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August 11, 2021

Via Electronic Mail: reg.comments@pbgc.gov

Regulatory Affairs Division
Office of the General Counsel
1200 K Street, NW
Washington DC 20005-4026

Attention: Daniel S. Liebman, Esq. – Deputy General Counsel

Re: Comments on PBGC Interim Final Rule – Special Financial Assistance by the PBGC, RIN 1212-AB53, on behalf of the Board of Trustees of the Michigan Regional Council of Carpenters – Detroit & Vicinity, Carpenters Pension Trust Fund

Dear Mr. Liebman:

On behalf of the Board of Trustees of the Michigan Regional Council of Carpenters – Detroit & Vicinity, Carpenters Pension Trust Fund (Pension Fund or Plan), we write to provide the following comments to PBGC's above-referenced Interim Final Rule (IFR or Rule), implementing Subtitle H of the American Rescue Plan Act of 2021 (ARP).

**Background.**

Facing a projected insolvency in PY 2035, the Pension Fund has applied to the U.S. Treasury for an order permitting the Plan to suspend benefits by reducing all benefits in pay status and all future benefits as permitted under the Multiemployer Pension Plans Amendment Act of 2014 (MPRA), and that application remains pending. To our knowledge there are presently only two other multiemployer plans with pending applications to suspend benefits under MPRA. The Pension Fund's facts and circumstances are therefore somewhat unique and, in particular, imply a difficult, immediate fiduciary decision in order to ensure future plan solvency – whether to utilize MPRA, or to seek special financial assistance (SFA) under ARP.

From the plain language of ARP it was the expectation of the Plan that SFA would not only remove the need to suspend benefits in order to avoid insolvency, but would also result in a long-term solution to the Plan's funding problems.[1] As written, the IFR may provide a basis to avoid

[1] Like other plans that have sought permission to suspend benefits, the Plan presents a case of increasing maturity, declining work hours, and an ever-contracting core of contributing employers. This imbalance between

suspending benefits (although that may change between now and the time at which the Plan may apply for SFA under the IFR's priority application provision, which will be at or before March 2023).[2] However, based on current estimates made by the Plan's actuary, SFA as calculated under the IFR results in a *lesser* probability of solvency in after PYE 2051 than does a suspension of benefits. The Plan then, has to decide whether to take SFA, and accept a higher risk of insolvency post-2051, or forego SFA and increase the probability of long-term solvency, but at the cost of cutting back vested benefits to the extent permitted by MPRA.

The reasons why SFA as calculated under the Rule is inadequate to provide an acceptable likelihood of long-term solvency are a function of several factors, significant among them – (1) defining "plan resources" as "all" assets of the Plan, including assets and contributions that are associated with benefits that will accrue post-PYE 2051; and (2) using a present value discount factor that is disconnected from the expected rate of return on segregated SFA assets.

**1. To address the long-term solvency of the Plan, the calculation of SFA should provide a carve-out from the definition of "plan resources" for plan assets and contributions that are associated with benefits accrued beyond PYE 2051.**

Section 4262(j) of ERISA provides:

> The amount of special 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 through and on the last day of the plan year ending in 2051 . . . .

Considering this language PBGC has written in the IFR that it believes Section 4262(j) should mean that "SFA is the amount by which a plan's resources fall short of its obligations, *taking all plan resources and obligations into account*." 86 Fed. Reg at 36601 (emphasis added). We disagree with PBGC's interpretation, which, again, results in an assistance amount that provides a lower probability of long-term solvency than does a suspension of benefits under MPRA. This result is attributable to other elements of the IFR in conjunction with the "all plan resources" definition, and we address them separately.

We urge PBGC to consider the following and revise the IFR accordingly.

Among the purposes Congress had in enacting ARP were to permit financially troubled multiemployer plans to restore their solvency, to protect participant's benefits in those plans, and to lessen the financial impact of those plans on the PBGC's multiemployer plan program. *See*, The Report of the Committee on the Budget, House of Representatives, H.R. 1319, February 24, 2021 (https: www.congress.gov/117/crpt/hrpt7/CRPT-117hrpt7.pdf). There is no reference in ARP to a

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assets/contributions and liabilities has not been made up for with investment performance (the market events of 2008 and other disruptions having contributed substantially to that imbalance as well). Notably, the Plan is a construction industry plan, so that while withdrawal liability recoveries are made with respect to non-construction employers, those employers are a relatively small portion of the Plan's contribution base, so this is another area of plan "income" that is not as robust as that seen in non-construction industry plans.

