

LOCAL 888 PENSION FUND

MAX BRUNY
CHAIRMAN OF THE BOARD

ROSALBA PÉREZ
FUND DIRECTOR

August 11, 2021

Via Electronic Mail (reg.comments@pbgc.gov)

Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005
Attn: Daniel S. Liebman, Esq., Deputy General Counsel

Re: Comments on Rulemaking Titled Special Financial Assistance by PBGC (RIN 1212-AB53)

Dear Mr. Liebman:

The Local 888 Pension Fund (“Fund”) is a multiemployer defined benefit pension plan covering approximately 4,000 participants who work, or have retired from work, in the retail industry in the New York/New Jersey metropolitan area. The Fund was in critical and declining status for the 2020 plan year under the Pension Protection Act of 2006 and is projected to become insolvent in 2027.

On behalf of the Fund’s Board of Trustees, we provide the following comments on the interim final rule (“Rule”) issued by PBGC and published in the Federal Register on July 12, 2021 relating to the special financial assistance provisions for financially troubled multiemployer pension funds under the American Rescue Plan Act of 2021 (“ARPA”).

Although there are a number of uncertainties regarding ARPA’s provisions relating to the multiemployer special financial assistance, the law’s intent and stated mandate are clear. Under Section 4262(j)(1) of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended by ARPA, multiemployer pension funds eligible for special financial assistance shall receive “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”

There are a number of provisions of ARPA that are open to multiple interpretations, and there are also provisions that, on the surface, may appear to be inconsistent with the Congressional mandate that eligible plans remain solvent until 2051. We recognize the difficult challenge PBGC faces in developing regulations that are consistent with both the statutory language and the legislative intent, and the Rule achieves this goal in many respects. However, there are additional opportunities for adopting reasonable statutory interpretations that would

align the Rule with the Congressional mandate to a significantly greater extent without a substantial increase to the overall cost.¹

Specifically, the interaction of the discount rate assumptions that the Rule requires for calculating the special financial assistance amount, and the limited investment options available with respect to the special financial assistance under the Rule, are inconsistent with the goal that the special financial assistance be sufficient to pay all benefits through 2051. As discussed below, two alternative approaches that are reasonable and consistent with the statutory language are available to remedy this inconsistency. Therefore, PBGC should change either or both of the relevant provisions of the Rule to better harmonize the Rule with the Congressional mandate.

1. Actuarial Assumptions Applicable to Determining Amount of Financial Assistance.

ARPA restricts the ability of a multiemployer plan to change assumptions, which is apparently intended to prevent a plan from manipulating the assumptions to maximize the amount of special financial assistance to which it will be entitled. This is a reasonable goal and there are appropriate restrictions.

Section 4262(e)(2)(A) of ERISA requires that the interest rate used to determine the amount of special financial assistance be equal to “the interest rate used by the plan in its most recently completed certification of plan status before January 1, 2021,” subject to a specified cap. The cap is equal to the third segment rate from the single-employer funding rules, without regard to the 25-year corridor, plus 200 basis points, which results in a cap of roughly 5.5% under current economic conditions. Since most plans use interest rates above 5.5% in their plan status certifications, in general the interest rate under ARPA will be 5.5%.

The Rule provides that this required interest rate applies not only to the expected returns on the existing plan resources, but also to the expected returns on the special financial assistance. However, the special financial assistance must be invested entirely in investment-grade corporate bonds, which are currently yielding significantly less than 5.5%. As a result, eligible plans are almost guaranteed to underperform the assumptions used to determine the amount of assistance, which means that they will not achieve the goal of remaining solvent until 2051 unless existing plan resources can achieve a return materially greater than what the Fund is currently projecting to earn on those existing plan resources.

As an example of the discord created by the Rule’s interest rate assumption provisions when coupled with its investment restrictions, the Fund’s actuary has projected that the amount of special financial assistance payable to the Fund, as determined under Section 4262.4 of the Rule, is unlikely to enable the Fund to remain solvent through 2051 using the Fund’s current long-term return assumption for existing plan resources.

¹ We only mention this cost because PBGC appears to believe it is a relevant consideration. However, we note that ARPA did not include an aggregate cap on the appropriation for special financial assistance, and it is entirely inappropriate for PBGC to read such a limitation into the statute, particularly where it undermines Congress’s goal of keeping plans solvent until at least 2051.

The interest rates used by plans in their 2020 status certifications apply to the existing plan resources that are managed by trustees, consistent with their fiduciary duties. Special financial assistance must be segregated from the existing plan resources and the investment of this assistance is governed by rules that are completely unrelated to, and dissimilar from, the rules governing the investment of current plan assets. The segregation of special financial assistance from other assets and the dramatically different framework for investing the two pools of assets implies that different and distinct interest assumptions must apply to the separate asset pools.

