NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005

RE: PBGC Request for Comments on Interim Final Rule Implementing the Special Financial Assistance Program in the American Rescue Plan Act (RIN: 1212-AB53)

Dear Mr. Liebman:

The National Coordinating Committee for Multiemployer Plans (NCCMP) welcomes the opportunity to submit comments on the Interim Final Rule (IFR) that the Pension Benefit Guaranty Corporation (PBGC) recently published in the Federal Register. The IFR sets out the rules and parameters governing special financial assistance (SFA) to multiemployer pension plans under the program established by Congress in the American Rescue Plan Act of 2021 (ARPA).

NCCMP is the only national organization devoted exclusively to protecting the interests of the job-creating employers of America and their labor partners, as well as the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America's working men and women.

NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code (IRC) section 501(c)(4), with members, plans, and contributing employers in every major segment of the multiemployer universe. Those segments include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking industries. Multiemployer plans are jointly trusteed by employer and employee trustees.

NCCMP was instrumental in the passage of both the multiemployer provisions of the Pension Protection Act of 2006 (PPA) and the Multiemployer Pension Reform Act of 2014 (MPRA) and has served as a resource to Congress for many years leading up to the enactment of ARPA because of NCCMP's depth of knowledge regarding multiemployer pension plans. NCCMP has provided technical support to members of Congress and their staff in their extraordinary efforts to pass ARPA.

NCCMP offers the following comments to encourage the PBGC to review its IFR and consider NCCMP's recommendations to better effectuate Congress' intent to restore troubled multiemployer pension plans to solvency so as to help protect participants' and retirees' hard-earned pension benefits within the statutory framework established by Congress. We welcome the opportunity to discuss the attached document with you further.

Regards,

Michael D. Scott
Executive Director

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I. Background

Section 9704(b) of ARPA adds a new section 4262 to the Employee Retirement Income Security Act of 1974, as amended (ERISA). Under this new ERISA section 4262, the PBGC is directed to provide SFA to eligible multiemployer pension plans. The SFA is to be provided in the form of one-time, non-refundable, lump-sum payments to plans. Section 9704(a) of ARPA also makes a permanent appropriation of federal funds to the PBGC in "such amounts as are necessary" so that the PBGC may carry out this new duty to provide SFA to eligible plans.

New ERISA section 4262 establishes, among other things, eligibility criteria for SFA, the process by which eligible plans are to apply for SFA, and requirements for determining how much SFA shall be provided to an eligible plan. Section 4262 also directs the PBGC to issue regulations or guidance setting out requirements for applications for SFA.

On July 9, 2021, the PBGC released its IFR that sets out the requirements for applications for SFA and related restrictions and conditions. The IFR and Supplementary Information were published in the Federal Register[1] on July 12, 2021.

II. NCCMP Comments on IFR

A. Overview of comments

NCCMP's analysis suggests substantially fewer plans and participants will be helped than PBGC has identified

In the IFR, the PBGC made very conservative interpretations of the ARPA requirements, of the purpose of the SFA program, and of PBGC's own authority. Instead of restoring the most financially troubled multiemployer pension plans to solvency, as Congress had intended[2], the PBGC made interpretations that all but guarantee that nearly three-quarters of the plans eligible for SFA will receive either nothing or insufficient amounts to remain solvent through 2051. Of the plans that will be able to pay benefits through 2051, only three are projected to have their assets begin to increase by the end of the 2051 projection period, the solvent indefinitely standard for approval of MPRA suspensions.

To determine the reach of the relief provided under the SFA program, as implemented by the IFR, NCCMP engaged Segal Consulting to analyze recently available Form 5500 information. Although we cannot replicate a plan actuary's projection of cash flow for individual plans, we estimate[3] the following outcomes from the IFR:

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[1] 86 Fed. Reg. 36598-36631.

[2] *See* Report of the House Committee on the Budget to accompany H.R. 1319, American Rescue Plan Act of 2021, H.R. Rep. No. 117-7, at 850. Accessed at https://www.congress.gov/117/crpt/hrpt7/CRPT-117hrpt7.pdf.

[3] These projections and estimates are based on extreme simplifications as to future benefit payments, expenses and contributions through 2051. The estimated findings are based on the following data, assumptions and methodology:

- The database uses 2018 Form 5500 data for calendar year plans and 2017 Form 5500 data for non-calendar year plans.

- There are 242 plans covering 2,225,000 participants that are estimated to be eligible under section 4262(b)(1) for SFA.
- Of those 242 eligible plans, 68 plans covering 693,000 participants are projected to receive no SFA.
- Of the 174 plans that are projected to receive SFA, only 69 plans covering 1,150,000 participants are projected to have assets remaining at the end of 2051. We have assumed the SFA will be used to pay benefits and administrative expenses until those funds are exhausted. This allows non-SFA assets to be projected at the plan-specific actuarially assumed investment return rate for the maximum amount of time.
- Of the 69 plans with assets at the end of 2051, only three plans have assets that are projected to begin to increase by the end of the 2051 projection period.[4]
- Another 105 plans covering 385,000 participants are projected to have no assets available to pay benefits by the end of 2051.

Mismatch between discount rate used by the PBGC and expected return on SFA portfolio frustrates the stated Congressional intent of the SFA program

One significant factor in the number of plans that are projected to become insolvent prior to 2052 is the use of the interest rate limit (approximately 5.5%) by most plans to discount the amount of SFA calculated, despite the requirement that the proceeds of the SFA be invested in publicly traded investment grade bonds, which today yield approximately 2% net of investment management fees. This requirement frustrates the Congressional intent, is not mandated by the statute, and is not justified under any financial or investment theory.

The IFR creates a fiduciary quagmire for trustees of plans with MPRA suspensions

Because plans were required to demonstrate solvency in order to have their MPRA suspensions approved (MPRA-suspended plans), and the IFR places SFA recipient plans on a course towards insolvency no later than 2051, the trustees of the 18 MPRA-suspended plans will face a very difficult fiduciary decision. They will be forced to decide whether to reject the SFA and keep their plans solvent, or accept the SFA and put their plans on the path to almost certain insolvency. This

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- In general, benefit payments, contributions, and administrative expenses were assumed to be level. For large plans (defined as a plan with annual benefit payments in excess of $30 million) the projected amounts were based on supplemental information available from MPRA applications and plan status certifications. For plans with MPRA suspensions where the Form 5500 was filed after the benefits were suspended, the projections do not reflect the restoration of benefits.
- SFA funds are estimated as the projected January 1, 2022 market value, plus the present value of projected contributions minus projected benefits and administrative expenses at 5.5% (or the plan's assumed investment return rate, if lower).
- Assets were projected using the plan's assumed investment return rate for non-SFA assets and 2% for SFA assets.

[4] Assets that are projected to increase at the end of the 2051 projection period reflect the solvent indefinitely standard used in MPRA regulations and is a strong indicator as to whether long-term financial health is restored to plans that receive SFA.

choice pits the interests of the retirees, who would receive an immediate benefit from SFA, against the interests of the active workforce, who would see their benefits sharply reduced when their plans went insolvent. If trustees of those plans chose to accept the SFA, the active workforce will correctly argue that their contributions (i.e., deferred wages) are being used to subsidize the retirees and the PBGC's SFA program until the plan is insolvent.

