

# INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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August 9, 2021

VIA ELECTRONIC MAIL: [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov)

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

Re: Comments on PBGC Interim Final Rule – Special Financial Assistance by PBGC, RIN 1212-AB53

To Whom It May Concern:

We write to comment on the above-referenced Interim Final Rule (IFR or Rule). This letter supplements comments regarding the American Rescue Plan Act of 2021 (ARPA) (Subtitle H, the Butch Lewis Emergency Pension Plan Relief Act of 2021) provided to PBGC by letter dated May 14, 2021, prior to the publication of the IFR, by the International Brotherhood of Teamsters (IBT).

The IBT reasserts and reaffirms its May 14, 2021 letter and all its recommendations. The views expressed in that letter are especially relevant in light of PBGC's policy choices as reflected in the IFR. We note that these policy matters "would have a significant impact on the pension insurance program," and therefore involve non-delegable responsibilities of the Board of Directors under the Agency's by-laws. 29 C.F.R. §4002.1. See also *Page v. PBGC*, 968 F.2d 1310, 1315-16 (D.C. Cir. 1992) (opinion by Ruth Bader Ginsburg). Accordingly, it is imperative that the Board be personally involved in the promulgation of the final regulations implementing ARPA.

**1. The PBGC's interpretation of the amount of special financial assistance (SFA) is contrary to ARPA and Congressional Intent.**

ARPA is a landmark law. The statute provides that:

[t]he amount of 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 and ending on the last day of the plan year ending in 2051 . . .

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ERISA section 4262(j); emphasis added.

The Report of the Committee on the Budget, House of Representatives, H.R. 1319, dated February 24, 2021 available online at <https://www.congress.gov/117/crpt/hrpt7/CRPT-117hrpt7.pdf> (Budget Committee Report), states the purpose of the ARPA:

The Committee believes that implementing a special financial assistance program for the most financially troubled multiemployer plans and increasing PBGC premiums for multiemployer plans will (1) **permit these plans to restore their solvency**; (2) **protect pension benefits of the participants and beneficiaries in these plans**; and (3) lessen the financial impact of these plans upon the PBGC's multiemployer plan program.

Budget Committee Report at 850; emphasis added. The Budget Committee Report further specifies the purpose of the SFA:

[t]he legislation generally would create a special financial assistance program under which cash payments would be made by the PBGC to financially troubled multiemployer pension plans **to ensure that such plans can continue paying retirees' benefits**.

Budget Committee Report at 851; emphasis added.

Finally, the Budget Committee Report states that:

The special financial assistance to be transferred to the eligible multiemployer plan is the amount necessary as demonstrated by the plan sponsor in its application. Such amount is the amount needed by the eligible multiemployer plan to be able to pay **all** benefits due during the period beginning on the date payment of the special financial assistance and ending on the last day of the plan year ending 2051, with no reduction in a participant's or beneficiary's accrued benefit as of the date of enactment of this provision, except to the extent of benefit adjustments adopted prior to the plan's application for special financial assistance, and taking into account the reinstatement of benefit suspensions (required as described below). The amount of special financial assistance is not capped by the PBGC multiemployer plan benefit guarantee.

Budget Committee Report at 854; emphasis added.

Furthermore, the Congressional Budget Office's analysis of Subtitle H is consistent with the goals set forth in the House Budget Committee Report. *See* Congressional Budget Office, Estimated Budgetary Effects of H.R. 1319, American Rescue Plan Act of 2021, available online at: <https://www.cbo.gov/publication/57056>.

PBGC's IFR contradicts this Congressional intent and the plain language of ARPA, and thereby undermines the Act's purposes. Section 9704 (ERISA Section 4262(j)(1)) states, "the amount of 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 and ending ... in 2051, with no reduction in a participant's or beneficiary's accrued

benefit ...” (emphasis added). The law uses the mandatory directive “shall be,” with all its legal meaning, and nowhere states that current and future plan assets are to be taken into account in determining the amount.