[2] As discussed below, the Plan may qualify to apply for SFA in priority category 6, but has not been able to confirm that fact through informal consultation with PBGC, nor does the IFR provide transparency on this important point.

definition of "plan resources" for purposes of crafting a regulation that will serve these purposes. By creating the "plan resources" definition in the IFR, and constructing that definition as narrowly as possible, the IFR ensures that the Congressional purposes described above will likely not be achieved with regard to the Plan (and will certainly not be achieved with respect to other plans in even more dire funding positions, as evidenced by other comments to the IFR).

Accepting the Plan actuary's projection that receipt of SFA as calculated under the IFR will result in the Plan being less likely to avoid long-term insolvency that would be the case with an approved MPRA suspension, we urge PBGC to accept that the method of calculation of SFA cannot possibly be reconciled with Congressional intent. After all, ARP specifically provides that plans which have implemented a suspension must use SFA to restore the suspended benefits, a requirement that strongly implies that SFA was intended to - at a minimum - not leave plans worse off than they would be by implementing a suspension. Additionally, the commentary from the House Budget Committee is suggestive of an intention to "restore plan solvency" and "protect participants' benefits" without any temporal limitation. If resources attributable to post 2051 obligations were carved out of the "plan resources" definition, the amount of resulting SFA would necessarily increase to the extent that it would foreseeably enable the Plan to be more rather than less likely to avoid insolvency in the long-term.

The Plan has sought relief through MPRA because, given its maturity, high percentage of deferred vested participants, and the substantial decrease in its contribution base, it has reduced (and ever reducing) assets left to invest in order to provide for payment of accrued benefits. As written, the IFR entirely fails to serve the stated Congressional purposes in enacting ARP as to the Plan.

**2. ARP's requirement that SFA be invested in "investment grade bonds", while also mandating use of a specific discount rate to project future liabilities, will always result in inadequate SFA.**

As other commenters have noted, the discrepancy between ARP's required discount rate for projected future liabilities (the Third Segment Rate + 200 bps, or, approximately 5.5%) and the anticipated rate of return on SFA assets invested in "investment grade bonds" (perhaps on the order of not more than 3%) guarantees that SFA cannot pay for promised benefits through PYE 2051. The current, preliminary, estimate of the Plan's actuary is that the SFA amount described above will pay for approximately six years of current plan benefits. As a result, unchanged from the scenario that led the Plan to seek to suspend benefits, once the SFA is "burned through" the Plan's remaining assets may be inadequate to avoid insolvency, and the Plan will be less likely to avoid insolvency than it would be by implementing a suspension.

Given that use of the discount rate and the investment restriction are specific, plain directives of statutory language, regulatory action changing them cannot be expected. However, insofar as this structural defect in the statute reduces the effectiveness of SFA we urge PBGC to consider that *further* restricting its utility by using the "all plan resources" formulation of the IFR serves only to lessen SFA's utility, and mutate the Act into a form far from the Congressional intentions described above. The cumulative effect of the structural defect and the unnecessarily restrictive calculation of the SFA amount results in an assistance program that will not pay for the Plan's benefits through PYE 2051, is less likely than a suspension of benefits to allow the Plan to avoid insolvency, and thus is inconsistent with the purposes of ARP.

**3. PBGC should stay the operation of the SFA program until such time as the fiduciary dilemma created by the IFR is resolved by either issuing a final regulation consistent with ARP, or the Department of Labor describes a "safe harbor(s)" for plan fiduciaries who apply for and receive SFA.**

The Trustees of the Plan, and similarly situated plans, are confronted under the IFR with choices that can expose them to claims of fiduciary breach. If the Plan accepts SFA it will avoid implementing a suspension of benefits and will forestall the Plan's insolvency (if all of the assumptions used to determine SFA are realized). On the face of it, these are outcomes apparently in the best interest of plan participants and beneficiaries.