B. Discussion of comments

1. Many otherwise eligible plans in critical status will not receive any SFA

Eligibility Criteria

ERISA section 4262(b) establishes the four categories of multiemployer pension plans that are eligible to apply for and receive SFA. To be an "eligible plan" for purposes of section 4262, a multiemployer plan must meet the criteria of one of the four categories. One of these categories, set out in section 4262(b)(1)(C), consists of multiemployer plans that are certified to be in "critical" status (within the meaning of ERISA section 305(b)(2)) and that meet specified funding and participant criteria. Notwithstanding the statutory directive to provide SFA to these eligible plans, the IFR provides that no assistance will be provided to plans for which current assets added to other resources equal or exceed the present value of the benefits expected to be provided through the end of a plan's plan year ending in 2051.

Sixty-eight eligible critical status plans with almost 700,000 participants will receive no relief

Under the very restrictive interpretations of section 4262 taken by the PBGC to deduct all of the assets and other resources of these eligible plans from the amount of the SFA they can receive, many SFA-eligible critical status plans will be entitled to receive nothing from the program. We estimate that approximately 68 plans will be in this situation, covering about 693,000 participants.

Without SFA relief, critical status plans remain financially vulnerable

Eligible critical status plans, as required by the eligibility criteria, have a heavy burden of active to inactive participants (less than 2 to 3) and a current liability funded percentage of less than 40%. These plans have made drastic reductions in benefits and have required participating employers and employees to bargain dramatically higher contribution rates under their rehabilitation plans since entering critical status in efforts to improve their funding. For a significant number, the imbalance between low benefits and high contribution rates will make the plans unsustainable in the long term because of deteriorating support from the active workforce and the bargaining parties.

2. For the vast majority of plans that receive SFA, the assistance will only forestall insolvency, with many plans becoming insolvent well before 2051

ERISA section 4262(j)(1) does not require the IFR's restrictive interpretation of the amount of SFA available to plans

ERISA section 4262(j)(1) describes the amount of SFA that is required to be provided to eligible plans under the SFA program. Specifically, section 4262(j)(1) requires—

> 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 . . . .

(Emphasis added.)

In IFR section 4262.4, the PBGC set out its interpretation of ERISA section 4262(j). This section of the IFR describes the amount of SFA that is to be provided to an eligible plan as being equal to the value of the plan's "obligations" (defined as being the sum of the present value of all benefit payments and administrative expenses expected to be paid by the plan through the last day of the plan year ending in 2051), *minus* the value of the plan's "resources" (defined as being the sum of the market value of plan assets and the present value of expected plan income – contributions at previously negotiated rates, withdrawal liability payments, etc. – through the last day of the plan year ending in 2051).

In the Supplementary Information section of the IFR, the PBGC set out its explanation for including the market value of plan assets and present value of expected plan income in the calculation of the amount of SFA to be paid.

> The heart of the matter is found in the requirement that the SFA be "*the* amount *necessary*" or "*required* for the plan to pay all benefits due." To the extent that a plan has other means available to pay benefits, it does not *require* or *need* SFA for that purpose. Thus, all of a plan's resources must be considered in determining the amount of SFA for the plan. Moreover, since the determination must be made by looking through the end of the last plan year ending in 2051, the resources to be considered must include plan assets and income (contributions, investment returns, etc.). If Congress had contemplated the exclusion of these resources in the calculation of the SFA "*required* for the plan," it would have done so explicitly.[5]

a. The IFR's full inclusion of the plans' other resources in determining SFA unnecessarily limits the amount provided

Congress did not direct PBGC to limit the amount of SFA available to plans

The text of ERISA section 4262(j)(1) includes no words that expressly require the inclusion of plan assets or expected plan income in the calculation of the amount of SFA to be provided. Instead, the requirement appears solely in the IFR. As explained in the Supplemental Information section of the IFR, the PBGC included plan assets and expected plan contribution income in the calculation of plan resources based on its interpretation of the words "necessary" as used in ERISA section 4262(i)(1) and "required" as used in section 4262(j)(1). The PBGC postulated that to the extent a plan has other resources available to pay benefits, it does not "need" or "require" SFA to

[5] 86 Fed. Reg. 36601.

do so. Section 4262.4 of the IFR therefore includes all plan resources in the calculation of the amount of SFA to be paid to an eligible plan. The PBGC ends the rationale for its interpretation with the statement, "If Congress had contemplated the exclusion of these resources [plan assets and expected plan income] in the calculation of the SFA '*required* for the plan,' it would have done so explicitly." However, this rationale does not appear to take into consideration how Congress typically writes legislation—if Congress wanted to require all plan resources be specifically included, or wanted to mandate a present value calculation for that matter, it would have specifically directed the PBGC to do so.

Examples of Congress' specificity

For example, we see this affirmative level of detail in Congress' prescription of the components of a particular calculation in ERISA[6] and the Internal Revenue Code[7], where Congress specifically directs what to include as "charges to [the funding standard] account" and "credits to [the funding standard] account" for purposes of calculating the accumulated funding deficiency of a multiemployer plan. ERISA also specifically directs present value calculations where it intends a present value calculation.[8]

In the Federal Credit Reform Act (FCRA), we see similar examples of Congressional specificity for calculating the "cost" of a direct loan[9] and in establishing the rate to discount for net present value purposes[10]. In the 2020 CARES Act[11], Congress established the Paycheck Protection Program (PPP) and provided detailed instructions for the Small Business Administration to implement the loan/loan forgiveness program on issues such as "payroll costs"[12].

Congress also knows how to establish caps on rescue programs in legislation, as it did for the PPP[13] (capped at $349 billion) and the Troubled Asset Relief Program established by the Emergency Economic Stabilization Act of 2008[14] (capped at $700 billion).

Simply put, when Congress wants something done in a particular manner, it says so specifically. When it does not provide that granular level of specificity, it implicitly grants the Executive Branch with the necessary discretion to implement the law in a manner that does not frustrate the purposes of the legislation.[15]

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[6] ERISA §304(b)(2).
[7] IRC §431(b)(2).
[8] *See, e.g.,* ERISA section 4041(b)(2)(A)(i)(II), (c)(2)(A)(ii)(II).
[9] FCRA §502(5)(B), 2 U.S.C. §661a(5)(B)
[10] FCRA §502(5)(E), 2 U.S.C. §661a(5)(E)
[11] Pub. L. No. 116-136, 134 Stat. 281.
[12] 15 U.S.C. §636(a)(36)(A)(viii).
[13] Pub. L. No. 116-136, 134 Stat. 281.
[14] Pub. L. No. 110-343, 122 Stat. 3765.
[15] As the Supreme Court has repeatedly held:

> [W]here a statute leaves a "gap" or is "ambigu[ous]," we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.

Cuozzo Speed Technologies, LLC v. Lee, 136 S. Ct. 2131, 2142 (2016), *citing* United States v. Mead Corp., 533 U.S. 218, 229 (2001), and Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

Nevertheless, the PBGC relies on an unduly narrow definition of the word "necessary", a definition that is unsupportable in the law. Instead, "necessary" has a more flexible definition that must be derived from the context in which it is used.[16]

Any PBGC reliance on CBO cost projections for statutory interpretation is misplaced

The PBGC elaborates on its rationale for including the plan's available resources in footnote 11 of the Supplemental Information of the IFR, which reads as follows.