Paradoxically, PBGC concluded that the IBT’s interpretation of special financial assistance “could be supported only by a strained reading of the clear language of section 4262 (j)(1).” According to PBGC, “[t]o the extent that a plan has other means available to pay benefits, it does not require or need SFA for that purpose.” The Agency further states that “the statutory language, by requiring the payment of all benefits due, **mandates by clear implication** the considerations of all plan obligations and resources in determining the amount of SFA that is needed or is “necessary.” 86 Fed. Reg. 36598, 36601 (July 12, 2021); emphasis added.

However, it is PBGC that has adopted a strained reading of the statute. The term “plan resources,” as used by PBGC, does not appear anywhere in the Act or the legislative history nor does the Act prescribe anywhere that current assets and future contributions and withdrawal liability payments be included in the special financial assistance calculation. It appears that PBGC invented this “requirement” out of whole cloth.

The IBT is not alone in expressing a broader view about SFA amounts under the statutory language. In a letter dated March 26, 2021, soon after the passage of ARPA, the Chamber of Commerce of the United States of America shared observations with the PBGC similar to the IBT’s understanding of SFA amounts. In the words of the Chamber, “[a] reasonable interpretation of the statutory language would be to provide sufficient SFA to assure every eligible plan remains solvent through 2051 so that the PBGC will not be required to pay SFA now and regular financial assistance to each plan starting in 2052, which would be the inevitable result if the ARPA only provided the minimum SFA necessary to maintain plan solvency through 2051 . . . Some of a plan’s current assets are needed to pay current accrued benefits beyond 2051 and should not be taken into account in determining the amount of SFA.” It should go without saying that where constituencies as diverse as the Chamber and the IBT are in agreement, it would behoove the Agency to see the merit in that position.

**2. PBGC’s interpretation of the amount of SFA exceeds its regulatory authority, usurps the role of Congress, and is at odds with the agency’s statutory mission.**

The agency’s narrow interpretation of the SFA amount to be paid to an eligible plan is contrary to the plain meaning of the statute and its purposes. Moreover, the interpretation goes beyond PBGC’s permissible role in implementing the pension provisions of ARPA.

In the pension provisions of ARPA (Subtitle H), Congress specified only three (3) areas in which PBGC is to issue regulations or other guidance. First, by July 9, 2021 PBGC was to “issue regulations or guidance setting forth requirements for special financial assistance **applications** under this section.” ERISA §4262(c) (emphasis added). Specifically, PBGC was directed to limit the materials required for an application to the minimum necessary to make a determination on the application; to specify effective dates for transfers of SFA upon the approval of an application; and to provide for an alternative application for certain partitioned

plans. PBGC is also permitted to specify priority plans for consideration. ERISA §4262(d). Second, PBGC was given authority to permit “other investments” for SFA proceeds beyond investment-grade bonds. ERISA §4262(l). And third, “in consultation with the Secretary of the Treasury,” PBGC “may impose, by regulation or other guidance, reasonable conditions” on a plan receiving SFA. ERISA §4262(m). ARPA neither requires nor authorizes any other PBGC regulations. In other words, there is no “catch-all” provision for other PBGC regulations to implement ARPA. In recognition of this limited authority, PBGC asserts that its authority for the IFR “also comes from section 4002(b)(3) of ERISA, which authorizes PBGC to issue regulations to carry out the purposes of Title IV of ERISA, and from section 4003(a) of ERISA, which authorizes PBGC to conduct investigations and audits.” 86 Fed. Reg. 36598 (July 12, 2021). PBGC takes an expansive view of what it refers to as its “inherent authority.” *Id.* at 36603, n.12. But PBGC is without authority to override express statutory provisions enacted by Congress to suit its policy preferences. As demonstrated below, Congress has spoken clearly on the calculation of the amount of SFA, and it gave no voice to PBGC on some other way to calculate that amount, by express delegation or otherwise.

