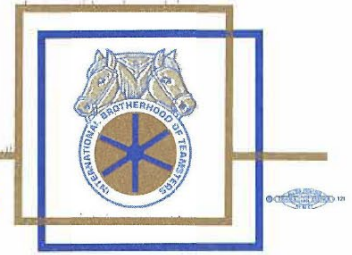


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**FUND ADMINISTRATOR**

**CAMILLE LUISI**

August 11, 2021

**VIA FEDERAL ERULEMAKING PORTAL, EMAIL**

Regulatory Affairs Division  
Office of the General Counsel  
Pension Benefit Guaranty Corporation  
1200 K Street NW  
Washington, DC 20005  
[reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov)

**Re: Special Financial Assistance by PBGC; Interim Final Rule (RIN 1212-AB53)**

To Whom It May Concern:

The undersigned Board of Trustees of the Bakery Drivers Local 550 and Industry Pension Fund (“550 Fund” or “Fund”), are writing to comment on the interim final rule issued by the Pension Benefit Guaranty Corporation (“PBGC”) on July 12, 2021 (“Interim Final Rule”) pursuant to Section 9704 of the American Rescue Plan Act of 2021 (“ARPA”) and section 4262 of the Employee Retirement Income Security Act of 1974 (“ERISA”). The Interim Final Rule provides in part that (i) if a plan experiences a merger on or after July 9, 2021, any special financial assistance (“SFA”) from PBGC is limited to the sum of SFA that would have applied to the plans involved in the merger if the merger had not occurred (29 C.F.R. § 4262.4(f)(1)); and (ii) a plan terminated by mass withdrawal in a plan year ending before 2020 is not eligible for SFA for plan years starting in 2020 through 2022 (86 Fed. Reg. 36,598, 36,600).

The 550 Fund strongly disagrees with the position taken in the Interim Final Rule regarding mergers and termination by mass withdrawal. The 550 Fund respectfully submits that this position (i) is contrary to the text and purpose of ARPA, as it apparently denies assistance to plans such as the 550 Fund that are in deep financial distress and does not decrease the risk of insolvency for those troubled plans; (ii) exceeds the mandate of PBGC as enumerated in ARPA; (iii) is inconsistent with PBGC’s prior stated actions and concerns; (iv) ignores the fact that plans such as the 550 Fund are facing insolvency for a fundamental reason identical to many plans that will apparently be eligible for SFA—namely, the ability of large participating employers to use the bankruptcy process as a means to circumvent paying enormous sums of withdrawal liability; and (v) will increase (or at least not decrease) the risk of PBGC insolvency. For the reasons described below, the Interim Final Rule should be modified to be consistent with ARPA and the

goals it aimed to achieve, by (1) providing that the amount of SFA available to merged plans is not limited to the amount each plan would have been separately eligible for; and (2) recognizing plans terminated by mass withdrawal prior to 2020 as eligible for relief, if such plans are not currently insolvent and already receiving financial assistance from PBGC. If such modification is not undertaken, the 550 Fund requests approval for an exception to the conditions regarding mergers and mass withdrawal in recognition of the circumstances described below, including that it underwent termination by mass withdrawal pursuant to a transaction that was approved by PBGC and designed to address precisely the same objectives as the SFA provision under ARPA.

## I. Relevant Background on the 550 Fund

In order for PBGC to appreciate fully the grossly inequitable impact of the Interim Final Rule on funds such as the 550 Fund, it will be useful to provide an overview of the relevant background of the 550 Fund. It was created in 1955 to provide retirement benefits to employees delivering baked goods. By 2011, Hostess Brands, Inc. (“Hostess”) employed the majority of active participants in the plan (61%), until it unilaterally stopped making contributions in June 2011. Hostess filed for bankruptcy on January 11, 2012. In February 2012, the 550 Fund issued a notice to Hostess stating it was terminated as a participating employer effective March 1, 2012 due to its failure to make contributions. The Fund submitted an estimated claim for contingent withdrawal liability in Hostess’ bankruptcy proceedings. Hostess terminated the majority of its employees participating in the Fund in November 2012, and in early 2013, the Fund notified Hostess that the Fund’s actuary had determined that Hostess had completely withdrawn from the Fund on March 1, 2012 in the amount of \$69,277,520.00.

