



Yanela C. Frias
President, Prudential Retirement

The Prudential Insurance Company of America
280 Trumbull Street
Hartford, CT 06103

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Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, D.C. 20005-4026

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

Dear Sir or Madam:

Prudential Retirement (“Prudential”) is pleased to submit comments on the referenced Special Financial Assistance Interim Final Rule (the “Regulation”), which was issued by the Pension Benefit Guaranty Corporation (“PBGC”) and made effective on July 12, 2021 (86 FR 36598). Our comments address the “permissible investments” limitations under Regulation Section 4262.14. Under that section, special financial assistance received by a multiemployer plan (“SFA”), and any earnings thereon, may generally be invested only in individual, U.S. dollar denominated, publicly traded fixed income securities that are “investment grade” within the meaning of the Regulation. Such investments may be made both directly and indirectly through “permissible fund vehicles” (*i.e.*, exchange traded funds, mutual funds, pooled trusts, or other commingled securities whose investible assets are invested solely in fixed income securities denominated in U.S. dollars, with an average credit quality, weighted by market value, that meets the definition of investment grade).

We believe PBGC should exercise its regulatory authority, in the alternative, either to (i) clarify that pension risk transfer buy-in contracts offered by life insurers (“PRT Buy-In Contracts”), as further described below, already satisfy the Regulation’s current Section 4262.14 definition of permissible investments; or (ii) amend Section 4262.14 of the Regulation to add PRT Buy-In Contracts as an additional category of permissible investments pursuant to the PBGC’s statutory authority under Section 4262(l) of the Employee Retirement Income Security Act of 1974, as amended, (“ERISA”).

As further explained below, PRT Buy-In Contracts have the potential to significantly alleviate one of the most significant stressors faced by the multiemployer plan community: the

risk that investments may need to be liquidated to meet benefit payment obligation liquidity needs during periods of market volatility. PRT Buy-In Contracts offer a measure of respite from that risk by generating a guaranteed, predictable and recurring source of liquidity that the plan's trust may draw upon to meet its benefit payment obligations.

About Prudential

Prudential is one of the nation's leading providers of retirement plan solutions for public, private, and nonprofit organizations. Our services include defined contribution, defined benefit and nonqualified deferred compensation record keeping, administrative services, investment management, comprehensive employee education and communications, and trustee services, as well as a variety of products and strategies, including institutional investment and income products, pension risk transfer solutions and structured settlement services. With over 85 years of retirement experience, Prudential helps meet the needs of 4.6 million participants and annuitants. Retirement products and services are provided by The Prudential Insurance Company of America, Newark, N.J., or its affiliates.

Prudential Retirement is a business unit of Prudential Financial, Inc. ("Prudential Financial"), a leading provider of financial wellness products and services and one of the nation's leading global investment managers with more than \$1.5 trillion in assets under management as of June 30, 2021. With operations in the United States, Asia, Europe and Latin America, Prudential Financial seeks to make lives better by creating financial opportunity for more people. Prudential Financial's iconic Rock symbol has stood for strength, stability, expertise and innovation for more than a century.

Introduction

Section 4262 of ERISA was enacted under the American Rescue Plan of Act of 2021 (Pub. L. 117-2). Subsection 4262(l) empowers the PBGC to authorize the investment of special financial assistance monies in investment-grade bonds and such other categories of investments as PBGC may from time to time permit. Subsection 4262(l) reads as follows –

“(l) RESTRICTIONS ON THE USE OF SPECIAL FINANCIAL ASSISTANCE.—Special financial assistance received under this section and any earnings thereon may be used by an eligible multiemployer plan to make benefit payments and pay plan expenses. Special financial assistance and any earnings on such assistance shall be segregated from other plan assets. ***Special financial assistance shall be invested by plans in investment-grade bonds or other investments as permitted by the [PBGC].*** (emph. added)

In the preamble explanation accompanying the Regulation, PBGC indicates it interprets the statutory language referenced above to mean that SFA funds and earnings should be invested in “relatively safe vehicles” that “will help assure that short-term needs to pay benefits can be met.” 86 Fed. Reg. 36598, 36608 (July 12, 2021).