PBGC’s interpretation of the amount of SFA is contrary to the plain meaning of Section 4262(j) of ERISA. Section 4262(i)(1) provides that:

Special financial assistance under this section shall be a transfer of funds in the amount necessary as demonstrated by the plan sponsor on the application for such special financial assistance, in accordance with the requirements described in subsection (j) . . .

In turn, section 4262(j) provides:

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

Clearly, Congress did not expressly delegate authority to PBGC to calculate that amount. In ERISA § 4062(b), for example, the liability due to PBGC upon termination of a single-employer plan is defined as the “total amount of unfunded benefit liabilities . . . calculated . . . in accordance with regulations prescribed by the corporation.” 29 U.S.C. § 1362(b). Congress knows how to delegate authority to PBGC to determine an amount, and it did not do so in ARPA.

Moreover, PBGC asserts its “belief” that the “plain meaning” of the statutory language supports its interpretation of 4262(j): “PBGC believes that the plain meaning of the statutory language is 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. This would be so if Congress had explicitly stated that all plan assets and resources are to be taken into account. But Congress did not do so. PBGC turns plain meaning on its head by saying “[i]f Congress had contemplated the exclusion of these resources in the calculation of the amount of SFA ‘required for the plan,’ it would have done so explicitly.” *Id.* As the IBT stated in its May 14, 2021 comment letter to PBGC:

The legislative language in the provision quoted above uses the mandatory directive “shall be”, not “may be”, in describing the special financial assistance. The language refers to “all benefits due during the period” (through 2051), which would include projected benefit obligations for actives, terminated vested participants, retirees and beneficiaries. The statute refers to “such amount required for the plan to pay all benefits due”, defined as future benefit payment cash flows during the period, not merely accrued benefits or unfunded liability. In our view, Congress did not provide discretion to PBGC to pay some lesser amount as special financial assistance.

The IFR effectively re-writes the statutory language to require that current and future plan resources be deducted from all benefits due through 2051. Such action is beyond the agency’s authority and usurps the role of Congress. Under the Administrative Procedure Act, a reviewing court may set aside agency action that is beyond the agency’s authority. E.g., *Chamber of Commerce v. US Dept of Labor*, 885 F.3d 360 (5th Cir. 2018)

In the Preamble to the IFR, PBGC criticizes commenters (including the IBT) advocating for a broader interpretation of the amount of SFA as advancing “a particular policy goal or desired outcome” including “long-term sustainability, avoiding a recurrence of the current crisis, protection of retirees, and simplicity.” 86 Fed. Reg. at 36601. It is concerning that PBGC does not share these policy goals, as they are fully consistent with its statutory missions, which are to:

- Encourage the continuation and maintenance of defined benefit plans for the benefit of their participants;
- Provide for the timely and uninterrupted payment of benefits to such participants; and
- Maintain low premiums consistent with its other statutory obligations.

ERISA §4002(a). It appears that PBGC has lost sight of its mission.

### **3. PBGC’s interpretation of special financial assistance amounts, combined with structural flaws in the Act, guarantees that many plans will fail before 2051.**

ARPA has a number of inherent technical problems that threaten Congress’ goal of protecting troubled multiemployer plan participants’ accrued benefits over the next 30 years. First and foremost, ARPA’s investment mandate for the segregated SFA assets creates a 300 basis-point return gap between today’s investment-grade bond yields (2.5 percent) and the legislatively required discount rate for projected accrued liabilities (approximately 5.5 percent). ARPA’s legitimate objective of managing the future investment risk of SFA assets is in conflict with the Act’s mandate on discounting accrued benefit liabilities to be covered by SFA.