> Furthermore, it 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 distributed under the program would increase by 2 to 4 times the estimated $94 billion amount projected under PBGC's ME-PIMS model. See section (4), Estimated Impact of Regulatory Action, of the Regulatory Impact Analysis section.[17]

In section (2), Introduction and Need for Regulation, of the Regulatory Impact Analysis, the PBGC referred to both the Congressional Budget Office (CBO) projection of total SFA payments that will be made to plans and the PBGC's own projection of total payments that will be made.

> Before the enactment of ARP[A] on March 11, 2021, the [CBO] projected the SFA program under section 4262 of ERISA to pay approximately $86 billion in total assistance to on average (across model simulations) 185 plans. PBGC has estimated the transfer amounts of the SFA program using ME-PIMS, PBGC's stochastic modeling tool, and projects the aggregate SFA to be approximately $94 billion in assistance payments to more than 200 plans and $150 million to PBGC to administer the SFA program.[18]

By referring to both the CBO projection of total financial assistance payments that will be made ($86 billion) and the PBGC's own projection ($94 billion), the PBGC implicitly defends its unduly narrow reading of the statutory language through its suggestion that the two projections are similar. CBO cost estimates are advisory only to Congress[19], and certainly are not binding on the Executive

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[16] As Chief Justice Marshall wrote for the Supreme Court more than 200 years ago:

> Does ["necessary"] always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.

McCulloch v. Maryland, 17 U.S. 316, 413-14, 4 Wheat. 316, 413-14 (1819).

[17] 86 Fed. Reg. 36601.

[18] 86 Fed. Reg. 36614.

[19] *See* Congressional Budget Office, CBO Explains Budgetary Scorekeeping Guidelines 1 (2021). Accessed at https://www.cbo.gov/system/files/2021-01/56507-Scorekeeping.pdf

Branch. CBO has issued an explanation of its process for estimating the cost of one-sided bets[20] and proposals with asymmetric uncertainties[21] that states that "all legislative proposals involve some uncertainty about their implementation and effects" but that "for some proposals, however, producing a meaningful estimate requires CBO to consider the probabilities of multiple outcomes with costs that might differ significantly."[22] CBO goes on to explain, "CBO weighted-average estimates are not predictions of actual costs" and that "CBO expects that most weighted average estimates to end up being either too high or too low."[23]

Any Executive Branch reliance on CBO's cost estimate when making statutory interpretations is odd for legislation that is explicitly designed to provide for an uncapped level of rescue, and is particularly odd where Congress appropriated "such amounts as are necessary for the costs of providing financial assistance under section 4262 and necessary administrative and operating expenses of the corporation". Congress clearly understood the cost uncertainty involved with both the eligible plans and well as the extended eligibility period and made sure that money was not a limitation.

This would not be the first piece of rescue legislation where CBO's estimates fell high or low when compared to the final cost of the legislation as implemented. For example, the Housing and Economic Recovery Act of 2008[24] provided the Secretary of the Treasury with authority to purchase obligations and other securities of Fannie Mae and Freddie Mac (the GSEs) as a financial backstop for the GSEs at the beginning of the housing and financial crisis of 2008. CBO estimated in July 2008 that Treasury's temporary purchase authority would cost $25 billion.[25] As of August 11, 2021, the GSEs have drawn $191.4 billion in funding, and Treasury has unused and available commitments to the GSEs of $254.1 billion, for a total commitment of $445.5 billion.

With respect to the September 2001 Air Transportation Safety and System Stabilization Act[26], CBO projected that the $10 billion loan guarantee program to rescue air carriers after the terrorist attacks of September 11th would lend $8 billion and cost $2 billion[27]. Yet, the loan guarantee program actually lent $1.7 billion and provided a net gain to U.S. taxpayers of more than $300 million.

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[20] *See* Congressional Budget Office, Estimating the Cost of One-Sided Bets: How CBO Analyzes the Effects of Spending Triggers (2020). Accessed at https://www.cbo.gov/system/files/2020-10/56698-One-Sided-Bets.pdf ("CBO Spending Triggers Report").
[21] *See* Congressional Budget Office, CBO Memorandum, Estimating the Costs of One-Sided Bets: How CBO Analyzes Proposals with Asymmetric Uncertainties (1999). Accessed at https://www.cbo.gov/sites/default/files/106th-congress-1999-2000/reports/onesided.pdf
[22] CBO Spending Triggers Report at 1.
[23] *Id*.
[24] Pub. L. No. 110-289, 122 Stat. 2654.
[25] Congressional Budget Office, Cost Estimate, H.R. 3221 Housing and Economic Recovery Act of 2008, July 23, 2008. Accessed at https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/costestimate/hr322100.pdf.
[26] Pub. L. No. 42, 115 Stat. 230 (2001).
[27] Congressional Budget Office, Pay-As-You-Go Estimate, H.R. 2926, Air Transportation Safety and System Stabilization Act, November 30, 2001. Accessed at https://www.cbo.gov/sites/default/files/107th-congress-2001-2002/costestimate/hr2926omb0.pdf.

These are but two examples of CBO cost estimates of rescue legislations that demonstrate the fact that actual rescue program implementation costs can deviate widely—higher or lower—from the initial CBO estimates.[28] CBO cost estimates of proposed legislation are considered by Congress for assessing budget impact before voting on legislation. But Executive Branch reliance on CBO cost estimates for purposes of making interpretations of the enacted law for program implementation is misplaced.

As a "prudent steward of taxpayer funds" PBGC should implement the SFA program as Congress intended to avoid tax revenue losses and overburdening federal safety net programs

In the IFR, the PBGC referred to itself as a "prudent steward of taxpayer funds" as a justification to "ensure that plans receive no more than the amount of SFA to which they are entitled"[29]. Yet, as is discussed throughout this letter, the PBGC has made interpretations that not only frustrate the Congressional intent of the SFA program, but are penny-wise and pound foolish.

Testimony[30] before Congress explained that rescuing just the "critical and declining" plans would cost the U.S. taxpayer significantly less than allowing these plans to become insolvent over the 10-year budget window and even more so over the 30-year projection period. Adding the other three categories of multiemployer plans eligible for SFA to the analysis would further increase the U.S. taxpayer's exposure to lost tax revenue and increased spending for poverty safety net spending programs in the absence of a government rescue.

To the extent that the PBGC interprets ARPA based on prudent stewardship of taxpayer funds, the PBGC should also consider these additional costs to the federal government that would follow from not restoring eligible plans to solvency.[31] A prudent steward would fully implement the SFA program as Congress intended and thereby avoid tax revenue losses and the additional follow-on safety net costs to the U.S. taxpayer.

b. Congress did not confer discretion to PBGC to curtail SFA

Ironically, notwithstanding its inappropriately rigid and narrow interpretation of the word "necessary," the PBGC ignores the meaning of the word "shall." ERISA section 4262(a)(1) states that the PBGC "shall" provide special financial assistance to an eligible multiemployer plan under

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[28] *See also* Ameritech Corp. v. McCann, 403 F.3d 908 (7th Cir. 2005), in which the Circuit Court considered the effect of a CBO cost estimate of a particular piece of legislation made before it was enacted and concluded,

> Although the Congressional Budget Office expressed an opinion that the 1986 law would not impose new costs on states, this view—on which Congress did not vote, and the President did not sign—cannot alter the meaning of enacted statutes. It suggests instead that CBO erred . . . .

403 F.3d at 913.

[29] 86 Fed. Reg. 36603.

