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August 9, 2021

Via Electronic Mail (reg.comments@pbgc.gov)

Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005
Attn: Daniel S. Liebman, Esq., Deputy General Counsel

**Re: Comments on Interim Final Regulation - Special Financial Assistance by
PBGC [RIN 1212-AB53]**

Dear Mr. Liebman:

Central States, Southeast and Southwest Areas Pension Plan (“Central States Plan”) appreciates the opportunity to provide comments to the Pension Benefit Guaranty Corporation (“PBGC”) on the interim final regulation (the “Regulation”) under section 4262 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and separate guidance on actuarial assumptions. This section of ERISA was added by the American Rescue Plan Act of 2021 (the “Act”) to create a special financial assistance program for financially troubled multiemployer pension plans. The Regulation addresses many of the ambiguities of the Act in a clear and reasonable manner, but, as outlined below, we request additional guidance and clarifications on certain issues of importance to the Central States Plan.

The purpose of the multiemployer pension provisions of the Act was to provide deeply underfunded plans with special financial assistance that would allow the plans to remain solvent and continue to pay full benefits to participants through 2051. The preamble to the Regulation, however, emphasizes PBGC’s role in ensuring that “plans receive no more than the amount of SFA to which they are entitled.” This is an important objective, but it is equally important that PBGC ensure that plans also receive *no less* than the amount of assistance to which they are entitled under the Act.

This comment letter discusses several areas where additional guidance would be helpful, or the Regulation could be clarified to ensure that the Central States Plan and other eligible plans receive the amount of assistance to which they are entitled under the Act.

As described in detail below, our specific recommendations are as follows:

1. Plans should not be required to include supporting details in applications for special financial assistance justifying the interest rate used to project the funding standard account in the last certification completed before January 1, 2021.

2. If PBGC issues guidance providing more flexibility on permissible investments for special financial assistance assets, the additional flexibility should apply equally to all plans that receive special financial assistance.
3. Plans in priority group 3 should be permitted to submit their application on an earlier date.
4. When reviewing the assumptions used in the most recent plan status certification before January 1, 2021, PBGC should be mindful of the fact that multiple sets of assumptions may be reasonable.
5. Acceptable assumption changes should be available equally to all plans that receive special financial assistance.
6. A plan that sets its long-term contribution base unit assumption using one of the acceptable or generally acceptable assumption changes should be allowed to apply that assumption to the latest available census data as of the measurement date, and be allowed to select a withdrawal liability income assumption that is consistent with the projected base unit assumption.
7. PBGC should require that plans exclude special financial assistance from withdrawal liability assessments using a simplified approach that does not involve tracking hypothetical asset balances.
8. PBGC should clarify that plans are not required to exclude any portion of benefit-bearing contribution rate increases when calculating withdrawal liability assessments.

Interest Rate

Section 4262(e)(2)(A) of ERISA provides the interest rate that plans must use when determining the amount of special financial assistance in their applications. The required interest rate is the rate the plan used in its most recently completed zone status certification before January 1, 2021, subject to a cap that is currently around 5.5%. In contrast with the other actuarial assumptions, there is no ability for plans to propose the use of an alternative interest rate assumption for purposes of determining the amount of special financial assistance. Further, there is no statutory requirement that the interest rate used for this purpose be reasonable, a fact that PBGC noted in the preamble to the Regulation.¹

¹ “These provisions do not require the interest rate used under the certification of plan status to be reasonable for purposes of eligibility or determining the amount of SFA.”

Section 4262.4(e) of the Regulation appropriately provides that the interest rate used to calculate the amount of special financial assistance, prior to the application of the interest rate cap, is the rate that was used for funding standard account purposes in the plan's most recently completed certification of plan status before January 1, 2021. Among the information that must be included in applications for special financial assistance under section 4262.8 of the Regulation are "supporting details" for how the interest rate was determined. We presume that the supporting details in this case refer solely to the calculation of the interest rate cap under section 4262.4(e)(1)(ii) of the regulation, and do not refer to a justification of the interest rate assumption that was used in the prior plan status certification.

Given that there are no provisions in the statute that permit changes to the interest rate assumption or require that the interest rate assumption be reasonable, requiring plans to provide a justification of the assumption is unnecessary and potentially confusing. We suggest that PBGC clarify this supporting information requirement such that it is clearly limited to the determination of the interest rate cap under section 4262(e)(3).