Hostess’ withdrawal from the Fund and its failure to pay withdrawal liability as a general unsecured debt in the bankruptcy process<sup>1</sup> had a staggering impact on the Fund. Prior to Hostess’ withdrawal (as of November 1, 2011), the Fund had approximately \$81 million in assets (actuarial value), and a funded percentage of 46.3%. As of the date of the Fund’s next valuation (November 1, 2012), it had approximately \$74 million in assets (actuarial value) and a funded percentage of 44.0%. By November 1, 2015, the 550 Fund had approximately \$56 million in assets (actuarial value) and a funded percentage of 33.7%. Hostess was relieved of its withdrawal liability obligation through the bankruptcy proceedings in December 2015, leaving its former employees as orphan participants in the plan.<sup>2</sup>

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<sup>1</sup> The Court of Appeals for the Second Circuit, similar to other circuits, considers withdrawal liability a general unsecured debt in bankruptcy proceedings. *See, e.g., In re Hostess Brands, Inc.*, 499 B.R. 406, 414 (Bankr. S.D.N.Y. 2013) (“pre-petition amount of ‘withdrawal liability’ imposed on debtor by ERISA was a general, unsecured claim”); *see also Trustees of Amalgamated Ins. Fund v. McFarlin’s, Inc.*, 789 F.2d 98, 100 (2d Cir. 1986) (“[Employer]’s withdrawal liability gave rise to a general unsecured claim, not an administrative expense meriting priority over [employer]’s other debts.”).

<sup>2</sup> *See In re Old HB, Inc. (f/k/a Hostess Brands, Inc.)*, No. 12-22052-rdd (Bankr. S.D.N.Y. Dec. 22, 2015), ECF No. 3803 (order dismissing Chapter 11 cases). Throughout the proceedings Hostess made clear its intentions to avoid its pension obligations to the 550 Fund and other plans. *See, e.g.,* Affidavit of Brian J. Driscoll in Support of First Day Motions and in Accordance with Local Bankruptcy Rule 1007-22 at 4, *In re Hostess Brands, Inc.*, No. 12-22052-rdd (Bankr. S.D.N.Y. Jan. 11, 2012), ECF No. 3 (CEO and member of board of directors of Hostess) (“management has developed a business plan that it believes will allow the Debtors to regain long-term viability. The business plan is premised upon achieving a competitive cost structure, including relief from uncompetitive pension and medical benefit legacy costs....”).

Faced with the solvency crisis that would soon be on PBGC's doorstep, the 550 Fund in August 2016 sought PBGC approval for an innovative transaction. This transaction involved creating a new fund with new funding for non-orphaned participants, while retaining the orphaned participants (primarily former employees of Hostess) in the 550 Fund but providing additional funding to forestall its insolvency.<sup>3</sup>

Then, in November 2016, in consultation with PBGC, participating employer Bimbo Bakeries USA, Inc. ("Bimbo") made an initial contribution to the newly created Teamsters Bakery Drivers and Industry Pension Fund ("Teamsters Fund") to satisfy PBGC solvency requirements. On December 1, 2016, PBGC approved the transfer of liabilities from the 550 Fund to the Teamsters Fund. On December 17, 2016, the 550 Fund transferred liabilities for all benefits associated with current/active employees of Bimbo, Grocery Haulers, Inc., the Bakery Drivers Local 550 and Industry Health Benefit Fund, and the Teamsters Local Union 553 (or beneficiaries or alternate payees) to the Teamsters Fund, as well as Local 550 Fund participants (or beneficiaries or alternate payees) with one-half or more of their total service with one of the four employers or their predecessors.

On January 1, 2017, pursuant to PBGC's approval of the transaction, the remaining four participating employers (listed above) withdrew from the 550 Fund, triggering termination due to a mass withdrawal. Contemporaneously, 550 Fund liabilities in the approximate amount of \$48 million were transferred to the Teamsters Fund, and the 550 Fund employers paid it approximately \$7 million in withdrawal liability. As a result of the transaction, the transferred participants and beneficiaries were better off because otherwise they would have remained in a plan projected to become insolvent by April 2023, and the transaction protected those remaining with the 550 Fund by forestalling insolvency by over two years, ensuring that then-current retirees received benefits in excess of the PBGC guaranteed levels longer than they would have. The PBGC was also better off because insolvency was forestalled.

