COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

August 11, 2021

SUBMITTED VIA REGULATIONS.GOV

The Honorable Gordon Hartogensis
Director
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005

RE: RIN 1212-AB53, Special Financial Assistance by PBGC

Dear Director Hartogensis:

We write in response to the July 12, 2021, interim final rule titled "Special Financial Assistance by PBGC" and to offer comments for consideration as your agency publishes a final rule.[1] The Pension Benefit Guaranty Corporation's (PBGC) interim final rule implements the ill-conceived taxpayer-funded bailout of failing and insolvent defined benefit multiemployer pension plans established by the *American Rescue Plan Act of 2021* (ARPA).[2] Republican Members of the Committee on Education and Labor, which has jurisdiction over the *Employee Retirement Income Security Act of 1974* (ERISA), have devoted significant time and effort to finding bipartisan, long-term structural solutions to the funding and governance challenges facing multiemployer pension plans and PBGC's multiemployer insurance program. As recently as 2014, the Committee worked in a bipartisan manner to pass the *Multiemployer Pension Reform Act of 2014.* Unfortunately, congressional Democrats and President Biden abandoned bipartisanship by unilaterally enacting a sweeping, costly, and deeply flawed taxpayer bailout of a select group of privately managed retirement plans.

ARPA Bails Out Multiemployer Pension Plans with Taxpayer Dollars

Section 9704 of ARPA amended ERISA to allow certain failing and insolvent multiemployer pension plans to apply to PBGC for "special financial assistance" (SFA). Upon approval of an

[1] 86 Fed. Reg. 36,598 (July 12, 2021).
[2] Pub. L. No. 117-2 (2021).

application, PBGC is directed to make a single, lump-sum payment to the plan in the amount necessary for the plan to pay benefits and expenses through 2051. The SFA program is funded exclusively by taxpayers from general revenues of the U.S. Treasury. Under ARPA, there are essentially no limits on the amount of taxpayer dollars which will be used, and qualifying plans are not required to repay the SFA. Significantly, not only are taxpayers responsible for paying the bill, but ARPA fails to require necessary, forward-looking reforms to ensure that future workers and retirees in these mismanaged plans will receive the retirement benefits they were promised.

Furthermore, the Democrat-sponsored ARPA irresponsibly expanded PBGC's role in providing financial assistance to failing and insolvent plans, requiring federal taxpayers to pay for a select group of retiree benefits that were negotiated and managed by private-sector entities. The law simply *hands* taxpayer money to these plans with few, if any, strings attached.

In fact, the Congressional Budget Office estimated that this provision alone will cost taxpayers \$86 billion over 10 years.[3] Meanwhile, PBGC now estimates the agency will make \$94 billion in SFA payments to plans.[4] The \$8 billion discrepancy between these estimates highlights the impact of PBGC's interpretation of the statute on the overall costs of this boondoggle. It is therefore imperative that PBGC use its limited authority to place conditions on plans receiving SFA to guard against abuse in the system and further unnecessary payoffs using taxpayer dollars.

PBGC Must Protect American Taxpayers

As part of this rulemaking, PBGC's interpretation of the amount of SFA, first and foremost, must protect American taxpayers from this limitless bailout. PBGC correctly decided in the interim final rule to include a plan's current assets and other resources in determining the amount of the SFA.

Several stakeholders recommend that PBGC calculate the amount of SFA under ARPA without including any of a plan's current assets or future contributions.[5] We strongly disagree with this irresponsible suggestion, and we agree with PBGC's answer rejecting this recommendation:

> [I]t would not be a reasonable result if the amount of SFA were to be calculated under a formula that disregards the plan's available resources, which could lead to a windfall for a plan that needs only a small amount of SFA to pay benefits. PBGC estimates that under such an approach, the total amount of SFA distributed under the program would increase by 2 to 4 times the estimated \$94 billion amount projected under PBGC's ME-PIMS model.[6]

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[3] CBO, RECONCILIATION RECOMMENDATIONS OF THE HOUSE COMMITTEE ON WAYS AND MEANS (Feb. 17, 2021), https://www.cbo.gov/system/files/2021-02/hwaysandmeansreconciliation.pdf.
[4] Special Financial Assistance by PBGC, 86 Fed. Reg., 36,598, 36,614 (July 12, 2021).
[5] *Id.* at 36,601.
[6] *Id.* at 36,601 n.11.