On the other hand, as designed and submitted to Treasury, the Plan's proposed suspension is projected to be more likely to avoid a post PYE 2051 insolvency than will SFA. It may be then that implementing a suspension is a more favorable approach for participants who will still be in pay status post-2051. We note here that the proposed suspension does not reduce benefits down to the minimum level permissible under MPRA, but if the Plan were to become insolvent post-2051 and seek assistance from the PBGC at that point, benefits would be reduced to the PBGC guarantee level.

Arguably, either choice implies a possible breach of fiduciary duty under Section 404 of ERISA. By calculating SFA to arrive at a value that actually pays all plan benefits through PYE 2051 this dilemma is removed, and Congressional intent is served.

**4. The restriction on future benefit improvements upon which acceptance of SFA is conditioned will reduce the likelihood of plan's achieving their long-term contribution assumptions, and so reduce the likelihood that SFA will allow plans to avoid insolvency.**

Currently, active participants in the Plan accrue a fraction of 1% of their contribution rate toward a future benefit. In past years, consistent with the need to preserve deductibility, the Plan's accrual rates were significantly higher. For younger participants the cost of contributions (the greater part of which goes to funding existing liabilities) is very high in comparison to the benefit accrued on those contributions. For potential new entrants and their employers, the Plan is simply not an attractive option for providing a retirement benefit. Plan actuaries and fiduciaries make best estimates about future participation but extending those estimates over the entire 30-year SFA period is a questionable exercise. With no possibility under SFA of improving benefit levels (absent "new money") the likelihood of employer withdrawals increases (again we note, the Plan is a construction industry plan, and withdrawals cannot be anticipated to produce withdrawal liability assessments at the same rate as in non-construction plans), and the likelihood of organizing new employers to take their place decreases. The adequacy of SFA to fund a plan is obviously sensitive to the assumptions used in its calculation. Here, the inability of a plan to improve its benefit for 30 years essentially guarantees that plans' CBU assumptions will not be met.

**5. PBGC should immediately identify each plan eligible for SFA, and state in which of PBGC's priority categories the plans are placed.**

In the IFR, PBGC accepted Congresses invitation to establish priority application categories for eligible plans. The Plan is an eligible plan, and understands itself to satisfy the test to be placed in priority category 6. However, while PBGC has indicated that it believes there are

11 plans in category 6, it has not identified those plans. Making a determination whether to proceed with a pending MPRA application, or to file one, now has to be measured against the relative value to a plan of instead applying for SFA. That decision, in turn, may be influenced by issues of timing. If PBGC in fact knows which plans it understands to be in category 6 (and the other categories), why not simply say so, thereby assisting plans to make intelligent, prudent choices between available alternatives? ARP contains adequate safeguards to avoid manipulation of SFA calculations (for example, by locking in PPA certification assumptions, utilizing the fixed discount rate assumption, and disregarding any post ARP benefit improvements in calculation of SFA) that the Plan can perceive no reason why this information should be withheld.

**6. For priority purposes, PBGC should consider a plan with a pending MPRA suspension application to be a category 2 plan.**

While Treasury has not yet issued an order allowing the Plan to suspend benefits, there is no reason to anticipate that Treasury will not do so. The Plan's MPRA application demonstrates that the Plan is experiencing and will continue to experience a substantial negative cash flow until a suspension is implemented. Assuming approval of the Plan's MPRA application within the required time frame, a suspension can be implemented, and the negative cash flow staunched, beginning in November 2021. If, however, a suspension is not implemented in favor of seeking SFA, the negative cash flow must continue until sometime in late 2023 (assuming that the Plan is permitted to apply for SFA in priority category 6 or 7). The reduction in Plan assets will necessarily be reflected in an increased SFA amount.

Given that PBGC's narrow path to determining SFA may be premised upon careful stewardship of taxpayer dollars, providing the Plan an earlier SFA funding date serves that purpose. Because the Plan is a MPRA-suspended plan in everything but name, there does not appear to be any reason to treat it differently from MPRA-suspended plans. Indeed, given that MPRA-suspended plans are likely *not* any longer experiencing the extreme negative cash flows they were pre-suspension, but the Plan is, elevating the Plan's priority category arguably represents a better approach to reducing the total cost of the SFA program.

Thank you for your consideration of these comments.

Very truly yours,

NOVARA TESIJA CATENACCI McDONALD AND BAAS, P.L.L.C.

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