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August 11, 2021

The Honorable Gordon Hartogensis
Director,
Pension Benefit Guaranty Corporation
c/o Regulatory Affairs Division
Office of the General Counsel
1200 K Street NW,
Washington, DC 20005-4026

Submitted via electronic mail: reg.comments@pbgc.gov

RE: Limited-scope Comments on the Interim Final Rule for Special Financial Assistance by PBGC (RIN 1212-AB53)

Dear Director Hartogensis:

We respectfully submit this comment letter on the interim final rule (IFR) issued by the Pension Benefit Guaranty Corporation (PBGC) on the special financial assistance program (SFA) under the American Rescue Plan Act of 2021 (ARPA).

The SFA program under ARPA is of great importance to Segal and our multiemployer pension plan clients. Segal is a major provider of actuarial, employee benefits, and human capital consulting services to employers and employee benefit plans throughout the United States, and provides actuarial services to more multiemployer pension plans than any other consulting firm.

We acknowledge and commend PBGC's efforts in developing and issuing the IFR by July 9, 2021. We also acknowledge the substantive and comprehensive comments other stakeholders in the multiemployer pension community will be providing on the IFR. With the understanding that other organizations will provide detailed comments on many other aspects of the SFA program, this letter focuses on two issues we believe deserve special attention:

- **SFA calculation methodology.** There are potential inconsistencies in the methodology for determining the amount of SFA. Specifically, the prescribed present value approach may, at times, be inconsistent with a deterministic projection of funding and solvency levels. We have also identified a possible internal inconsistency in the IFR provisions.

- **Special provisions for MPRA Plans.** Based on the IFR, many—perhaps most—plans with an approved suspension of benefits under the Multiemployer Pension Reform Act of 2014 (MPRA) may decide to decline SFA relief and leave benefit suspensions in place. We believe this outcome is inconsistent with Congress' intent when it enacted ARPA. PBGC has the opportunity to make modify certain provisions in the IFR to make it more likely these "MPRA Plans" will decide to receive SFA and reinstate suspended benefits.

SFA calculation methodology

IFR section 4264.4 provides that the amount of SFA an eligible multiemployer plan may receive is the shortfall, if any, between the present value of plan obligations and the present value of plan resources. Section 4262(j)(2) of ERISA,[1] however, requires that the amount of SFA must be based on "funding projections … performed on a deterministic basis."

In most cases, an amount calculated based on present values will be the same as if that amount had been calculated based on a deterministic funding projection. Depending on the timing of cash flows, however, the two methodologies may produce different results. For example, it is possible the amount of SFA determined on a present value basis will result in projected plan insolvency before the intended date (e.g., before the end of the 2051 plan year). If the amount of SFA is determined on the basis of a deterministic funding projection, however, the plan will necessarily be projected to meet its intended solvency objective.

Accordingly, we respectfully recommend that further PBGC guidance prescribe deterministic funding projections, and not present value calculations, to determine SFA amounts.

Interaction with alternate interpretations

We acknowledge that comment letters from other organizations recommend that PBGC change its interpretation under the IFR as to the calculation of the amount of SFA. Proposed changes seek amounts of SFA to enable plans to remain solvent beyond 2051, rather than facing insolvency at the end of 2051 or several years sooner. We are also aware of support for a "bifurcated" interest rate that would help resolve the disconnect between the prescribed interest rate under ERISA section 4262(e) and restrictions on the investment of SFA assets. We defer to the comment letters from other organizations on these critical points.

We note that these alternate approaches to determining the amount of SFA would be better supported by a deterministic funding projection rather than a present value calculation. For example, a deterministic funding projection may be structured to target a given solvency level at the end of 2051, while it is more difficult to do so using present value calculations. Furthermore, a deterministic funding projection would support a bifurcated interest rate approach, while a present value calculation would not.

Possible internal inconsistency

We also note a possible internal inconsistency in the IFR. While IFR section 4262.4 describes the calculation of present values, the actuarial and financial information required under IFR section 4262.8 appears to require the components of a deterministic funding projection.

Specifically, IFR section 4262.4(a)(viii) requires the disclosure of "projected investment income based on the interest rate required under §4262.4(e)(1)…" Note that projected investment income is a necessary component of a deterministic funding projection, but it is not part of a present value calculation.

[1]The Employee Retirement Income Security Act of 1974, as amended.

Special provisions for MPRA Plans

There are 18 "MPRA Plans" that have implemented a suspension of benefits and are eligible for SFA. These MPRA Plans cover over 90,000 participants and beneficiaries. If a MPRA Plan receives SFA, the statute requires that the suspension be unwound and that previously-suspended benefits be restored.

As described below, the trustees of MPRA Plans face a dilemma in deciding whether to apply for SFA. We are aware that after reviewing the IFR, many boards of trustees of MPRA Plans are concluding that it would be better for the overall interests of plan participants to decline SFA and leave the MPRA suspensions in place.

We believe the intent of Congress in enacting ARPA was for MPRA Plans to receive SFA and reinstate suspended benefits. PBGC has the opportunity to modify certain provisions in the IFR so that the final regulations better fulfill this intent—or at least make it more likely the trustees of a MPRA Plan will decide to receive SFA relief rather than decline it.