[30] *See* The National Coordinating Committee for Multiemployer Plans, Testimony to the United States House of Representatives, Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions, Hearing on *The Cost of Inaction: Why Congress Must Address the Multiemployer Crisis*, March 7, 2019, https://nccmp.org/wp-content/uploads/2019/03/Testimony-to-House-Ed-and-Labor-HELP-Subcommittee-March-7-2019.pdf, pages 10-12.

[31] See Prepared Remarks of Michael D. Scott, Executive Director, National Coordinating Committee for Multiemployer Plans at NCCMP's Lawyers and Administrators Meeting, April 7, 2021, https://nccmp.org/wp-content/uploads/2021/04/Michael-Scott-Prepared-Remarks-to-2021-Lawyers-and-Administrators-Meeting.pdf.

section 4262. As noted above, of the plans that meet the requirements of being "eligible multiemployer plan[s]", more than an estimated 28% will not receive any SFA. Similarly, ERISA section 4262(j) plainly states that the amount of financial assistance provided to an eligible multiemployer plan under section 4262 "shall" be the amount required for the plan to pay all benefits due through the end of the plan year ending in 2051. But, as discussed above, the IFR's conservative interpretations of section 4262 will result in more than 60% of those plans receiving SFA becoming insolvent prior to 2051. Thus, under the PBGC's narrow reading of the statutory provisions, 72% of the plans eligible for SFA will receive either nothing or insufficient amounts to remain solvent through 2051.

When Congress used the word "shall" in section 4262(a)(1) and (j), it was not conferring discretion. "Unlike the word 'may,' which implies discretion, the word 'shall' [in a statute] usually connotes a requirement." *Maine Community Health Options v. United States*, 140 S. Ct 1308, 1320 (2020), *quoting Kingdomware Technologies Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). "[In a statute], the word 'shall' usually creates a mandate, not a liberty." *Murphy v. Smith*, 138 S. Ct. 784, 784 (2018). "The mandatory 'shall' [in a statute] normally creates an obligation impervious to judicial discretion." *Lexecom, Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998). In short, as the result of the conservative interpretations made in the IFR, the PBGC will be unable fulfill its express statutory mandates for nearly three-quarters of eligible plans. If we expand the unfilled mandate to include restoring these plans to solvency, the IFR fails more than 98% of eligible plans.

Congress did not confer discretion to the PBGC to curtail SFA. The PBGC's restrictive interpretations are inconsistent with the statutory mandate and should be modified accordingly. As the Supreme Court has held:

> A reviewing court "must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or frustrate the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981).[32]

c. The IFR frustrates the stated Congressional intent

Congressional intent is to restore plan solvency

While the text of new ERISA section 4262 does not have a "purposes" section, the House Budget Committee report on the bill (H.R. 1319) that was enacted into law as ARPA does state the Congressional intent in enacting section 4262. As the Supreme Court has held, "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations and internal quotation

[32] Securities Industry Ass'n v. Bd. of Governors of the Fed. Reserve System, 468 U.S. 137, 143 (1984). *Accord* Friends of Animals v. Haaland, 997 F.3d 1010, 1016 (9th Cir. 2021).

marks omitted). The House Budget Committee report contains the following explanation regarding the reason for having included the SFA program in the bill that the House of Representatives adopted and was enacted into law as ARPA.

> The [House Ways and Means Committee – the committee that drafted new ERISA section 4262] 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.[33]

This statement of intent by the Congressional committee of jurisdiction differs importantly from the statements by the PBGC in the Supplementary Information section of the IFR of its much more limited expectations regarding results of the SFA program:

> . . . In turn, the SFA program *improves* the financial condition of PBGC's multiemployer insurance program. It is expected that over 100 plans that would have otherwise become insolvent during the next 15 years will instead *forestall insolvency* as a direct result of receiving SFA.[34]

> . . . Second, imposing conditions that severely restrict the level of return-seeking assets may impair a plan's ability to achieve greater investment returns and *forestall insolvency*.[35]

Indeed, the PBGC's interpretations made throughout the IFR reflect that the PBGC viewed the purpose of the SFA program to, at best, "forestall insolvency" rather than "restore solvency" of eligible multiemployer plans.

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[33] Report of the House Committee on the Budget to accompany H.R. 1319, American Rescue Plan Act of 2021, H.R. Rep. No. 117-7, at 850 (emphasis added).

In addition, courts look to statements made by sponsors of the bill on the floor of the legislative chamber debating the bill to ascertain the legislative intent. "As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

In this regard, Senate Leader Schumer, in recommending that senators vote in favor of the bill that would, among other things, establish the new SFA program for multiemployer pension plans, stated on the floor of the United States Senate, the following:

> This new program is intended to be *a long-term solution* for those ailing plans, a solution that protects retiree benefits as well as the health of the plans themselves.

167 Cong. Rec. S1270 (Mar. 5, 2021) (emphasis added).

Similarly, Speaker Pelosi, in recommending that members of the House of Representatives vote in favor of the bill, stated on the floor of the House the following:

> And the economic security of children is also enhanced by *pension security* of their grandparents, which *is historically secured by this bill*.

167 Cong. Rec. H1280 (Mar. 10, 2021) (emphasis added).

[34] 86 Fed. Reg. 36599 (emphasis added).

[35] 86 Fed. Reg. 36618 (emphasis added).

The adverse consequences of PBGC's interpretation that Congressional intent was only to "forestall insolvency"

Including all plan assets in the calculation of the SFA amount will result in a large number of eligible plans receiving zero assistance, another large number of plans becoming insolvent before the end of the plan year ending in 2051, and all but a very small number of plans becoming insolvent after 2051. Only three eligible plans are projected to begin to increase their assets by the end of the 2051 projection period. Even when viewed in its most favorable light, the PBGC's interpretation of how to calculate the SFA amount only provides a limited subset (less than 30%) of eligible plans with sufficient assets to pay benefits to participants for 30 years. As of 2052 (or earlier), the PBGC would be required to assume responsibility for providing benefits at guaranteed levels, to the detriment of the plans' participants and beneficiaries, the PBGC, and the multiemployer pension system overall.

This is not what Congress intended when it enacted the new ERISA section 4262 into law. Congress intended to "restore solvency" to financially troubled multiemployer, not just "forestall insolvency".

d. The mismatch between the required "interest rate limit" used to determine the amount of SFA and the expected low rate of return from restricted SFA investments results in a funding shortfall

"Interest rate limit" required under section 4262(e)

As previously discussed, ERISA section 4262(j) prescribes the amount of SFA required to be provided to an eligible plan, and IFR section 4262.4 sets out the PBGC's interpretation of that amount. Importantly, the determination of the SFA amount for a plan under IFR section 4262.4 requires the calculation of the present value of benefits expected to be paid by the plan through the end of the 2051 plan year. The IFR makes no distinction between plan benefits that will be paid from existing plan assets and plan benefits that will be paid from the SFA amount provided to the plan.

ERISA section 4262(e) provides that, in determining the amount of SFA in an eligible plan's application, the plan must use the interest rate assumption used in the plan's 2020 certification of plan status, subject to an "interest rate limit." In the event the interest rate assumption used in the plan's 2020 certification of plan status is lower than the interest rate limit, the lower rate is to be used.

The "interest rate limit" in ERISA section 4262(e)(3) is defined as the rate specified in ERISA section 303(h)(2)(c)(iii). The rate specified in ERISA section 303(h)(2)(c)(iii) is defined as the third segment rate of the 24-month average corporate bond yield curve, without the 25-year corridor for the month the application is filed or the preceding 3 months, plus 200 basis points. This limit is currently just under 5.5%.