That interpretation is reflected in the language of Section 4262.14 of the Regulation, which limits “permissible investments” to publicly-traded, U.S. dollar-denominated, investment-grade, individual fixed-income securities, held directly or through “permissible fund vehicles.” PBGC indicates that its intention in so defining permissible investments was to ensure that SFA monies will be “fairly protected” and that “plans will have clear expectations about what the income return [on SFA investments] will be.” *Id.* Yet PBGC also acknowledged concerns about the potentially overly restrictive nature of the permissible investments provision and expressed a desire to engage in a dialogue with the regulated community over striking a more appropriate balance between investment certainty and safety, on the one hand, and providing plans with greater flexibility to decide appropriate overall investment policies, on the other. *Id.*

Prudential seeks to constructively contribute to that dialogue by describing PRT Buy-In Contracts – a unique category of life insurance company products developed with a view to assuring pension benefit protection and safety and to clearly delivering on plan investment return expectations. PRT Buy-In Contracts are used today by pension plans seeking to mitigate – or altogether eliminate – exposure to mortality, interest rate, default and other investment risks that might otherwise jeopardize the prompt payment of promised benefits to retirees and beneficiaries. Prudential is actively engaged in the development of pension risk transfer products, including PRT Buy-In Contracts, to assist plans in meeting their benefit obligations.

By virtue of their unique benefit safety, protection and clarity of return features, PRT Buy-In Contracts fit precisely within the PBGC’s description of the types of instruments it believes should be made available for SFA fund investment activity. PRT Buy-In products are safe and provide concrete guarantees that benefit payment obligations will be met. Moreover, PRT Buy-In Contracts are perfectly suited for supporting a plan’s discharge of its benefit payment obligations. Typically, an exhibit to the contract lists the names of covered, in-pay status participants, the form of payment they are receiving from the plan and the dollar amount that the plan is paying to them. The insurer pays that aggregate amount to the plan each month. So, the insurer’s obligation to the plan (in respect of the covered participants) correlates exactly or closely to the plan’s benefit payment obligations to those participants.

We are urging, in the alternative, that PBGC either (i) clarify that PRT Buy-In Contracts satisfy the Regulation’s current Section 4262.14 definition of permissible investments; or (ii) amend Section 4262.14 of the Regulation to add PRT Buy-In Contracts as an additional category of permissible investments. Doing so would undoubtedly improve the situation of the multiemployer plan community by affording an additional measure of SFA investment flexibility while preserving core SFA investment certainty and safety objectives.

PRT Buy-In Contracts

A PRT Buy-In Contract may be purchased by a plan in a pension risk-transfer transaction. Such transactions involve the assumption by a well-qualified life insurer like Prudential, which specializes in managing longevity and investment risks, of a specified set of plan benefit payment obligations in consideration of a mutually agreed-upon, single-premium amount paid by the plan. Pension risk transfers may be structured as a “buy-in” or as a “buy-out” arrangement.

In a “buy-out” pension risk transfer transaction, the insurer issues annuity certificates to a plan-designated group of individual participants and beneficiaries shortly following the plan’s payment of a single-premium obligation. The plan decides upon the cohort of individuals whose benefits are to be guaranteed. The plan may elect to purchase guarantees for all or a portion of the benefits owed to the individuals in that cohort. Each annuity certificate issued in a buy-out transaction constitutes an irrevocable commitment on the part of the insurer to pay a stated stream of benefits to the certificate holder and vests the certificate holder with payment rights that are independently enforceable by that person against the insurer. As such, a buy-out transaction discharges the plan of any further obligation to pay the benefit liabilities assumed by the insurer.

As with a buy-out transaction, in a buy-in transaction the insurance company guarantees the payment of benefit amounts owed to a plan-designated cohort of individual participants and beneficiaries. But, in contrast to a buy-out arrangement, under a buy-in transaction, the insurer’s guaranteed payment obligations run solely to the plan and the insurer makes periodic annuity payments into the plan’s trust. PRT Buy-In Contracts may be converted to a “buy-out” basis at the election of the plan. Unless and until the plan elects to trigger a buy-out conversion, however, under a PRT Buy-In Contract, the insurer does not issue irrevocable commitments in the form of annuity certificates to individual participants and beneficiaries. Accordingly, during the buy-in phase of the arrangement, the plan is not relieved of any of its obligations to pay benefits to the cohort of individual participants and beneficiaries covered by the insurer. Those benefit payment obligations continue to be reflected as plan liabilities. However, by virtue of purchasing the PRT Buy-In Contract, the plan has secured a guaranteed funding source to meet those benefit payment obligations. A PRT Buy-In Contract may cover all or a portion of the benefit liability due to a designated individual. Coverage may be arranged for the life of that individual or, if less, for a stated period of time (*e.g.*, 30 years). A PRT Buy-In Contract, therefore, may flexibly address the central statutory restriction on the use of SFA funds to provide benefit payments by securing amounts that a multiemployer plan may utilize to meet those payment obligations.

