

August 11, 2021

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Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, N.W.
Washington, DC 20005-4026

Re: Comments on Interim Final Regulations - Part 4262 – Special Financial Assistance

Dear Director Hartogensis:

We are fund counsel to the Sign Pictorial and Display Local No. 591 AFL-CIO Pension Fund. The Sign Fund is a multiemployer defined benefit plan that qualifies for Special Financial Assistance. We respectfully register the comments of the Trustees of the Pension Fund with respect to PBGC's Interim Final Regulations – Part 4262 Special financial Assistance.

Initially, we would like to suggest that the focus of the regulations appears to emphasize fiscal restraint instead of a “can-do” approach to fixing troubled multiemployer pension plans while preserving the multiemployer pension plan system and the employment of employees in the industries that the system serves.¹ We believe that this restrictive reading and implementation of the Special Financial Assistance provisions of the American Rescue Plan Act of 2021 (ARPA) is short-sighted and contrary to the intent of Congress.

Initial Genesis of Funding Difficulties. As time passes and Congress and the Executive Branch focus on current crises, it's easy to lose track of the fact that the root of most multiemployer plans' financial difficulties was tax-law contribution deductibility requirements. The multiemployer pension system was making a comeback in the 1990s after surviving industry contraction that was triggered by deregulation and overt government hostility towards organized labor. As financial prospects improved during the multiemployer pension system's comeback in the 1990s, plan benefits were required to be increased beyond that which may have been desirable.

These benefit increases were unavoidable. Plan contributions are the subject of multi-year collective bargaining agreements. Internal Revenue Code funding rules required a minimum level of under-funding to assure contribution deductibility. The result of these rules and the late 1990s bull market was a spiraling level of benefit accrual. Prior Internal Revenue Code amendments had already taken away the primary remaining safety valve on benefit accumulation – ten-year cliff vesting. As a result, benefit increases implemented to assure contribution deductibility typically became irrevocable obligations of the Fund.

Despite assertions that the country had entered into a new, recession-proof economy, the tech bubble burst in 1998-1999. Finally, but too late to avert the creation of the benefit accrual “bubble”, multiemployer contribution deductibility rules were changed. But the damage had been done and defined benefit multiemployer pension plans were saddled by large, unsustainable, benefit obligation liabilities.

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The Interim Final Regulations. The Interim Final Regulations as currently constituted do not appear to further Congress' mandate to rescue financially troubled multiemployer pension plans. Instead, the regulations, like so many past attempts to address multiemployer plan solvency, create an unintended difficult choice for fiduciaries of eligible multiemployer pension plans: (1) take the likely diminishing Special Financial Assistance money at the cost of structural damage to the active employees, their collectively bargained representatives and contributing employers, (2) use, if available, the flawed and limited MPRA benefit suspension and assisted merger provisions to avoid insolvency and recover their financial health, and/or (3) continue to move their plans' assets into riskier asset classes to chase the return required to eventually reach financial health.

We believe that the following aspects of the Interim Final Regulations should be modified so that the law can be administered consistent with Congress' intent:

A. Interest Rate. Both ARPA and the Interim Final Regulation (Section 4262.4(d)) measures the interest rate cap applicable to the computation of both Plan liabilities and ARPA financial assistance on the date the application is submitted. Whether a qualifying plan (Section 4262.3) can submit an application for financial assistance depends on whether and where it falls into the priority categories established in the Interim Final Regulation (Section 4262(10)).

Most financial experts agree that interest rates are likely to rise during the ensuing three years. Therefore, fixing the applicable interest rate at the application date while mandatorily deferring the application date for most of the eligible multiemployer plans impairs the amount of aid that can be disbursed to lower priority and non-priority plans. This differential treatment is not consistent with the intent of Democratic Congress.

We ask the PBGC consider amending the Interim Final Regulations to permit "optional place-holder filings" to lock-in the interest rate cap, using the cap in effect on the date of Interim Final Regulation. This would preserve the uniformity of limits on financial assistance while staying true to statutory language.

B. Contribution Assumptions and Post-SFA Restrictions. The Interim Final Regulation (Section 4262.5) generally requires the use of the contribution assumptions used in the actuary's last PPA certification. Eligible multiemployer plans may use assumptions that differ from the last PPA certification, provided that the PBGC determines that the use of the changed assumptions is reasonable. (Section 4262.5).