It appears that for most plans, the interest rate limit would apply, as multiemployer valuation discount rates reflect the long-term nature of plan benefit obligations and the expected return on plan assets, which are currently higher than 5.5%.

While ERISA section 4262(e)(4) allows an eligible plan to propose in its application changes to prior assumptions if the use of a prior assumption is unreasonable, that paragraph (4) also states that the plan may not propose a change to the interest rate otherwise required under subsection (e). The PBGC appears to have relied on the statutory language prohibiting "changes" to the interest rate when it required, in IFR section 4262.4(d), that plans "us[e] a single set of assumptions" when projecting the present value of (i) benefits expected to be paid by the plan, (ii) administrative expenses expected to be paid by the plan, and (iii) future contributions, withdrawal liability, and other payments expected to be paid to the plan. The consequence of this PBGC interpretation is that nearly all plans will use the interest rate limit (5.5%) as the discount rate when determining the present value of all benefits to be paid by the plan through the end of plan year 2051, including the portion of those benefits that will be funded from SFA amounts provided to the plans.

Expected low rate of return on SFA resulting from the investment restrictions in IFR section 4262.14

ERISA section 4262(*l*) places restrictions on the use of SFA, including that the amounts received must be segregated and invested in investment-grade bonds or as otherwise provided by the PBGC.

> Sec. 4262(*l*) Restrictions on the Use of Special Financial Assistance.—Special financial assistance received under this section and any earnings thereon may be used by an eligible multiemployer plan to make benefit payments and pay plan expenses. Special financial assistance and any earnings on such assistance shall be segregated from other plan assets. Special financial assistance shall be invested by plans in investment-grade bonds or other investments as permitted by the corporation.

The interest rate limit (currently approximately 5.5%) used to determine the required amount of SFA under the IFR contrasts with the investment rate return available to be earned by SFA. Section 4262(*l*) requires that SFA amounts be invested in investment-grade bonds or as otherwise permitted by the PBGC. Today, the expected return on a portfolio of investment-grade corporate bonds is approximately 2% net of the fees incurred to manage the portfolio and the yield on these assets is at the lowest level observed in 50 years. Locking in these rates exposes multiemployer plans to significant risks of losses in the near future. The requirements of ERISA section 4262(e) and IFR section 4262.14, therefore, create a mismatch of the interest rates that will create a significant funding shortfall which will result in plans becoming insolvent as early as 2037.[36] This mismatch frustrates the Congressional intent of the SFA program.

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[36] Consider the following example: the plan actuary determines, using the assumptions required under ERISA section 4262(e)(2) and (3), that the present value of the total funds needed to provide benefits and administration expenses for the next 30 years is $23 million. The actuary also determines that plan assets including the present value of the next 30 years of contributions total $8 million. The amount of assistance is then calculated to be $15 million—the amount by which the cost of benefits exceeds the resources the plan is expected to have. However, ERISA section 4262(*l*) requires that SFA amounts must be invested in investment-grade bonds where section 4262(e)(2) and (3) requires that plans assume they can earn a rate far in excess of returns on investment-grade bonds. In a very simple example, at the SFA calculation rate actuaries must use, the $15 million would grow to $25.6 million in 10 years, where in reality it would grow to only about $18.3 million. Because the SFA can never earn what the calculation requires, the plan's resources will fall short and the outcome will be insolvency.

3. The IFR puts the trustees of MPRA-suspended plans in a fiduciary bind as to whether to seek SFA at the cost of the plans' solvency

Prior to the issuance of the IFR, the NCCMP expressed its concern that, should the final regulations be issued taking the positions now embodied in the IFR, the fiduciary trustees of plans that have previously taken suspensions under MPRA would be placed in a very difficult situation by the need to make a decision whether to seek and accept SFA or not. The IFR did not address this concern.

The interests of active participants are pitted against the interests of the retirees

As noted above, although a decision to take SFA will provide an immediate benefit to such a plan's retirees, it does so at the expense of the plan's solvency, which has a particularly detrimental effect on the active employees who are likely to see little or no return on the share of their contributions (i.e., deferred wages) being used to pay for other people's benefits. Indeed, the IFR would result in MPRA-suspended plans receiving less in SFA than the value of the benefits the plans would be required to restore. Acceptance of SFA and the restoration of benefits would, therefore, leave MPRA-suspended plans in markedly worse financial condition than they are in today and result in a near certain insolvency later. Thus, trustees effectively will be forced to pit the interests of the retirees who would benefit from SFA against the interests of the active participants in future benefits. Trustees of such plans who decide to take SFA face the risk of litigation from active employees, while those trustees who elect to not seek SFA risk being sued by retirees. The trustees also face the very real risk that the active workforce and the bargaining parties will not support the plan going forward.

The IFR fails to adequately recognize that MPRA-suspended plans are uniquely situated and already have taken the steps necessary to preserve long-term solvency. Those plans have reduced benefits—in consultation with Treasury, DOL, and PBGC—by the amount necessary to ensure that their assets increase over time, the solvent indefinitely standard required under MPRA. The IFR attempts to substitute the benefit reductions deemed necessary for long-term solvency under MPRA for SFA, but does so without affording plans a one-for-one substitution. MPRA-suspended plans instead would have to accept less in SFA than the amount previously determined as necessary for their long-term survival. This certainly does not comport with the stated legislative intent of restoring these plans to solvency and the restoration of previously reduced benefits.

DOL's statement correctly encourages all eligible plans to apply for SFA but it does not reflect PBGC's views

We are, of course, aware that the Department of Labor's Employee Benefits Security Administration (DOL) has informally expressed its view that such concerns are not warranted, as follows:

> 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.[37]

While we appreciate the DOL's view, we remain concerned about the potential legal jeopardy facing trustees required to make the difficult choice whether to take SFA.

Initially, it is worth noting that the PBGC does not share DOL's view that "SFA reflects a clear legislative objective . . . to encourage all eligible plans to apply for SFA . . . " as PBGC's interpretations have resulted in a substantial portion of eligible plans being entitled to zero in SFA assistance.

DOL's statement does not go far enough to protect trustees

We also note that DOL's position appears to be limited on its face to a fiduciary decision to take SFA. Not only does it not directly address a fiduciary decision to reject SFA in order to preserve plan solvency, DOL's statement may well be considered supportive of retiree litigation challenging such a decision.

DOL's statement does not acknowledge the adverse consequences for MPRA-suspended plans of taking SFA

ERISA establishes prompt and corrective action requirements for plans whose financial statuses are troubled[38] or heading toward insolvency, including funding improvement plans and rehabilitation plans, as well as annual funding notice requirements that include insolvency disclosures[39]. It also provides plans heading toward insolvency with the option to suspend benefits under MPRA, however, only to the extent necessary for the plan to be solvent indefinitely. Here, however, DOL suggests that the trustees will be legally protected against liability for knowingly and deliberately taking action that place a solvent plan on the path towards eventual insolvency. Given that section 4262(m)(6) prohibits a future MPRA application for those plans that take the SFA, it seems unlikely that Congress intended these eligible plans to face a future insolvency.