A PRT Buy-In Contract issued to a plan, unless and until converted to a buy-out basis at the election of the plan, is accounted for as an asset of the plan and is reflected as such on the plan’s financial statements. As noted, the benefit payment obligations covered under a PRT Buy-In Contract continue to be reflected as plan liabilities. Moreover, while the insurance company is obligated to pay to the plan’s trust an amount sufficient to meet the plan’s benefit obligations to a designated group of individual participants and beneficiaries under the PRT Buy-In Contract, the plan is not bound to utilize the funds generated by those payments for that purpose. Funds received by the plan’s trust from the insurer may, like other assets of the plan, be disbursed to pay benefits, to pay expenses of plan administration, or re-invested, depending on the plan’s liquidity and investment needs at that time.

The premium amount paid to an insurer in consideration of a PRT Buy-In Contract may be allocated to the insurer’s general account or to a separate account, depending on the terms of the arrangement. The general account contains the insurer’s general operating assets; a separate account, on the other hand, is a segregated asset arrangement under which the premium amount paid-in may be set-aside to meet the insurer’s obligations under a single PRT Buy-In Contract or

under a group of PRT Buy-In Contracts and/or buy-out contracts. In either case, the insurer owns the assets of the account, and does not function in the capacity of a trustee of such assets. Insurance company investment activities are subject to strict regulation by the insurance departments in the states where the company is licensed to conduct business. The principal focus of state insurance regulators is on assuring solvency in order that insurers may satisfy their benefit payment and claims obligations as they come due. Importantly, the plan does not participate in the investment or mortality experience of the insurer under a PRT Buy-In Contract and such experience (whether favorable or unfavorable) has no effect on the insurer's payment obligations to the plan.

State insurance regulators have generally adopted the National Association of Insurance Commissioners risk-based capital rules (the "RBC Rules") for purposes of assuring and monitoring an insurer's solvency. Under the RBC Rules, an insurer is required to maintain minimum levels of capital based on the risks inherent in the business lines that it writes. In order to assure that an insurer's investments are appropriate to support its liabilities, state insurance laws also regulate the kinds and amounts of assets in which an insurer may invest. Those regulations seek to assure that the investments held by an insurer are sufficiently diversified and of sufficient quality so as to make good and sufficient provision for the insurer's obligations. While an insurer has considerable freedom to invest in a variety of asset classes, including fixed income (public and private), equities, and real estate, as a general matter only investments that are liquid and whose value can be readily determined or receivables that can reasonably be expected to be paid are "admitted," for purposes of satisfying capital adequacy requirements under the RBC Rules. Under this strict regulatory framework, life insurers typically invest a preponderance of their general account assets and the assets of separate accounts dedicated to supporting pension risk transfer obligations in high quality fixed income instruments.

In addition to securing a guarantee with respect to a portion of the plan's liabilities, plan fiduciaries may, among other things, wish to purchase a PRT Buy-In Contract to lock-in the price of the insurer's annuity guarantees at a point in time when it appears advantageous to do so. Since a PRT Buy-In Contract may be converted to a buy-out arrangement at the election of the plan, some plans may ultimately choose to trigger a buy-out conversion at some future date when the plan's funded status has improved. Also, since buy-out events frequently occur in connection with a plan termination, the fiduciaries of a plan that is preparing to terminate may wish to secure an insurer's annuity guarantees on a buy-in basis, through a PRT Buy-In Contract as part of the process for preparing for termination, rather than waiting to purchase an annuity until the end of the plan termination process when market conditions, and the insurer's pricing and capacity may not be favorable. Securing annuity guarantees in advance assures the plan a ready source of the irrevocable commitments that will be needed to complete the termination process.