While PBGC notes in its preamble to the Rule that Section 4262(e)(4) of ERISA, as amended by ARPA, mandates the use of the interest rate described above and prohibits the plan from proposing a change to this interest rate assumption, the statute is silent on PBGC's authority regarding the interest rate assumption; it certainly does not expressly prohibit PBGC from adjusting the interest rate assumption as necessary to ensure that the core purpose of the statute, namely providing eligible financially distressed multiemployer pension funds with the amount necessary to pay full benefits through 2051, is met. Further, as the agency responsible for implementing the special financial assistance provisions of ARPA, PBGC has not only the authority but also the mandate to harmonize the various sections of the statute in a manner designed to satisfy its overarching purpose.

Given this authority and mandate, the PBGC should establish separate assumptions for the special financial assistance. The 2020 status certifications provide interest rates that are applicable to the existing plan assets, but do not provide interest rates applicable to special financial assistance. Since special financial assistance did not exist and was not contemplated when the 2020 interest rates were selected, the scope of those rates can be understood to be limited to existing plan assets. It is therefore a reasonable interpretation of the statute for PBGC to apply the 2020 status certification interest rates to the existing plan assets and treat the interest rate applicable to special financial assistance as a newly established assumption by PBGC that has no precedent.

The expectation that after receiving special financial assistance, the Fund will be insolvent before 2051 is directly contrary to the express purpose and direction of ARPA. Consequently, the Fund's Trustees respectfully request that PBGC adopt the reasonable interpretations discussed in this section. Under these interpretations, PBGC has the authority to revise the Rule's interest rate assumption provisions applicable to calculating the amount of special financial assistance such that, when implemented in combination with the other sections of the Rule, the interest rate assumption produces a special financial assistance amount that is projected to maintain each eligible fund's solvency through the end of 2051.

2. Investment Options Available for Special Financial Assistance.

If PBGC does not adjust the interest rate assumption applicable to the calculation of the special financial assistance amount, then the Fund alternatively suggests that the Rule be revised to provide special financial assistance recipients with greater flexibility to select a wider variety of investment options for the special financial assistance.

Section 4262(l) of ERISA, as amended by ARPA, clearly grants PBGC discretion to expand the scope of investment options applicable to special financial assistance amounts, stating that the special financial assistance may be invested in investment-grade bonds “or other investments as permitted by the corporation.” Congress would not have granted PBGC this authority if it did not intend for it to be exercised in a meaningful way. Further, if Congress had intended that the other investments permitted by PBGC be similar in character to investment-grade corporate bonds, it would have said so. The absence of any such qualifiers is a clear indication that Congress intended the default investment should be investment grade bonds but that PBGC should exercise its independent judgement to allow other investments to the extent consistent with the overall objective of the legislation.

In the preamble to the Rule, PBGC notes its agreement with commenters’ concerns that limiting the scope of investment options for special financial assistance amounts to investment grade bonds could result in recipient pension funds becoming insolvent well in advance of 2052. However, the questions that PBGC poses in the preamble about expanding the available investment options are limited and appear to be focused on investment options that resemble investment grade fixed income. The Fund believes that a better approach to determining the appropriate investment options is to consider which options are most likely to assist recipient funds in achieving ARPA’s stated goal of enabling such funds to pay full benefits through 2051, considering the assumptions required under the Rule for calculating the lump sum special financial assistance amount.

Put another way, the Rule must function holistically -- the provisions regarding assumptions and permissible investments must work in tandem to satisfy the Congressional mandate that the special financial assistance be sufficient for eligible pension plans to pay benefits through 2051. While the calculation of the special financial assistance, and the investment returns on such amounts, are subject to actuarial and investment projections and there can be no guarantee that the special financial assistance will last through 2051, the Rule’s mandated design at the outset must reasonably be expected to result in the special financial assistance lasting through 2051. Of course, consistent with ARPA’s apparent reasonable intent to prevent unreasonable speculation with the financial assistance that is received, PBGC should still restrict permissible asset allocations and investments, but the goal should be to allow asset allocations and investments that are designed to achieve the assumed rate of return but not permit those that are designed to greatly exceed it.

If PBGC does not believe that it can mandate assumptions as we suggest, given that different recipient funds will be subject to different interest rate assumptions when calculating the amount of special financial assistance, it would be reasonable to revise the Rule such that it allows the permissible investment options under the Rule to vary depending on the specific assumptions applicable to each recipient fund. For example, the Rule could permit recipient funds to develop an investment policy designed to achieve long-term investment returns that target the interest rate assumption each such fund is required to apply when calculating the amount of special financial assistance under the Rule. In this way, there would be a greater likelihood their special financial assistance would provide for the full payment of benefits through 2051.

The Board of Trustees of the Fund thanks PBGC for its consideration of the above suggestions and would be happy to discuss these matters in more detail at PBGC's convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'Max Bruny', written over a horizontal line.

Max Bruny, Chair

On behalf of the Board of Trustees

cc: Board of Trustees (via email)
Barry Slevin, Esq. (via email)
Paul Esposito, Esq. (via email)
Rosalba Pérez (via email)