The trustees of MPRA-suspended plans almost certainly face litigation risk

For the purpose of illustrating the litigation risk facing trustees, it is useful to compare the circumstances surrounding the decision to seek SFA with that of adopting a rehabilitation plan. In the case of *Ely v. PACE Industry Union-Management Pension Fund,* 2019 BL 35822 (D. Idaho 2019), the court dismissed a suit by a participant claiming to have been harmed by the terms of a rehabilitation plan on several grounds, three of which are particularly relevant here. First, in its

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[37] U.S. Department of Labor Statement on PBGC "Special Financial Assistance" Interim Final Rule for Eligible Multiemployer Plans (July 9, 2021). Accessed at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/arp/dol-statement-on-pbgc-special-financial-assistance-interim-final-rule.

[38] IRC §432.

[39] If a plan is certified to be in critical and declining status, the annual funding notice required under ERISA section 101(f) with respect to a multiemployer plan must include (1) whether the plan was in critical and declining status for the plan year and if so, (2) the projected date of insolvency, (3) a clear statement that such insolvency may result in benefit reductions, and (4) a statement describing whether the plan sponsor has taken legally permitted actions to prevent insolvency. The annual funding notice must be provided to plan participants and beneficiaries, the bargaining parties, and the PBGC within 120 days after the end of the plan year to which the notice relates.

decision on the plan's motion to dismiss, the court determined that ERISA provided no express cause of action for participants aggrieved by rehabilitation plans, which are governed by ERISA section 305. *Ely,* 2019 BL at *6.

Here, by contrast, Congress has provided an express cause of action for participants aggrieved by decisions made with respect to SFA. ERISA section 4301 provides:

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.[40]

ERISA sections 4262 and 4301 are, of course, both part of the same subtitle, Subtitle E of ERISA's Title IV.

Second, in that same decision, the *Ely* court determined that a general fiduciary claim could not be maintained because the contents of a rehabilitation plan are a matter of plan design, which is not a fiduciary function. *Ely,* 2019 B.L. at *8. In the case of a decision whether to seek SFA, however, the issue being challenged is not the decision to modify benefits. Rather it is at least arguably the decision whether to pursue additional revenues in the form of SFA, which a court may well consider to be a financial, and therefore a fiduciary, decision.

Notably, in its ruling on the plan's motion to dismiss, the court did not dismiss the participant's claim that the terms of the rehabilitation plan were not "reasonable," and concluded that ERISA section 305(e) does in fact create an implicit cause of action. *Ely,* 2019 B.L. at *17. Following discovery, however, in its subsequent decision on summary judgment, the court dismissed this remaining portion of the suit on the ground that the participant lacked standing based on lack of harm, since the plan was projected to become insolvent without regard to the challenged actions taken by the trustees or the outcome of the case. *Ely v. PACE Industry Union-Management Pension Fund,* No. 3:18-cv-00315-CWD, (D. Idaho Nov. 30, 2020), slip op. at 49.

In a case challenging a decision whether to take SFA, on the other hand, an action by either retirees or active participants would very likely not be dismissed on grounds of standing. Because the trustees' actions in taking SFA would be the direct cause of the plan's projected insolvency, this mootness analysis on an action brought by active participants would lead to a conclusion that the case is not moot. Similarly, an action by retirees challenging a trustee decision to not seek SFA, which would have had a direct and immediate effect on the retirees' pensions, would also not be moot.

Additionally, the claims in *Ely* and other cases like it arose under Title I of ERISA, and were therefore brought under ERISA section 502(a). Section 502(a) generally precludes suits by employers and labor organizations.[41] This means that suits by employers and unions similar to

[40] ERISA section 4301(a)(1).

[41] *See Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1, 27 (1983).

those raised in Ely could be subject to dismissal for lack of statutory standing[42]. ERISA section 4301, however, which would apply to any "act or omission" taken with respect to a decision whether to apply for SFA, specifically authorizes suits by both employers and unions. This means that employers, who might claim harm both because of the potential future increases in their funding obligations and their potential inability to retain their active workforces, and unions, which could claim harm to their bargaining units due to the projected plan insolvency, would have statutory standing to bring these claims.

Any litigation involving the decision whether to take SFA likely will be protracted and expensive

While we hope that DOL's position would ultimately prevail, that is not a certainty. In fact, the only certainty is that this will result in very expensive litigation, paid for by plans that are in financial distress. Furthermore, even in the *Ely* case, where the litigation was dismissed before ever reaching the merits, the participant's claims survived a motion to dismiss and were only rejected following discovery on a motion for summary judgment. In fact, the case remains pending on appeal, more than three years after it was originally brought. *Ely v. PACE Industry Union-Management Pension Fund,* No. 20-36127 (9th Cir.). Thus, we can say with near certainty that vindication of DOL's position would be protracted and expensive and would be shouldered by plans that are already in dire financial straits.

The NCCMP therefore hopes that the PBGC accepts the recommendations as provided in Section III. This would negate the need for DOL to provide more definitive protection for trustees caught on the horns of the dilemma whether to seek SFA at the cost of the plan's solvency. Furthermore, the protective actions that could be taken by DOL, either through regulation or a prohibited transaction class exemption, would be subject to revision or elimination by a future Administration.

4. PBGC's present value approach ignores cash flow timing issues

Certain plans with negative immediate cash flow but positive cash flow by the end of their plan year ending in 2051 (the SFA coverage period) will be denied the amount of SFA needed to keep the plans solvent, by the use of a simplified present value approach instead of a careful evaluation of cash flows to analyze the potential for insolvency before the end of 2051.

Any plan with positive cash flow toward the end of the projection period will have those years counted as a subtraction from the SFA amount, so that such a plan would become insolvent at a point in a year prior to when the negative annual cash flows turn positive. That might be the case for a plan projected to maintain much of its contribution income for the long term yet have benefit payment obligations that decrease significantly over time—due to current retirees having much larger benefits than those in the future because of sharp reductions in accrual rates at any point following the 2000-2002 economic downturn or the elimination of "adjustable benefits" under a rehabilitation plan following the passage of the PPA in 2006[43]. It could also be true of a plan in an

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[42] Although ERISA section 502(a)(10) grants employers and unions standing to sue trustees who either fail to adopt a required funding improvement or rehabilitation plan, or for failure to comply with the terms of such a plan, this provision does not grant them standing to challenge the terms of such a plan.

[43] Pub. L. No.109-280, 120 Stat.780.

industry that experienced a substantial reduction in its workforce in the 1990s or early 2000s. Such a reduction leaves plans with a very retiree-heavy population. The retiree population, however, will be substantially reduced over time and the active workforce may be expected to stabilize at lower levels for the long term, thereby producing far fewer new pensioners than the number projected to pass away.

To eliminate this problem, if the present value approach is retained, plans should be permitted to eliminate from consideration in the present value formula years in which cash flows are positive toward the end the SFA coverage period. Alternatively, plans should be permitted to perform a year-by-year analysis to determine how much additional money would be required to remain solvent in each year during the SFA coverage period. While this issue likely involves a relatively small number of plans, it is important to address it to ensure that all plans receive the aid Congress intended.

III. NCCMP Recommendations

A. Recommendation for determining the required SFA amount

In order to meet the Congressional intent for the SFA program of restoring the most financially troubled plans to solvency[44], the PBGC should interpret the provisions of section 4262 in a way that seeks to ensure that plans that receive SFA would have assets that are projected to begin to increase at the end of the SFA coverage period (which is consistent with the solvent indefinitely standard that is used in MPRA regulations). Since the PBGC's interpretation—to determine the amount of assistance as the difference between the present value of plan obligations and plan resources—is not required by the text of section 4262 and frustrates the stated Congressional intent of restoring the most financially troubled plans to solvency, the NCCMP provides the following recommendation for determining the amount of SFA to be provided.