It must be emphasized that Congress, when drafting ARPA, specifically determined that funds which took such bold measures to redress their solvency crises should not be deprived of financial relief under the statute. Thus, ARPA provides for the reinstatement of full benefits (and back pay of suspended benefits) to participants covered by funds that applied for and received approval for benefit suspensions under the Multiemployer Pension Reform Act of 2014 ("MPRA"). See ERISA § 4262(k).

## **II. Relevant Provisions of ARPA and Legislative History**

ARPA provides for PBGC to issue regulations and guidance regarding three areas. First, PBGC "shall issue regulations or guidance setting forth requirements for special financial assistance applications." ERISA § 4262(c). Second, PBGC "may specify in regulations or guidance" temporary priority consideration of applications in the first two years after enactment." *Id.* § 4262(d)(1). Third, in a paragraph entitled "Conditions on Plans Receiving

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<sup>3</sup> For reference, all supporting documents regarding this transaction are in PBGC's possession. (Plan EIN/PN: 13-6626195/001)

Special Financial Assistance,” ARPA provides that PBGC (in consultation with the Secretary of Treasury) “may impose, by regulation or other guidance, 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, reductions in employer contribution rates, diversion of contributions to, and allocation of expenses to, other benefit plans, and withdrawal liability.” *Id.* § 4262(m)(1) (emphasis added). PBGC “shall not impose conditions on an eligible multiemployer plan as a condition of, or following receipt of, special financial assistance under this section relating to” prospective reduction in plan benefits, plan governance, or “any funding rules relating to the plan receiving special financial assistance under this section.” *Id.* § 4262(m)(2).

Notably, ARPA itself does not state PBGC must make rules limiting SFA with respect to mergers or mass withdrawal liability. Indeed, such interpretation runs contrary to concerns expressed in the House Committee on the Budget report for the bill:

About 10 million Americans participate in multiemployer pension plans and about 1.3 million of them are in plans that are quickly running out of money.... Many of these troubled multiemployer plans cover workers who are on the front lines of the COVID-19 public health crisis, such as trucking.... The economic catastrophe resulting from COVID-19 has exacerbated the multiemployer pension crisis .... This threatens to bankrupt the PBGC .... Committee believes that implementing a special financial assistance program for the most financially troubled multiemployer plans and increasing PBGC premiums for multiemployer plans will (1) permit these plans to restore their solvency; (2) protect pension benefits of the participants and beneficiaries in these plans; and (3) lessen the financial impact of these plans upon the PBGC’s multiemployer plan program.<sup>4</sup>

The House report does not mention that SFA should be limited in the event of mergers or termination by mass withdrawal. It does not mention mergers at all, and only mentions mass withdrawal in the context of stating that termination can occur as result of freezing accruals, an amendment causing the plan to become a defined contribution plan, or mass withdrawal.<sup>5</sup>

A. Legislative and agency history regarding termination by mass withdrawal and bankruptcy

While there were no Congressional hearings prior to consideration of Section 9704 of ARPA in light of the pandemic, hearings prior to recent bills regarding multiemployer plans took place in 2019 and concerns regarding insolvency, bankruptcy and withdrawal liability were discussed extensively. For example, the Committee on Ways and Means report on the Rehabilitation for Multiemployer Pensions Act of 2019 (H.R. 397) states, “[a]bout 130 multiemployer pension plans are projected to become insolvent over the next twenty years. These plans are in critical and declining status.... The failure of these plans jeopardizes the solvency of the [PBGC] multiemployer program and the entire multiemployer pension system.”<sup>6</sup>

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<sup>4</sup> H.R. Rep. No. 117-7, at 850 (2021), <https://www.congress.gov/117/crpt/hrpt7/CRPT-117hrpt7.pdf>.

<sup>5</sup> *Id.* at 850.

<sup>6</sup> H.R. Rep. No. 116-159, pt. 1, at 11 (2019), <https://www.congress.gov/116/crpt/hrpt159/CRPT-116hrpt159-pt1.pdf>.