A highly regarded fixed-income asset manager has advised the IBT that a cash-matching strategy using only investment-grade securities would cover less than 65 percent of the benefits expected to be paid through 2051, exhausting the SFA assets in 16 years. This negative arbitrage dilemma is built into ARPA and cannot be corrected absent subsequent legislation. PBGC acknowledges this financial conundrum and has sought input from the plan and investment community on the subject. But PBGC’s request is pointless – there is no solution when

legislation defies the laws of math! The problem created by ARPA's public policy mismatch between investment risk and its measure of discounted benefit liabilities is further exacerbated by PBGC's interpretation of SFA amount. PBGC's definition of SFA amount destroys Congress' intent for these troubled multiemployer plans to survive through 2051 and beyond. All available non-SFA plan assets, including current assets, future contributions and withdrawal liability payments, are sorely needed to neutralize all or part of the negative arbitrage costs described here and extend plan solvency beyond 2051. Therefore, those assets should not be counted in determining the amount of SFA.

**4. Multiemployer Pension Reform Act (MPRA) suspension of benefit plan trustees face a Hobbesian choice with fiduciary implications.**

PBGC's Rule on the SFA amount has the potential to create a serious legal dilemma for boards of trustees of MPRA suspension of benefit plans. Do trustees apply for SFA and restore benefits knowing that their plan will become insolvent before 2051, or is the possibility of solvency with the MPRA cuts perceived by trustees as preferable when considering the fact that their plan will not be eligible for MPRA cuts again, along with the almost certain likelihood of retiree benefits being cut further to PBGC-guaranteed levels? This lose-lose decision forced on trustees by the IFR will inflame the already present inter-generational conflict between active workers and retirees, increasing the trustee's legal exposure. The U.S. Department of Labor's recent statement suggesting there are no "potential fiduciary liability concerns about undoing current or precluding future MPRA suspensions" provides little comfort to trustees facing this decision. This result was surely not the outcome that Congress intended.

**5. A number of plans that are eligible for SFA support will receive nothing or de minimis assistance.**

Another unintended result of the PBGC definition of SFA amount is that a number of SFA-eligible plans will receive no assistance or minimal assistance (i.e., less than 10 years of benefit payments). Ironically, those plans that were most aggressive with their Rehabilitation plans, or are currently better funded, and whose insolvency is projected to be closer to 19-20 years into the future, will be the most penalized by PBGC's interim rule.

**6. PBGC's proposed withdrawal liability rules provide a perverse incentive for employers to withdraw from plans receiving SFA.**

In the House version of what became ARPA, H.R. 1319, "[a]n employer's withdrawal liability is calculated without taking into account special financial assistance received under this provision until the plan year beginning 15 calendar years after the effective date of the special financial assistance." (Budget Committee Report at 855). Although this provision did not ultimately become law, it offered a strong model for discouraging employers from withdrawing from plans and capturing a SFA windfall by substantially reducing or eliminating withdrawal liability compared to pre-ARPA. Further, the IBT recommended much stronger plan protections

in its May 14, 2021 letter to PBGC, including not counting SFA in the withdrawal liability calculation, using mass withdrawal interest rates and extending the conditional period through the entire SFA 30-year period ending in 2051.

Strangely, PBGC rejected this alternative condition because it determined it “to be more administratively complex and therefore less desirable” (86 Fed. Reg. at 36619). Contrary to its own long-term financial interest, PBGC ruled that SFA would be included as plan assets in the withdrawal liability calculation, with plans required to use mass withdrawal liability interest rates to discount liabilities for a minimum 10-year period. The IBT believes this creates a massive incentive for employers to withdraw immediately after the infusion of SFA into the plan, because the unfunded liability will dramatically decrease or even disappear at that time, even at mass withdrawal liability interest rates. PBGC’s assertion that, “[p]ayment of SFA was not intended to reduce withdrawal liability or to make it easier for employers to withdraw” (*Id.* at 36611), will ironically become a reality if the withdrawal liability conditions in the IFR are not modified in the final rule.

