employer's ability to obtain credit or banking at reasonable rates. See U.S. Chamber of Commerce and Association of Food and Dairy Retailers, Wholesalers and Manufacturers Comments on Proposed Multiemployer Pension Recapitalization and Reform Plan available at https://www.uschamber.com/comment/comments-proposed-multiemployer-pension-recapitalization-and-reform-plan.

that SFA funds must be used first and eliminate the reference to earnings.

Funding Standards

Law

ARPA added Internal Revenue Code Section 432(k)(2)(D) that provides that "Special financial assistance received by the plan shall not be taken into account for determining contributions required under section 431."

Concerns

Some plans have been using the threat of (or an actual) accumulated funding deficiency to increase the amount a withdrawing employer must pay by assessing the employer's share of any potential accumulated funding deficiency when the employer withdraws, even though a funding deficiency has not occurred (and may never occur). If a plan may not include the SFA amount within determining the funding status, it is possible that some plans may treat the accumulated funding deficiency as additional withdrawal liability.

Recommendations

The PBGC should clarify any accumulated funding deficiency (actual or potential) is not part of withdrawal liability, and such liability should not be assessable as an additional penalty for withdrawn employers.

Conclusion

As noted, we appreciate the work and effort that went into the IFR, guidance and instructions and the ongoing work that PBGC will face as it implements this extremely important program. We look forward to working with PBGC as this program progresses.

Sincerely,

American Bakers Association
Associated General Contractors of America
Association of Food and Dairy Retailers, Wholesalers and Manufacturers
Food Industry Association
The Minnesota Auto Dealers Associations
National Association of Wholesaler-Distributors
The National Auto Dealers Associations
The National Beer Wholesalers Association
U.S. Chamber of Commerce

About the American Bakers Association

The American Bakers Association (ABA) is the Washington D.C.-based voice of the wholesale baking industry. ABA's membership has grown to represent more than 300 companies with a combined 1600+ facilities.

About the Associated General Contractors of America

The Associated General Contractors of America is the largest national commercial construction trade association, representing more than 27,000 firms including America's leading general contractors, specialty contractors, service providers, and suppliers.

About the Association of Food and Dairy Retailers, Wholesalers and Manufacturers

The Association of Food and Dairy Retailers, Wholesalers and Manufacturers is a coalition of 14 employers representing various sectors in the food industry. Collectively, these companies employ over one million associates and contribute to over 90 multiemployer pension plans.

About the Food Industry Association

As the Food Industry Association, FMI works with and on behalf of the entire industry to advance a safer, healthier, and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain, from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services, to amplify the collective work of the industry. More information about our organization is available www.FMI.org.

About the Minnesota Auto Dealers Association

The Minnesota Auto Dealers Association is a statewide trade association representing 375 dealerships that employs over 19,000 dealership professionals.

About the National Association of Wholesaler-Distributors

The National Association of Wholesaler-Distributors (NAW) is composed of wholesaler-distributors and a federation of international, national, regional, state and local associations and their member firms, which total more than 30,000 employers that have locations in all 50 states and the District of Columbia. NAW's constituency is at the core of our economy—a vital link in the supply chain between manufacturers, retailers, and commercial, institutional and governmental end users.

About the National Auto Dealers Association

The National Automobile Dealers Association represents over 16,000 dealers who sell new and used motor vehicles and engage in service, repair, and parts sales, including 1,800 who commercial trucks. Together they employ approximately 1,000,000 people nationwide, the majority of whom are small businesses as defined by the Small Business Administration.

About the National Beer Wholesalers Association

The National Beer Wholesalers Association (NBWA) represents America's 3,000 independent beer distributors who service every state, congressional district and media market across the country. Licensed at the federal and state levels, beer distributors get bottles, cans, cases and kegs from a brewer or importer to stores, restaurants and other licensed retail accounts through a transparent and accountable regulatory system.

Distributors build brands of all sizes – from familiar domestic beers to new startup labels and imports from around the world – and generate enormous consumer choice while supporting more than 140,000 quality jobs in their home communities. Beer distributors work locally to keep communities safe by sponsoring programs to promote responsible consumption, combat drunk driving and reduce underage drinking.

About the U.S. Chamber of Commerce

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.