It was also reported that multiemployer plans “do not have the ability to respond to large fluctuations in the value of the assets in the pension trust, both because contributions are typically set over multiple years and because contributing employers vary over time, either because of bankruptcy or because of selective exit through withdrawal.”<sup>7</sup> Further, the Committee on Education and Labor’s report on the same bill states that the multiemployer pension crisis is primarily due to withdrawal liability, and “in the instances when an employer withdraws because of bankruptcy, then it may not be possible to recover an employer’s withdrawal liability.”<sup>8</sup>

These problems have been long recognized and anticipated. Hostess, an employer who withdrew from the 550 Fund as described above, was even discussed in hearings prior to the enactment of MPRA, which was the last substantial legislation regarding multiemployer plans. The Chairman of the Subcommittee on Health, Employment, Labor and Pensions, David P. Roe, stated in a Subcommittee hearing in December 2012:

Hostess Brands, an iconic American company for more than 80 years, decided in November to close its doors and lay off 18,500 workers. Hostess participates in 42 multiemployer pension plans, and its total withdrawal liability, the penalty a company pays when exiting a plan, could exceed \$2 billion. Yet it is uncertain whether that money will be collected in bankruptcy.... Regrettably, the Hostess story is one that is becoming all too common in the multiemployer pension system. An employer withdraws from a pension plan leaving behind unfunded promises that then fall to the remaining employers. At times, this can drive even more employers out of the system, creating a domino effect that undermines the strength of the individual plan and the pension system as a whole. These events have a profound effect on workers, and they also impact [PBGC].... I think another issue is where the PBGC lines up in bankruptcy. I think the Hostess situation is clear, that you are not at the front of the line. Those employees that have worked there for decades are not at the front of the line. They may be getting a much--could be potentially getting a much-reduced benefit.<sup>9</sup>

Joshua Gotbaum, then-PBGC Director, stated during the hearing, “[f]or those plans where Hostess was the big dog, the fact that they are not going to contribute anymore and will be able to discharge their obligations in bankruptcy is going to put those plans in severely distressed status and some of those plans will probably run out of money.” Gotbaum also noted that withdrawal liability is generally not restored if an employer emerges from bankruptcy, and employers in certain industries including the trucking industry are in “difficult segments” of the economy, resulting in less profits and “fewer workers paying into the fund.”<sup>10</sup> It is clear that the

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<sup>7</sup> *Id.* at 140 (emphasis added) (quoting testimony of Dr. James Naughton, Kellogg School of Management).

<sup>8</sup> H.R. Rep. No. 116-159, pt. 2, at 17 (2019), <https://www.congress.gov/116/crpt/hrpt159/CRPT-116hrpt159-pt2.pdf>.

<sup>9</sup> Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. & the Workforce, 112th Cong. (2012), <https://www.govinfo.gov/content/pkg/CHRG-112hhrhg77383/html/CHRG-112hhrhg77383.htm>.

<sup>10</sup> *Id.* Deregulation has also been acknowledged as a factor causing plans to be in severe financial distress and PBGC to be “on the brink of collapse.” H.R. Rep. No. 116-159, pt. 2, at 11 (2019), <https://www.congress.gov/116/crpt/hrpt159/CRPT-116hrpt159-pt2.pdf>.

difficult issues faced by the 550 Fund were exactly the issues recognized by Congress and PBGC, and which legislation such as ARPA aimed to address.

### B. Legislative and agency history regarding mergers

Congress and PBGC have also long recognized the benefits of merger for participants and PBGC alike. Indeed, a main component of MPRA was to facilitate and financially assist with plan mergers.<sup>11</sup> In a prepared statement by Gotbaum for a 2016 hearing of the Senate Committee on Finance on MPRA and challenges persisting after its enactment, Gotbaum states, “In MPRA, Congress recognized that PBGC can play an essential role in preserving distressed plans by providing financial assistance to facilitate plan mergers....”<sup>12</sup> More recently, PBGC described the benefits of mergers, especially with respect to forestalling insolvency, in a 2018 final rule. In describing the merger of a soon-to-be insolvent multiemployer plan into a larger, more financially secure multiemployer plan, PBGC stated that as a result of the merger, “the participants and beneficiaries in the failing plan received more than they would have in the absence of a facilitated merger from a financially secure plan that was more likely to remain ongoing. In addition, the financial assistance provided was generally less than PBGC's valuation of the present value of future financial assistance to the failing plan.”<sup>13</sup>

The provisions in the Interim Final Rule unduly restrict plans' ability to seek mergers and contradict Congress' and the PBGC's well-established policy recognizing the importance of facilitating—not restricting—mergers.