Provide SFA in an amount that restores solvency without providing a windfall

The amount of SFA required to be provided to eligible plans should be the amount of additional assets needed for a deterministic projection of plan assets to be increasing during the last plan of the SFA coverage period (the plan year ending in 2051), up to the full cost of benefits projected to be provided over the SFA coverage period without any offsets. These additional assets could be deducted from the calculation of SFA-eligible plan resources by adding a new paragraph (3) to IFR section 4262.4(c) stating: "(3) Less the present value of plan resources required for the plan to have assets that are projected to increase during the last year of the SFA coverage period—the plan year ending in 2051." In making this determination, the PBGC should reflect all benefits expected to be earned and received by all participants, all current assets, and should retain the current interpretation that only contribution rates that have already been negotiated and contracted for are reflected in the projection of expected contributions. Under this interpretation, the SFA would be just enough to ensure that the assistance meets Congressional intent to restore the most

[44] Report of the House Committee on the Budget to accompany H.R. 1319, American Rescue Plan Act of 2021, H.R. Rep. No. 117-7, at 850 Accessed at https://www.congress.gov/117/crpt/hrpt7/CRPT-117hrpt7.pdf.

financially troubled plans to solvency without either violating the express directives of the statute or providing a windfall of more aid than is needed.

Bargained-for benefits must be secured

This interpretation also secures bargained-for benefits. It restores all previously accrued benefits, other than benefits reduced through rehabilitation plans, and otherwise allows for the payment of bargained-for benefits without further reduction. Unions, on behalf of employees, bargain with employers over employees' compensation packages. Compensation packages include wages and contributions made by employers to the multiemployer pension plan and other benefit plans. In the case of financially troubled pension plans, the bargaining parties have taken measures to help put the plans in a better financial position so that the plans may continue into the future. To do that, employers increased contributions and active participants saw their wages reduced from what they would otherwise be over time so that additional money could be paid into the plans. This bargained-for "shared sacrifice" was necessary, despite other measures also taken under rehabilitation plans, to allow for the funding of past liabilities. This interpretation recognizes these past and current "shared sacrifices" and helps ensure that the benefit of that bargain, the continuation of the plan beyond 2051, is realized.

B. Recommendation for other permissible investments and SFA discount rate

The PBGC needs to modify the IFR to avoid the significant pre-2051 SFA funding shortfalls and insolvencies that would otherwise result for many plans from the use of the interest rate limit to discount the plan benefits and expenses calculated for the SFA amount and its investment returns. The recommended approach is within the PBGC's discretion and necessary for the amount of SFA to be "such amount required for the plan to pay all benefits due" through the "last day of the plan year ending in 2051" as directed by ERISA section 4262(j)(1).

In order to correct this serious deficiency within the IFR and to avoid a budget impact, the recommended approach would be for the PBGC to exercise its authority under section 4262(*l*) to allow "other investments as permitted by the corporation" for the segregated assets of the SFA portfolio, and include investments that are reasonably liquid U.S. dollar denominated public debt or equity securities that collectively represent a well-diversified portfolio whose targeted expected return is no less than the interest rate limit used in the present value calculation of the amount of SFA.

C. Implication of Recommendations on Eligible Plans

By implementing the changes proposed above, the issues for critical status plans that qualify for SFA are generally resolved. Based upon our projections, we estimate:

- There are 242 plans covering 2,225,000 participants that are estimated to be eligible for SFA.
- Of those 242 plans, 66 plans covering 593,000 participants are projected to receive no SFA because they are currently able to meet the solvent indefinitely standard.

- Of the 176 plans that are projected to receive SFA, all are projected to have assets that are projected to increase at the end of the 2051 projection period.
- All plans are projected to be solvent indefinitely.

D. Estimated Cost of Adopting Recommendations

Based on NCCMP's analysis, we estimate that adopting the objective of solvent indefinitely and expanding the other permissible investments will increase the federal cost of the SFA program from $94 billion to between $109 billion and $120 billion.

IV. Other Concerns

A. PBGC Metering of Applications

1. Advanced notice of opening and closing of filing periods must be adequate for plans to determine when to commence work on applications

The IFR states that the portal for the filing of SFA applications will be periodically closed to avoid overloading the system and to ensure that applications can be acted upon within the 120-day statutory deadline.[45] It also states that notice will be provided on the PBGC's website as to whether the filing portal is open for accepting applications.[46] The Supplementary Information adds that advance notice will be provided of the opening or closing of the filing portal, although there is no statement of how much notice will be provided.[47]

We support the PBGC's goal of maintaining an orderly filing process, as well as avoiding the inadvertent automatic approval of applications for failure to act. We are, however, concerned about the mechanism the PBGC has chosen to meter the flow of applications. In particular, we are concerned that the amount of notice will likely be inadequate for plans that intend to apply to determine when to commence the work of preparing their applications.

Although some of the information required in the application process is not time sensitive, a significant portion is, and it is difficult, time-consuming, and expensive to obtain and produce this information. Most of the information required to be provided in an application must be based on data and measurements as of the "SFA measurement date", which is defined as the last day of the calendar quarter immediately preceding the date of the filing of a complete application.[48] This effectively means that a plan has, at the absolute maximum, the period of time from the beginning of a calendar quarter to its end to prepare and submit its application, which, depending on the quarter, is approximately 120 days. In this short period, a plan must:

- Decide whether to file during the quarter;

[45] IFR section 4262.10(d)(1)(i). See also Supplemental Information at 86 Fed. Reg. 36607.
[46] IFR section 4262.10(d)(1)(iii)
[47] 86 Fed. Reg. 36607
[48] IFR section 4262.2.

- Gather the required data, including:
  - The value of the plan's assets;
  - Participant census and other information;
  - Current employment information;
  - Current contract provisions;
  - Contribution information; and
  - Any other data needed for the application.
- Review and verify the data;
- Review the actuarial assumptions for reasonableness;
- Update assumptions that are no longer reasonable or were not covered by the pre-2021 status certification, and provide comprehensive analysis and justification for these updates;
- Perform the required actuarial calculations on that data to produce the required asset and liability projections;
- Complete the required application forms and templates; and
- Complete the filing.

The problem engendered by the metering of applications in the manner adopted by the PBGC is that plans will not know at the beginning of a calendar quarter whether they will be able to file within that quarter. This means that some plans that commence the work required to file an application will find themselves shut out from filing after having expended substantial plan resources, and then having to start from scratch in developing the information that is time-sensitive a later quarter, with the possibility of being shut out a second, or even a third, time. This is a waste of time, money, and other resources.

2. Notice of intent to file should be required

To prevent these types of false starts, we recommend that any metering mechanism be designed to ensure that plans know that they will have the full calendar quarter to file their applications before they begin to expend the resources that are required to prepare an application. We suggest plans be permitted to file notices of their intention to apply for SFA during the quarter prior to the quarter, as well as in the first month of the current quarter in which they anticipate filing their applications.

The notice would include sufficient plan information to enable the PBGC to quickly estimate the level of its own resources that processing each such plan's application would require. Based upon these notices, the PBGC would then authorize the filing of as many applications as it projects it would have the capacity to process within the 120-day period. Once the PBGC determines that it has reached its capacity, it would cease granting authorizations to file.