The dilemma facing MPRA Plans

Trustees of MPRA Plans face a dilemma in determining whether to apply for SFA. Currently, most (if not all) of the MPRA Plans are projected to remain solvent indefinitely, without SFA, and with the benefit suspensions remaining in place.

If the trustees of a MPRA Plan apply for and receive SFA, they must restore suspended benefits retroactively. After receiving SFA and restoring benefits, however, the plan will very likely be projected to become insolvent in 2051, or perhaps several years sooner. This outcome is the result of provisions in the IFR regarding PBGC's interpretation of the amount of SFA available to plans, the disconnect between the prescribed interest rate assumption and expected returns on plan assets, and the restrictions on the investment of SFA assets.

The Employee Benefits Security Administration of the Department of Labor (DOL) has issued a statement regarding the IFR which included comments on the decision facing trustees of MPRA Plans.[2] The following is a key excerpt from the statement:

> "In the Department of Labor's view, ARP[A]'s inclusion of plans that suspended benefits under MPRA and the prohibition against a future MPRA suspension for a plan receiving SFA reflects a clear legislative objective to allow plan fiduciaries to restore benefits that were previously suspended and to encourage all eligible plans to apply for SFA without raising potential fiduciary liability concerns about undoing current or precluding future MPRA suspensions."

We agree that the potential fiduciary liability concerns and the accompanying litigation it likely will provoke are factors the trustees of MPRA Plans must consider in deciding whether to accept or decline SFA. The deciding factor, however, will more likely be the long-term solvency of the

[2] Link to DOL statement: https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/arp/dol-statement-on-pbgc-special-financial-assistance-interim-final-rule

plan. Trustees of a MPRA Plans may decide to decline SFA if receiving it would cause the plan to go from a position of indefinite solvency, to a position of likely insolvency by 2051 or several years sooner.

We expect that other comment letters will discuss in detail how the dilemma faced by MPRA Plans is further complicated by potential litigation, regardless of the decision made by the trustees. A decision to receive SFA could prompt lawsuits from active participants and employers, while a decision to decline SFA could prompt lawsuits from retirees. We defer to the commentary provided by other organizations on this potential litigation.

Additional recommendations for MPRA Plans

In addition to the points discussed above, we respectfully request that PBGC consider the following recommendations as it works towards finalizing its regulations. Adopting these recommendations will make it more likely that trustees of MPRA Plans will arrive at the decision to accept SFA and restore suspended benefits, rather than declining SFA and leaving the benefit suspensions in place.

1. *Increase the overall amount of SFA.*

   As noted earlier, we acknowledge that other organizations will provide recommendations that PBGC change its interpretation regarding the calculation of the amount of SFA. We strongly support any change in PBGC's interpretation that would enable eligible plans to attain solvency through 2051 and beyond, as well as to bridge the disconnect between the prescribed interest rate assumption and restrictions on the investment of SFA assets. Again, we defer to the detailed comment letters from other organizations on these critical points.

2. *Disregard recent investment gains from the market value of assets.*

   In the IFR, the amount of SFA is calculated based on the plan's market value of assets as of the end of the calendar quarter immediately preceding the application date. For many MPRA Plans, investment returns have been favorable since the suspension was implemented. Using the latest market value of assets in the determination of the amount of SFA means that these recent investment gains will reduce the amount of SFA the plan will receive.

   PBGC may wish to consider providing a special rule that allows MPRA Plans to disregard investment gains from the effective date of the suspension of benefits through the end of the calendar quarter immediately preceding the application date. Such a rule would allow MPRA Plans the option of imputing a market value of assets based on assumed investment returns (for example, based on the limited interest rate assumption) for the effective period of the benefit suspensions.

3. *Permit actuarial assumptions from the MPRA application as a safe harbor.*

   For some MPRA Plans, non-investment experience since the implementation of the suspension has been favorable. As with investment gains, reflecting favorable non-investment experience in the determination of SFA amounts will reduce the amount of SFA the plan will receive.

PBGC may wish to consider providing a special rule that permits MPRA Plans to use one or more of the actuarial assumptions included in their approved MPRA application as a safe harbor. Specifically, some MPRA Plans may benefit from using the projection of contribution base units from their MPRA application in determining the amount of SFA.

4. *Provide a minimum amount of SFA equal to the value of reinstated benefits.*

   Based on the provisions in the IFR, MPRA Plans may find that the amount of SFA is less than the present value of the reinstatement of suspended benefits, including retroactive payments. If PBGC implements one or more of the above provisions, this result may change. Nevertheless, PBGC should consider providing a minimum amount of SFA to MPRA Plans so that they will receive no less in SFA than the present value of the reinstated benefits.

Closing

The SFA program in the ARPA provides tremendous support to troubled multiemployer pension plans. At a minimum, the SFA program will delay the multiemployer solvency crisis by several years. We strongly encourage PBGC to give serious consideration to proposals that would strengthen the SFA program and make it more likely that eligible plans will receive enough SFA to enable them to remain solvent at least through 2051—and hopefully many years beyond that.

Segal understands the deep and complex history of multiemployer plans. We have been on the forefront, then and now, in developing innovative approaches to assist multiemployer plans in navigating the challenges they face. We would welcome further discussions with PBGC on any of the points we have raised in this comment letter, or ways that further guidance could strengthen the SFA program—and therefore, the multiemployer pension system.

Sincerely yours,

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