### III. PBGC Interim Final Rule – Relevant Provisions

Without citing any authority, PBGC interprets its objectives in promulgating regulations under ARPA to include “ensur[ing] prudent stewardship of taxpayer-funded appropriations for SFA, including the prevention of waste, fraud, and abuse in the SFA program.” 86 Fed. Reg. at 36,614. In order to achieve this objective, PBGC concluded, again without citing any authority, that it is appropriate for PBGC “to impose conditions on plans receiving SFA designed to ensure that plans receive no more than the amount of SFA to which they are entitled,” which PBGC interpreted as “not to give effect to changes made to a plan's structure or terms on or after July 9, 2021.” *Id.* at 36,603.

With respect to mergers, the Interim Final Rule provides that “if two or more plans are merged, then the SFA is limited so that it does not exceed the sum of the SFA that would have been calculated for all of the plans involved in the merger had the plans applied separately for SFA.” PBGC acknowledges that it read this rule into the statute. *See id.* at 36,603. While PBGC

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<sup>11</sup> MPRA § 121 (amending ERISA § 4231(E)).

<sup>12</sup> The Multiemployer Pension Plan System: Recent Reforms and Current Challenges: Hearing Before the S. Comm. on Finance, 114th Cong. 2 at 52 (2016), <https://www.finance.senate.gov/imo/media/doc/23589.pdf>. The prepared statement of Hon. Gotbaum to the December 2012 hearing also provides, “mergers can reduce a plan's administration costs, improve future investment returns, and help expand the plan's ratio of active to inactive participants.” Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, *supra* note 9.

<sup>13</sup> Mergers and Transfers Between Multiemployer Plans, 83 Fed. Reg. 46,642, 46,643 (Sept. 14, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-09-14/html/2018-19988.htm>.

argues that this prohibition is consistent with its authority to impose “reasonable conditions” regarding “diversion of contributions,” *id.* at 36,604, “reasonable conditions” does not mean absolute prohibition. This is especially true in light of the purpose of ARPA.

With respect to termination by mass withdrawal, PBGC concluded that a plan terminated by mass withdrawal in a plan year ending before January 1, 2020, is not eligible for SFA under ERISA sections 4262(b)(1)(A) and 4262.3(a)(1) in “any plan year beginning in 2020, 2021, or 2022.” *Id.* at 36,600. PBGC explains that based on IRS interpretation, because additional funding rules for plans in endangered, critical, and critical and declining status do not apply to such plan in plan years 2020 to 2022, they are not in critical and declining status and are therefore not eligible for SFA. *Id.* n.6. This is interpretation and not what is provided in the statute. In light of how such interpretation penalizes plans which terminated by mass withdrawal with the approval and assistance of PBGC in order to forestall insolvency and reduction of benefits, does not assist financially troubled plans, and is not expressly provided for in the statute, this rule should be revised to interpret such plans that are not currently insolvent and receiving PBGC financial assistance as being within the meaning of section 4262(b)(1)(A) of ERISA.

#### **IV. Application to Plans Terminated by Mass Withdrawal or Seeking Merger**

- A. PBGC’s discretionary interpretation of the statute that no more relief is available to two plans after a merger than if they separately applied is inconsistent with ARPA’s text and purpose.

The purpose of Section 9704 of ARPA is to provide financial relief to troubled multiemployer plans and to aid as many participants as possible. The Interim Final Rule frustrates this purpose because no more relief is available than if a fund had not merged, and the regulations as they are worded currently cut out many financially troubled plans from receiving much-needed assistance.

- B. PBGC’s rigid interpretation of the statute that any plan terminated before 2020 through mass withdrawal is ineligible for relief is inconsistent with ARPA and legislative history.

The text of ARPA does not state that any plan terminated before 2020 through mass withdrawal is not eligible for relief, PBGC was not asked to create such limiting construction, and such interpretation and application by PBGC is inconsistent with the purpose of ARPA and would be highly unfair to the 550 Fund.