**7. The benefit increase conditions for SFA in conjunction with the PBGC’s definition of SFA amounts undermine plan integrity.**

Active workers have borne the brunt of the multiemployer pension crisis for the past two decades. This generation of workers has absorbed benefit reductions and has seen their benefits erode to both wage and price inflation. At the same time, a significant portion of their non-wage compensation is being contributed into plans where the contributions are non-benefit bearing. This is not a sustainable economic relationship. Active worker commitment to troubled multiemployer plans is waning.

With the enactment of ARPA and creation of SFA, active workers deserve an alternative pension arrangement that offers the potential to rebuild benefit levels consistent with wages, in contrast to the bleak future offered by the PBGC benefit increase conditional rules, which essentially freeze benefits for the next 30 years. The PBGC’s assertion that “plans still have the flexibility to offer active participants more attractive benefit accruals when the plan is able to afford them” is both cynical and disingenuous. In the IBT’s May 14, 2021 comments to the PBGC, we offered a potential solution: freeze the legacy plan benefit for current and future active employees, which actually reduces the amount of required SFA, and allow some existing contributions as well as newly negotiated contributions to support a future service accrued benefit in a new defined benefit plan. Employer contributions to the legacy plan could only be reduced by the level of normal cost of the frozen benefit. By supporting this rational redesign, PBGC could effectively reduce SFA commitments, maintain and grow defined benefit pensions for active workers, and continue to receive premium income from the new future service plan.

**8. PBGC's regulatory direction on plan work activity assumptions ignores economic trends around the changing American workplace.**

In PBGC SFA 21-02, Special Financial Assistance Assumptions <https://www.pbgc.gov/sites/default/files/sfa/sfa-assumptions-guidance.pdf>, PBGC offers direction on proposed changes to the contribution base units (CBU) assumption. Section V.A. asserts that PBGC will not accept a CBU assumption that is not adequately supported by historical data or where the change is **speculative**. On one hand, PBGC admits the difficulty of projecting industry trends over a 30-year period, but then the Agency determines that the only way to fix that impossible problem is to depend on historical data informed by recent trends.

This backward-looking mindset defies economic trends in many industries. For the past several decades there has been a public debate in the United States about the future of work and the impact of technological change. For example, the IBT's warehouse and trucking jurisdiction is already subject to a wave of technological impacts, from robots to driverless trucks. The business press and academic writing are replete with articles, research and editorials on the subject of technological change and automation and how traditional jobs will be adversely affected. Albertsons Companies, in their April 13, 2021 comment letter to the PBGC, directly refers to the expected expansion of technological change in the supermarket industry that "will cause material reductions in contribution base units and must be considered in the amount of assistance the PBGC provides."

Yet, Section V.A. specifically states that "PBGC generally will not accept a CBU assumption that anticipates extreme automation of an industry (e.g., self-driving trucks replacing all human truck drivers)." PBGC also seems to suggest that any long-term CBU change outside of +/- 1 percent of the prior year's level is not generally acceptable.

This guidance is unreasonable, and may even contravene Actuarial Standard of Practice (ASOP) #35, which requires the actuarial profession to consider "relevant factors known to the actuary that may affect future experience, such as the economic conditions of the area or industry, availability of alternative employment, or human resource policy or practices of the employer" (ASOP #35, Section 3.3.4 (d)). Assumptions that simply ignore the view of experts are further at odds with the Actuarial Standards of Practice which recognize that highly relevant data and analysis will come from a variety of sources. The standards explicitly sanction actuaries to incorporate the views of experts in setting assumptions (ASOP #35, Section 3.10.6). This entire discussion of CBUs and the uncertainty of future work activity also argues for not including the value of future contributions in determining SFA amounts.