Permissible Investments for Special Financial Assistance Assets

We appreciate PBGC's guidance on permissible investments of special financial assistance assets under section 4262.14 of the Regulation, particularly the deference afforded to plan fiduciaries regarding the investments that are considered to be "investment grade." In the preamble to the Regulation, PBGC seeks public input for refining section 4264.14 of the Regulation to potentially provide better balance between certainty and safety on one hand, and flexibility on the overall investment policy on the other.

Allowing plans to invest a portion of the special financial assistance in assets other than investment grade corporate bonds could potentially enable fiduciaries to extend the solvency of their plans without taking unreasonable or inappropriate risks. Importantly, if PBGC issues further guidance on permissible investments for special financial assistance assets, any additional flexibility (or constraints) on investments should apply equally to all plans that receive special financial assistance. All plans must make difficult asset allocation decisions based on their unique circumstances, and PBGC should not impose special rules that would favor or disfavor certain plans based on their priority group, actuarial assumptions, or other factors.

Application Deadlines

The Central States Plan is in priority group 3 as defined in the Regulation, meaning it may file an application "beginning on April 1, 2022, or such earlier date specified on PBGC's website..." If a plan in this priority group wants to submit an application as soon as practical after the April 1, 2022 application window opens, it would have to base that application on its asset value as of March 31, 2022. The time and effort required to determine the asset value as of that date, perform the necessary actuarial calculations, and prepare the application would mean that the plan would not be able to submit its application until at least several weeks after April 1, 2022.

We suggest that PBGC instead permit plans in priority group 3 to submit their applications sometime in the first quarter of 2022. Allowing plans to apply in the period near the end of a calendar quarter is more logical than opening the application portal at the beginning of a calendar quarter, as it avoids the unnecessary delay associated with obtaining and incorporating updated asset figures. For example, an application filing on March 15, 2022 would only be two weeks earlier than the deadline in the Regulation, but it would likely accelerate the application date for a priority group 3 plan by considerably more than two weeks. This principle could apply to application dates for other priority groups as well.

Actuarial Assumptions

The guidance on the selection of actuarial assumptions in the Regulation and the separate document providing guidance on special financial assistance assumptions (PBGC SFA 21-02) goes a long way towards providing clarity on the application process. The following comments on actuarial assumptions relate to any further guidance that PBGC may issue, and also to the approach PBGC takes when reviewing applications.

In reviewing the actuarial assumptions (other than the interest rate) used in the most recent status certification completed prior to January 1, 2021, we encourage PBGC to be mindful of the fact that multiple sets of assumptions may be reasonable. For example, if a plan experience study was completed after the aforementioned status certification and results in relatively small changes to certain demographic assumptions, it does not mean the prior assumptions are unreasonable. Additionally, assumptions that were reasonable for purposes of the 2020 certification should not be deemed unreasonable for purposes of the special financial assistance application because of the passage of time, subsequent events, or the different purpose of measurement.

The language of the Act is clearly intended to minimize discretion by the plan sponsor, plan actuary, and regulatory agencies, and consistent with this intent PBGC should apply a very large degree of deference to the assumptions used in the most recent status certification completed prior to January 1, 2021. We further recommend that PBGC confirm that the acceptable assumption changes may be adopted by all plans, regardless of the credibility associated with a plan's experience data.

Projection Assumptions for Base Units and Withdrawal Liability Payments

In its guidance on special financial assistance assumptions, PBGC defines certain "acceptable assumption changes" and "generally acceptable assumption changes," including proposed changes to contribution base unit (CBU) assumptions. We recommend PBGC confirm that an assumed rate of change in future CBUs that is acceptable or generally acceptable under the guidance may be applied to the latest available participant census data as of the measurement date. In other words, the starting active participant count and CBUs would reflect any observed changes that occurred prior to the measurement date, and the acceptable or generally acceptable assumption would be applied from that point forward.