PBGC's estimate that SFA will amount to $94 billion in taxpayer spending is alarming enough; a range of $188 billion-$376 billion, which would be the estimated cost to taxpayers when excluding plans' current assets or future contributions, would be catastrophic.[7] Further multiplying the amount of SFA by excluding a plan's assets and other resources would be an abuse of the public's trust and taxpayer dollars. Therefore, it is imperative that PBGC's interpretation of the SFA provision take into account all plan resources, including but not limited to existing assets, contributions, earnings on assets, and withdrawal liability payments.

In addition, as PBGC begins to process applications for SFA and to distribute lump-sum payments to qualifying plans, the agency should also periodically update and make public estimates of the total amount of SFA paid by PBGC to plans. Given both ARPA's massive and unprecedented infusion of taxpayer dollars into failing plans and also the variability in plan applications, it is vital that Congress and the American people have up-to-date information on the amount of taxpayer dollars spent and what is expected to be spent.

Plan Investments Must Be Prudent

Committee Republicans have had serious and longstanding concerns with the questionable investment practices and liability valuation of multiemployer plans. Most multiemployer plans have long attempted to decrease the cost of providing benefits by investing in risky assets, which they hope will provide higher returns, rather than safe, low-risk investments that guarantee participant's benefits.

In testimony before the Subcommittee on Health, Employment, Labor, and Pensions, Dr. James Naughton explained that plan trustees collect "a fraction of the value of [the] annuity benefit, hoping that it can recoup the difference from future generations of union members or through exemplary investment performance."[8] He continued:

> Multiemployer plans have not collected actuarially sound contributions and have invested the contributions they received aggressively. If these plans had chosen to collect actuarially sound contributions and purchase[d] annuity contracts (or mimic the investing philosophy of life insurance companies), there would be no crisis…. Trustees chose to take aggressive risks, and the current crisis is the inevitable outcome of these risky choices…. I am not aware of any convincing reason why multiemployer plans should invest primarily in the stock market.[9]

Although this risky approach may sometimes earn higher investment returns, taking this gamble can result in insufficient funds to pay benefits. It is clear from the current state of multiemployer pension funding that plan trustees have not properly managed failing and insolvent plans. From decades of experience, these plans cannot be trusted to invest their existing assets prudently, let

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[7] *Id.*
[8] *The Cost of Inaction: Why Congress Must Address the Multiemployer Pension Crisis: Hearing Before the Sucomm. On Health, Emp't, Labor, & Pension of the H. Comm. on Educ. & Labor,* 116th Cong. 45 (Mar. 7, 2019) (statement of James P. Naughton, Assistant Professor, Kellogg Sch. of Mgmt., Nw. Univ.).
[9] *Id.* at 45-46.

alone the billions of taxpayer dollars they will receive through SFA. Therefore, at a minimum, plans must not be allowed to invest SFA as they would other plan assets.

For these reasons, we encourage PBGC not to expand its interpretation of "other investments as permitted by the corporation" under ERISA Section 4262(l).[10] With regards to PBGC's request for comment, we urge the agency to err on the side of "certainty and safety" of investments.[11]

Causes of Multiemployer Pension Crisis Remain

PBGC's multiemployer insurance program entered a deficit in 2003, and this deficit has continued to grow, spurred by the drastic increase of underfunding in the plans it insures. According to the most recent PBGC data, multiemployer plans are only 42 percent funded when measured using the PBGC rate, and they are collectively underfunded by $673 billion.[12] By propping up this clearly unsustainable system without enacting the reforms necessary to prevent the future mismanagement, ARPA continues to enable and encourage the irresponsible plan behaviors that have resulted in extreme underfunding.

Since ARPA does not address the root causes of multiemployer plan failures, which include the mismanagement of plans under the direction of plan trustees, the law unsurprisingly fails to provide a long-term solution. Since ARPA provides SFA to qualifying plans in the "amount required for the plan to pay all benefits due" through 2051, these plans will ultimately be insolvent after 2051, if not sooner, leaving plans again unable to pay promised benefits.[13] Remarkably, under ARPA, PBGC is not permitted to place certain important conditions on plans receiving SFA such as amending benefits, reforming plan governance, or altering plan-funding rules as a condition of receiving SFA.[14] These are among the missing reforms needed to stabilize the multiemployer system and to protect millions of workers' retirement benefits.

ARPA has established a new and clear incentive—recklessly underfund your pension and Congress will bail you out. This is a perilous reality for participants in multiemployer plans, including those not eligible for SFA, for active workers in plans receiving SFA, and for American taxpayers who are paying dearly to fund this debacle.