**9. PBGC's request for public input regarding permissible investments of SFA under Section 4262.14.**

As the original proponent of the Butch Lewis Act concept when it was conceived as a Federal loan program, the IBT advocated that loan assets be invested in very conservative, liability-driven strategies, including cash-matched and duration-matched strategies. The purchase of annuity contracts from insurance companies that meet ERISA fiduciary standards was also



recommended. We further suggested in our May 14, 2021 letter to PBGC that the National Association of Insurance Commissioners (NAIC) investment model for the insurance industry be utilized to assist the Agency in identifying eligible securities and asset classes. Further to that point, a high reputation asset manager specializing in liability-driven investment (LDI) strategies recommended that commercial mortgage-backed securities (CMBS), collateralized loan obligations (CLO) and trade finance loans be considered as permissible securities to invest SFA assets because these securities have investment-grade characteristics. This LDI manager suggested that allocations to any one of these strategies be capped at 10%, with a maximum exposure to this special group of securities capped at 25 percent. Maximizing these securities based on these suggestions could add 100 basis points of yield value to a SFA portfolio, which is still 200 basis points short of closing the existing ARPA gap.

**10. Transparency and sharing PBGC’s modeling of SFA eligible plans and amounts.**

The Preamble to the IFR refers to PBGC’s estimate of the total amount of SFA at \$94 billion to 200 plans. The IBT hereby requests that the PBGC:

1. Identify the 200 plans referenced in the Preamble by eligibility category, and how much SFA each plan is projected to receive.
2. Describe the methods and assumptions used in the calculation of the \$94 billion.
3. Explain PBGC’s estimate in footnote 11 on page 36601 of the Federal Register “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.”
4. Provide PBGC’s long-term financial solvency projection of the multiemployer insurance program based on the IFR.
5. Provide all reports related to the above inquiries prepared by PBGC’s actuaries in accordance with the Actuarial Standards of Practices (ASOP) issued by the Actuarial Standards Board, including disclosure of methods and assumptions. Where assumptions are prescribed, provide commentary by PBGC’s actuaries on whether the prescribed assumptions significantly conflict with what, in the actuary’s professional judgment, would be appropriate.

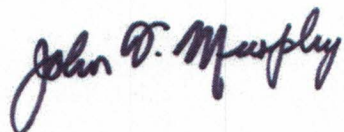
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Contrary to the statutory language of ARPA and Congressional intent, PBGC has decided to apply the most restrictive interpretation of SFA amount to the detriment of about three million affected plan participants. The Agency has decreed that ARPA is “not a permanent solution” and was only meant “to address the immediate crisis facing severely underfunded multiemployer plans and the solvency of the PBGC.” Those who proposed and enacted ARPA have a very different view. For instance, Senate Majority Leader Schumer stated on the floor that the SFA “program is intended to be a long-term solution for these ailing plans” and that plans receiving such assistance should not be “placed in a worse long-term funding position than they are today or are projected to be

into the future.” Cong. Rec. (Daily Ed.), March 5, 2021, S1270. Why would Congress require 30 years of benefit financial support if it was merely interested in a short-term solution to the multiemployer pension crisis? Why would Congress mandate highly conservative investment restrictions on SFA if not for the need to manage the risk of investing those government-financed assets for the long term to ensure that the SFA assets covered 30 years of projected accrued benefits?

Moreover, ARPA’s requirement that all projections of SFA amounts “shall be performed on a deterministic basis” greatly under-estimates the true volatility and risk profile of current plan assets, further undermining the integrity of PBGC’s interpretation. Capital markets are currently overvalued – what happens if a major asset drawdown occurs in the first ten years of this program? What effect does the Agency’s IFR have on the PBGC’s multiemployer insurance program and what is the new insolvency date for that program? “As a prudent steward of taxpayer funds” (as PBGC describes itself in the IFR’s Preamble), the Agency has taken a legally questionable approach to its duties under ARPA. We respectfully request that PBGC (including its Board of Directors) consider all the points raised in this letter prior to finalizing the Rule.

Very truly yours,

A handwritten signature in black ink that reads "John F. Murphy". The signature is written in a cursive style with a large, prominent "J" and "M".

John F. Murphy  
Vice-President  
International Brotherhood of Teamsters