It is possible that a substantial period of time could elapse between a plan's purchase of a buy-in contract and the exercise of its option to convert the arrangement to a buy-out contract. In light of these timing considerations, it has become commonplace for plan fiduciaries to negotiate for contract terms allowing the plan to surrender a PRT Buy-In Contract in the unlikely event that a plan fiduciary determines, before a buy-out election is made, that the insurer would no longer satisfy the standards applicable to the selection of a buy-out contract provider under ERISA. Under such circumstances, the surrender right affords the plan's fiduciaries a means of

recourse if the “safest available annuity” standard applicable to a buy-out transaction under U.S. Department of Labor Interpretive Bulletin 95-1 (29 CFR § 2509.95-1) cannot be satisfied at the time a buy-out election would otherwise be made.¹ Accordingly, Prudential’s PRT Buy-In Contracts permit the plan to surrender the contract in the extremely unlikely event that a plan fiduciary determines that the insurer would no longer satisfy the standards applicable to the selection of a buy-out contract provider under ERISA, and where the plan has arranged to purchase irrevocable commitments from a third party insurer covering the same block of benefits as the Prudential buy-in contract. Upon surrender, Prudential makes a lump sum surrender payment to the plan and is relieved of any further liability under the contract.

Responses to PBGC Questions

In the preamble discussion accompanying the Regulation, PBGC posed four sets of questions for purposes of seeking public input as to how the permissible investment limitations under Section 4262.14 of the Regulation could be refined. The first of these question sets, which inquires about the potential benefits and risks of investing SFA assets in other vehicles that are or have the nature of fixed income, including synthetic replications of fixed income securities, insurance contracts, hybrid securities and preferred stocks, is most directly relevant to PRT Buy-In Contracts and to our comments. Each of the questions included in that initial question set, followed by Prudential’s respective response, follows below.

- **What are the advantages of investing in such vehicles, relative to a portfolio of investment grade fixed income, in terms of expected returns, reduced risk, or other improved outcomes?**

Response: There are numerous potential advantages to purchasing a PRT Buy-In Contract relative to investing in a plan-owed portfolio of investment-grade fixed income securities. *Most significantly, a PRT Buy-In Contract allows the plan to completely eliminate the liquidity, longevity, interest rate, default and other investment risks associated with fixed income investing, as those risks are now assumed within the guarantee provided by a highly qualified insurer.* We believe this ability to transfer risks would not only benefit plans and their participants, but also the PBGC and, ultimately, taxpayers.

As noted above, life insurance companies are required to maintain and manage their investments in accordance with applicable insurance laws that dictate the level of reserves that must be maintained in connection with the arrangement. Reserving and asset maintenance requirements vary based on the types of risks underwritten by the insurer and on quality and risk features of the assets it holds to support those obligations. Relative to a plan-owned basket of fixed income securities, a PRT Buy-In Contract introduces a significant measure of additional

¹ I.B. 95-1 generally provides that ERISA pension plan fiduciaries responsible for selecting an annuity provider for the purpose of making a benefit distribution (*i.e.*, in a buy-out pension risk transfer) must take steps calculated to obtain the “safest annuity available unless under the circumstances it would be in the interests of participants and beneficiaries to do otherwise,” in order to meet their duties of prudence and loyalty with respect to the transaction under ERISA section 404. 29 C.F.R. §2509.95-1

certainty that amounts needed to satisfy benefit obligations in respect of insured lives will always be available, regardless of the circumstances. To reiterate a key point: the plan does not participate in the investment or mortality experience of the insurer under a PRT Buy-In Contract and such experience (whether favorable or unfavorable) has no effect on the insurer's payment obligations to the plan.

- **What are the disadvantages of investing in such vehicles relative to a portfolio of investment grade fixed income, including lower returns, higher risk, inequitable outcomes amongst participants or other issues?**