As discussed above, the 550 Fund’s termination by mass withdrawal was an innovative solution that was approved by PBGC and was aimed to forestall insolvency despite circumstances far outside the 550 Fund’s control. Already facing the effects of a deregulated and dwindling industry, the plan’s largest employer, Hostess, withdrew from the plan and declared bankruptcy, and its withdrawal liability was ruled an unsecured debt. Hostess was the very employer discussed during Congressional hearings regarding the issue of employers getting out of their withdrawal liability by declaring bankruptcy. The Interim Final Rule in essence penalizes the 550 Fund for a devising a transaction in consultation with PBGC to achieve the same purposes that ARPA aims to achieve. It is therefore unjust and inequitable to deny relief to the

550 Fund and other plans in similar situations. For the reasons described above, the regulation should be revised to give such plans eligibility for SFA.

C. PBGC's Purpose Is to Protect Pension Benefits, Not to Serve as a Guardian of the Treasury.

Lastly, PBGC tries to justify its interpretations by arguing that it is merely fulfilling its role as a “prudent steward” of the Treasury. We respectfully submit that PBGC’s role is not to serve as a guardian of the Treasury. PBGC’s purpose as described in ERISA is to “encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,” “provide for the timely and uninterrupted payment of pension benefits,” and to maintain premiums “at the lowest level consistent with carrying out its obligations.” 29 U.S.C. § 1302(a). PBGC does not cite any authority for its proposition, and ARPA does not provide that the PBGC has such discretion in interpreting the statute or promulgating regulations.

Further, in emphasizing its role in protecting the interests of taxpayers, PBGC ignores the plain fact that participants of the 550 Fund and similarly situated funds are precisely the taxpaying constituency whose interests ARPA seeks to protect. Not only will these taxpayers be harmed by PBGC’s Interim Final Rule as regards to mergers and termination by mass withdrawal, but so will other taxpayers and the wider economy.<sup>14</sup>

Moreover, in the same manner Congress saw fit not to deprive financial relief under the statute to funds and participants who proactively utilized existing legislation to forestall insolvency and protect benefits to the extent possible under MPRA, PBGC’s interpretation of ARPA should not serve to punish the 550 Fund and its participants for resorting to difficult, yet critical measures, to benefit as many workers and beneficiaries as possible under ERISA. Viewed another way, adoption of our recommended solution eliminates the patently unfair scenario where two Hostess retirees with 25 years of service meet at a reunion, one is a 550 Fund participant and another is a participant of a fund that still has several small participating employers, and the latter retiree’s monthly benefit is three or four times more than the 550 Fund retiree’s monthly benefit simply because several small employers remained in the latter participant’s fund. Surely Congress did not intend such an absurd and inequitable result when it enacted ARPA.

## Conclusion

The Interim Final Rule as it applies to mergers and terminations by mass withdrawal should be modified consistent with the arguments made herein, such that (1) the amount of SFA available to merged plans should not be limited to the amount each plan would have been separately eligible for; and (2) funds terminated by mass withdrawal prior to 2020 but are not currently insolvent and already receiving financial assistance from PBGC should be eligible for

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<sup>14</sup> This was recognized and discussed in the Committee on Ways and Means report on the Rehabilitation for Multiemployer Pensions Act of 2019. “[T]he failure of the multiemployer pensions system could have significant economic effects. It is estimated that the 10-year cost to the U.S. government of not solving the multiemployer pension crisis is between \$170 billion and \$240 billion.” H.R. Rep. No. 116-159, pt. 1, at 12.



SFA relief. As detailed above, the policy considerations in favor of such modification are substantively identical to the policy considerations motivating the current eligibility requirements for relief. This modification will not put any additional burden on PBGC, and can instead help delay the insolvency date of the 550 Fund and other similarly situated plans and postpone receipt of financial assistance from PBGC and reduction in benefits to the guaranteed level.

Thank you for your consideration.

Respectfully,

Demos Demopoulos, Michael Spinelli, Lou Minella,  
Dennis J. McGuire, Philip Paturzo

Board of Trustees of the Bakery Drivers Local 550 and  
Industry Pension Fund