The PBGC guidance on special financial assistance assumptions does not mention future withdrawal liability payments. We encourage PBGC to be deferential to the plan sponsor and plan actuary on assumptions related to future withdrawal liability payments. PBGC should also consider that assumptions for future withdrawal liability payments are closely related to assumptions for future CBUs. For example, a projected sustained decline in future CBUs suggests the continued receipt of withdrawal liability payments, while a constant level of future CBUs suggest that no, or very few, withdrawals will occur in the future, causing a reduction in the receipt of withdrawal liability payments over time as employers pay off the existing schedules but no new payment schedules are added. If a plan adopts a future CBU assumption in accordance with the acceptable or generally acceptable assumption changes, a withdrawal liability payment assumption that is consistent with that CBU assumption should be deemed to be reasonable.

Withdrawal Liability Determinations

In the Regulatory Alternatives Considered section of the preamble to the Regulation, PBGC noted:

“A separate regulatory alternative was considered under which PBGC would mandate that during the SFA coverage period, SFA assets are disregarded in the determination of unfunded vested benefits for the assessment of withdrawal liability. This alternative would prevent a decrease in the value of employer unfunded benefit obligations due to the receipt of SFA and thereby block an incentive from arising that may cause employers to withdraw from these plans. This would mitigate against a change in plan assumptions for increased employer withdrawals within the application for SFA that would in turn increase the aggregate transfers of SFA across all plans under Section 4262. This alternative was determined to be more administratively complex and therefore less desirable.”

We agree that disregarding special financial assistance would effectively mitigate the possibility of employer withdrawals resulting from the reduction in employer withdrawal liability due to the receipt of special financial assistance. Attempting to determine the amount of unfunded vested benefits that would have existed had the plan not received special financial assistance is indeed potentially administratively complex, as it would require tracking a hypothetical asset balance over an extended period of time. However, PBGC should consider adopting a simpler alternative under which plans would simply exclude the remaining amount of special financial assistance from each year's determination of the unfunded vested benefits. This easy-to-administer approach would eliminate the initial special financial assistance windfall to withdrawing employers and result in a gradual phasing down of the exclusion as special financial assistance assets are used to pay benefits.

We suggest that PBGC also clarify that plans do not need to disregard any portion of benefit-bearing contribution rate increases that are required by their rehabilitation plans. Section 305(g)(3) of ERISA and section 432(g)(3) of the Internal Revenue Code provide that

contribution increases required by funding improvement or rehabilitation plans are generally excluded when determining withdrawal liability assessments. An exception applies, however, when the contribution rate increase is used to provide increased benefit accruals. For plans like the Central States Plan that have required that employers increase their contributions rates substantially over a period of many years, excluding benefit-bearing contribution increases when calculating the quarterly withdrawal liability payment amounts would have a significantly adverse impact on withdrawal liability collections. For example, an analysis of the 100 largest contributing employers to the Central States Plan indicates that calculating withdrawal liability installment payments using pre-2015 contribution rates instead of current 2021 contribution rates would reduce the assessments by an average of 16%, which could have a significant impact on the solvency of the Plan. As contribution rates continue to increase under the rehabilitation plan, this gap will continue to widen, which will further provide employers an economic incentive to withdraw rather than continuing to contribute, thus impairing a plan's ability to maintain long-term solvency.

For plans that credit benefit accruals based on a percentage of employer contributions, PBGC should clarify that if the contribution rate increases required by a funding improvement or rehabilitation plan are included in the benefit calculations, the plan does not need to exclude those contribution rate increases in the calculation of withdrawal liability. Ideally PBGC regulations should apply this clarification to all plans in endangered or critical status. As an alternative, PBGC could use its authority under the Act to impose this clarification as a condition that applies to plans that receive special financial assistance.

Conclusions

We appreciate your attention to these issues and all the work you are doing to protect the pension benefits of the over one million participants in multiemployer pension plans eligible for financial assistance. Implementation of the recommendations contained in this letter will ensure that the Central States Plan is able to project that it will remain solvent until 2051. As you know, participants in the Central States Plan are understandably anxious about the security of their benefits, and they will be greatly relieved to hear that their plan is projected to achieve the 30-year solvency target that is the centerpiece of the multiemployer financial assistance provisions of the Act.

Thank you for considering these comments, and we are available to discuss our recommendations in more detail at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "T.C. Nyhan", written in a cursive style.

Thomas C. Nyhan
Executive Director