Response: As noted, life insurers invest the assets of their general accounts and separate accounts established in connection with buy-in Contracts in mixes of assets of sufficient diversity and quality to assure their ability to meet insured obligations. The PRT Buy-In Contract produces a reliable stream of income that assures the plan's ability to meet its obligations in respect of a certain cohort of participants and beneficiaries (e.g., those that have commenced retirement). Under ordinary circumstances, however, the PRT Buy-In Contract is not itself a liquid asset in that it cannot be sold or exchanged for value in the marketplace. In that sense, a PRT Buy-In Contract involves a long-term commitment by both parties. Some may view the inability to trade out of a PRT Buy-In Contract as disadvantageous relative to the ready liquidity of a plan-owned portfolio of fixed income obligations. However, in our view, liquidity is less relevant in the context of a PRT Buy-In Contract considering the nature of the guarantee provided and the fact that the plan has no exposure to any losses that may be incurred with respect to the assets supporting the PRT Buy-In Contract. Further, although the payments made by the insurer to the plan's trust are determined in respect of a cohort of specified participants and beneficiaries, the plan may use the funds paid to its trust by the insurer to satisfy any and all of its benefit obligations and expenses.

- **What are the implementation and management costs of investing in such vehicles?**

Response: The primary cost associated with implementing and managing a PRT Buy-In Contract consists of the single premium amount paid by the plan on the effective date of the PRT Buy-In Contract in consideration of Prudential's assumption of guaranteed benefit liabilities. Costs of administration are relatively modest, and primarily relate to the personnel expense associated with performing periodic reconciliations of amounts paid-in to the plan's trust by Prudential under a PRT Buy-In Contract with the plan's census of living participants and beneficiaries with respect to whom guaranteed payments are owed.

- **Which organizations are qualified to manage and advise on these vehicles?**

Response: PRT Buy-In Contracts require very little in the way of ongoing management. In respect of the initial purchase decision and in respect of any subsequent decisions to add additional premium to an arrangement or to convert the arrangement to a buy-out basis, the plan's actuarial firm would be a likely source of expertise. In addition, numerous actuarial and insurance consulting firms offer advice, including fiduciary

advice, to plan officials who may wish to explore the potential benefits associated with PRT Buy-In Contracts.

- **Can the vehicles as they might be used in multiemployer plan portfolios or in the pool of SFA assets, be clearly defined and easily used?**

Response: Yes. A PRT Buy-In Contract may be clearly defined and accounted for if it were used as part of a multiemployer plan portfolio, including as part of a pool of SFA assets. In addition, the cash flows generated under a PRT Buy-In Contract may readily be tracked and accounted for as they are made into a plan's trust.

Closing Comments

For the reasons described above, we believe multiemployer plans, participants and beneficiaries, as well as the PBGC and, by extension, taxpayers, would be benefited if PRT Buy-In Contracts were permissible investments using SFA funds. PRT Buy-In Contracts are consistent with the PBGC's interpretation of Congress' intent that SFA funds be invested in assets that provide safety and certainty. And the availability of PRT Buy-In Contracts would enhance plan investment flexibility by allowing plans to lay-off unwanted and difficult to manage longevity, interest rate and credit risks. Most importantly, PRT Buy-In Contracts make available a pathway for multiemployer plans to procure guaranteed streams of insured income that may be relied upon as a foundational element of their planning to assure that benefit payment obligations to participants and beneficiaries are met. Multiemployer plans are regularly confronted by the risk that they may need to liquidate longer term investments to raise liquidity needed to meet benefit payment obligations during periods of market volatility. The regular and predictable streams of income guaranteed by PRT Buy-In Contracts could help to meaningfully alleviate this significant source of stress.

We believe the PBGC could reasonably clarify that PRT Buy-In Contracts already meet the Regulation's "permissible investments" definition. In this regard, a PRT Buy-In Contract has many of the attributes of an immunized portfolio of investment-grade, fixed income securities in that it generates a steady and reliably predictable flow of cash to the plan's trust, all of which is supported by a guarantee issued by a qualified and well-regulated life insurance company.

Alternatively, if the PBGC is unable to reach the conclusion that PRT Buy-In Contracts are permissible investments as defined under the current Regulation, we would urge that the Regulation be amended to include PRT Buy-In Contracts as an additional permissible investment category.

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We hope that this description of the unique features and advantages of PRT Buy-In Contracts has been helpful. We would be pleased to meet with you in person or virtually to discuss any questions you may have on this important topic. For additional information please feel free to contact Peggy McDonald via email at margaret.mcdonald@prudential.com.

Very truly yours,

A handwritten signature in black ink, appearing to read "Yanela C. Frias", with a long horizontal flourish extending to the right.

Yanela C. Frias
President, Prudential Retirement