We also suggest that, in the event that a plan files its notice of intent to file an application and is authorized to file but, because of PBGC capacity, is precluded from filing its application, such a plan should be allowed to file in a later quarter but would be permitted to use the original SFA measurement date so that the calculations would not need to be restarted using new information. The plans that are so authorized would then have the assurances they need that the resources they expend in preparing their applications will not be wasted, while those that are not so authorized would know to wait until a later quarter.

We acknowledge that there may be other ways to accomplish the same goals and would be pleased to discuss such processes.

B. Retroactive Benefit Increases

1. The prohibition on retroactive increases likely will be counterproductive

The interests of active participants must be addressed to incentivize them to remain in plans

IFR section 4262.16(b)(1) imposes an absolute prohibition on the adoption of benefit increases within the SFA coverage period based on service earned, or other events occurring, prior to the adoption of the increase. By contrast, IFR section 4262.16(b)(2) permits prospective benefit increases upon a showing that the increases are fully paid for out of bargained contributions sufficient to pay for the increases that were not factored into the determination of the SFA. The rationale for this distinction is that "increases to future accrual rates more effectively bolster the future engagement of active participants than retroactive improvements."[49] This rationale is further explained as follows:

> Unlike increases to the level of future accruals, which incentivize active members to participate in the plan and can thereby improve the expected contribution income, increases to retroactive benefit levels harm the funded position of the plan without improving expected future plan income.[50]

We believe that the absolute prohibition on retroactive increases is likely to be counterproductive.

We acknowledge and fully support the goal of providing active employees with incentives to remain in these plans, as well as to encourage new entrants. In fact, our view is that without the support of the active workforce, these plans face a very difficult future.

As the PBGC is fully aware, current accrual rates in many of these troubled plans have dropped dramatically. Even though a default program of benefits under a rehabilitation plan may not be reduced below 1% of contributions, that contribution baseline is determined without consideration of contribution rate increases required under the rehabilitation plan. That means that it is common to see accrual rates of less than 0.3% of contributions, and in some cases, there is no accrual at all. Since employer contributions are essentially a type of compensation that potentially would be available to the employees as wages or other benefits, as contributions rates increased, active participants saw increasingly larger shares of their wages going to pay for other people's pensions.

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[49] 86 Fed. Reg. 36618.
[50] 86 Fed. Reg. 36614.

Although the benefit suspensions under MPRA imposed a great hardship on the retirees, those suspensions represented a form of "shared sacrifice" that was necessary to protect to the future provision of benefits to both the active workforce and the retirees. While the retroactive elimination of the MPRA suspensions significantly reduces the hardship to the retirees, it does nothing for the active workforce.

Thus, from the prospective of an active employee in a plan that receives SFA, the absolute prohibition on retroactive increases makes one thing crystal clear: none of those lost benefits will be restored for at least the next 30 years. Although prospective increases may be adopted in the future based on contribution increases, the years of sacrificed benefits will remain lost forever, a prospect that will not be lost on the active workforce. Thus, we believe that, rather than encouraging currently active employees to remain in their plans, this absolute prohibition can have the opposite effect. Conversely, we believe that the prospect of benefit restorations could provide an incentive for active participants to remain in their plans, particularly for the plans that will experience improvements in their financial conditions through positive investment experience, additional contributions, and other experience gains. Furthermore, the prospect of restoring lost benefits has the potential to encourage active participants in recovering plans to seek to increase contribution rates. While we understand that the circumstances of each plan will be different, the trustees of the plans should have some flexibility to fashion benefit increases that best meet their plans' needs.

Lastly, we note that section 4262.16(d) of the IFR provides an exception to the otherwise absolute prohibition on employer contribution rate reductions where "the risk of loss to plan participants and beneficiaries is lessened by the reduction".[51] As described in the Supplementary Information, this can occur to permit an employer to remain in business and not withdraw from the plan.[52] This is, in effect, a hardship exception. No similar hardship exception, however, is provided for participants whose support for the plans have been weakened by years of reduced benefits with no prospect of restoration.

2. Two exceptions to retroactive increases should be permitted: Improved financial condition of the plan and *de minimis* increases

We recommend two exceptions to the prohibition on retroactive benefit increases. First, retroactive increases should be permitted where a plan's financial condition has improved to the point that it can sustain and continue that improvement. Presumably, this would require a showing by the plan that the benefit increases do not jeopardize the plan's future solvency. This would both enable plans to conserve SFA assets while encouraging active participants to support continued participation in the plans.

Second, we believe that a *de minimis* exception to this prohibition would be appropriate, like the one applicable to plans that operate under amortization extensions. Pursuant to ERISA section 302(c)(7), benefit improvements are permitted by such a plan if they are both reasonable and *de*

[51] 86 Fed. Reg. 36610.
[52] *Ibid*.

minimis.[53] Because the cost of such increases is, by definition, negligible, and because they are typically used to address hardships and inadvertent errors in plans, the benefits of allowing them certainly outweigh the cost.

C. PBGC should formally adopt a deferential approach in reviewing assumptions

IFR section 4262.5(c) provides that a plan may propose in its application for SFA a change in its pre-2021 zone status certification assumption provided that, among other things, the original assumption is deemed "unreasonable" and the application includes a demonstration (to be reviewed by PBGC and Treasury) as to why the changed assumption is reasonable. PBGC issued guidance, "Special Financial Assistance Assumptions", that is helpful regarding such changes in assumptions.[54]

We urge PBGC to issue additional instructive guidance and to formally adopt in the final regulation a deferential approach when reviewing assumptions, including clarification that baseline (pre-2021 status) assumptions are deemed acceptable for purposes of determining the amount of SFA, unless clearly erroneous or unreasonable. This will allow the SFA program, unlike MPRA, to be fully implemented in a timely and comprehensive manner. MPRA provided plan trustees with a self-help program designed to restore plan solvency. However, Treasury's implementing regulations and practices have been an enormous impediment to plans seeking approval to suspend benefits due, in large part, to the unreasonably high level of scrutiny and substitution of its own judgment that Treasury has imposed when reviewing actuarial assumptions. Of the 18 plans that were approved under MPRA, 11 applied multiple times before receiving approval from Treasury. Because the process of applying for approval of suspension represents a significant financial burden to a plan with a largely uncertain outcome, MPRA has not provided the widespread-solution intended by Congress and the multiemployer community. The SFA program must not suffer a similar fate.

V. Conclusion

We appreciate PBGC's timely issuance of the IFR implementing the SFA program as provided under ARPA, legislation that was long in the making and that offers significant relief to the most financially troubled multiemployer pension plans. PBGC's interpretations of ARPA as reflected in the IFR have, however, resulted in a substantial portion of eligible plans being entitled to zero in SFA assistance, another significant group that will be insolvent before 2052, and of the rest—only three plans—will have increasing assets at the end of the 2051 projection period. To ensure that the promised relief is provided to these plans, the SFA program must be fully implemented as Congress has intended. We hope that PBGC finds our comments and recommendations regarding the IFR constructive as PBGC works towards finalizing its regulations consistent with these recommendations which will result in all plans receiving SFA to be solvent indefinitely at a modest increase to the projected cost of the SFA program.

[53] 26 U.S.C. § 412(c)(7)(B)(i).
[54] The "Special Financial Assistance Assumptions" guidance is available at: https://www.pbgc.gov/sites/default/files/sfa/sfa-assumptions-guidance.pdf