Plans Must Accurately Measure Liabilities

Plan trustees are responsible for collecting sufficient contributions from participating employers. Together with investment earnings, these contributions must safely provide the benefits that trustees, employers, and unions promise plan participants. To accomplish this goal, plan trustees should collect contributions equal to the present value of the benefits they are promising, rather than counting on nonexistent funds, such as above-market investment returns or contributions from future workers.

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[10] 29 U.S.C. § 1432(l)(2).
[11] Special Financial Assistance by PBGC, 86 Fed. Reg., 36,598, 36,609 (July 12, 2021).
[12] 2018 PBGC DATA TABLES, Table M-9, https://www.pbgc.gov/sites/default/files/2018_pension_data_tables.pdf.
[13] *Id.* at 36,609.
[14] ERISA § 4262(m)(2), 29 U.S.C. § 1432(m)(2).

Current law does not provide a specific discount rate that multiemployer plans must use to discount liabilities, but it does require plans to use "reasonable" assumptions.[15] Historically, most multiemployer actuaries have used an interest rate assumption to discount future liabilities that is inappropriately based on the expected hypothetical future rate of return on the plan's assets and on the underlying asset allocation. However, economists generally believe that using the rate of return on assets is unsound because it is not connected to the measurement of liabilities.[16] For workers to rely on the pension promised them with peace of mind, the appropriate measurement of such a secure promise should be based on the discount rate on Treasury bonds matching the duration of the promise.[17]

Failing and Insolvent Plans Must Stop Making New Promises

ARPA continues to allow multiemployer plans that have already gone insolvent and are unable to pay current retiree benefits to continue to make new promises to participants, which they have no ability to pay. As such, ARPA creates false expectations for plan participants who believe they will receive a pension in retirement, and it interferes with workers' ability to plan for retirement. Many plans receiving SFA will ultimately become insolvent in 2051 or sooner. PBGC should ensure that plans stop making new benefit promises that they will be unable to keep.

PBGC Premiums are Inadequate

Prior to ARPA, PBGC's multiemployer insurance program was funded entirely by annual premiums paid by each plan, and its guarantees were not backed by taxpayer dollars. Premium levels are set by Congress, which for multiemployer plans in 2021 is a flat-rate $31 per participant. The existing multiemployer premium structure, which ARPA failed to fix, does not reflect the risk underfunded plans pose to the insurance program. In contrast, the single-employer program requires a plan sponsor to pay an annual flat-rate premium of $86 per participant in addition to a variable-rate premium assessed on a plan's level of underfunding, capped at $582 per participant in 2021. Congress must increase the flat-rate premium and introduce a variable-rate premium for multiemployer plans to better align premiums with the risk posed by these plans to PBGC.

Conclusion

ARPA included a deeply flawed bailout of a select group of privately managed retirement plans that neglected forward-looking, systemic reforms to address the failures of the multiemployer

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[15] ERISA § 304(c)(3), 29 U.S.C. § 1084(c)(3).

[16] Financial regulators require companies to value liabilities based on market bond yields, not on expected rates of return. Economists ''almost universally'' believe that this is the appropriate method for valuing pension liabilities. *The Multiemployer Pension Plan System: Recent Reforms and Current Challenges: Hearing Before the Sen. Comm. on Fin.*, 114th Cong. 42 (Mar. 1, 2016) (statement of Andrew G. Biggs, Resident Scholar, Am. Enter. Inst.).

[17] *See How the Multiemployer Pension System Affects Stakeholders: Hearing Before the J. Select Comm. on Solvency of Multiemployer Pension Plans*, 115th Cong. 50 (July 25, 2018) (statement of Joshua D. Rauh, Senior Fellow & Dir. of Research, Hoover Inst., Stanford Univ.).

pension system. Instead, ARPA created an incentive for mismanagement and underfunding on the taxpayer’s dime. It is therefore incumbent on PBGC to limit the use of taxpayer dollars to the greatest extent possible and to aggressively oversee how such dollars are spent. Additionally, Congress must act in a bipartisan manner to address underfunding in multiemployer pension plans and to return PBGC’s multiemployer insurance program to self-sufficiency.

Thank you for your consideration of these comments.

Respectfully submitted,

Rep. Virginia Foxx
Ranking Member

Rep. Rick Allen
Ranking Member
Subcommittee on Health, Employment, Labor, and Pensions