Eligible plans did not become eligible plans without first directing every available dollar into plan contributions. These contributions, if maintained, could damage the industries that maintain the plans which the Special Financial Assistance provisions of ARPA are trying to save. Specifically, contributors to multiemployer plans and their sponsoring unions have directed every available dollar to these plans to try to meet the enhanced funding requirements imposed by the PPA and recover from repeated "black swan" market events. In most instances, there simply is no more left to give.

Multiemployer plan participants who have supported financially troubled multiemployer pension plans with high value/low benefit accrual work hours for the past 20 years now are approaching retirement age. Participants in multiemployer plans typically perform physically taxing labor, exhausting their bodies and physical health in exchange for current compensation.

Participants often must vote on how any additional bargained-for compensation is allocated – either as taxable wages or as non-taxable fringe benefit contributions. Proper compensation allocation and fringe benefit construction provides competitive living wages during working careers while setting aside assets for reasonable non-cash benefits, including retirement benefits payable after workers exhaust their physical well-being. If resources are misdirected, the plans are unlikely to survive because covered employers will shift to employment practices necessary to effectively attract and retain new and younger employees.

The Interim Final Regulation requires Special Financial Assistance to be computed using assumptions that calculate aid amounts assuming employers will maintain financially unsustainable contribution levels which lead to reduce aid amounts. If contribution levels are unsustainable for 30 years, (and they probably are), assets will not be sufficient to pay vested accrued benefits when due. And if the wage scale for plan participant labor becomes unacceptably uncompetitive, contributing employers can be expected to open parallel operations and/or shed CBA and withdrawal liability liabilities through Title 11 proceedings, so recipient plans may again need PBGC financial assistance. For these reasons, we ask that this issue be considered in determining the level of employer contributions used to measure available financial resources and in computing Special Financial Assistance.ⁱⁱ

In addition, the exception included in Interim Final Regulation Section 4262.16 that permits reduced employer contributions during the Special Financial Aid period is unworkable in industries where more than one employer is subject to the same collective bargaining agreement. Therefore, consistent with the PBGC's request, we ask that the PBGC consider modifying the Interim Final Regulation Section 4262.16 to include an exception based on percentage of covered employee wage package or some similar measurement that considers covered employers' ability to continue to pay contributions at the level provided by the collective bargaining agreement in effect on March 11, 2021.

C. Financial Resources Considered. The Interim Final Regulation (Section 4262.4(c)) requires, consistent with statutory language, that financial resources used to compute Special Financial Assistance include the fair market value of Plan assets and the present value of employer contributions based on the collective bargaining agreement in effect on March 11, 2021. Therefore, the Interim Final Regulations, as they now read, include as available financial resources, assets that have been set aside to pay for benefits that become payable after the 2051 termination of the Special Financial Assistance period. This means that Special Financial Assistance is required to be computed as if current and future plan participants who are still many years from retirement will be left with no projected plan assets to pay benefits earned and payable after 2051. This problem makes the operating definition of available financial resources in the Interim Final Regulation untenable. Therefore, the Final Interim Regulation definitions related to financial resources available should carve out assets, contributions and earnings that are properly allocable to benefits that are actuarially projected to become payable after 2051.

Thank you for considering the Fund's comments. We will be happy to address any questions that you have about the issues that are raised.

Sincerely,

NOVARA TESIJA CATENACCI McDONALD & BAAS, PLLC



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ⁱ In introducing multiemployer pension plan funding relief, U.S. Senator Sherrod Brown stated that [t] multiemployer pension system is on the verge of collapse threatening collapse, threatening the livelihoods of millions of American and tens of thousands of small business.”[And, if multiemployer pensions fail] “[c]urrent workers will be stuck paying into pension funds for benefits they’ll never receive [and] small businesses will be left drowning in pension liability they can’t afford to pay.”

ⁱⁱ Critical Status multiemployer defined benefit plans typically cannot accept CBAs with lower contribution rates and only contribution rates that are reflected into enforceable CBAs can be considered in plan funding assumptions. So, even though contributions have or may become economically crippling, that fact never gets taken into account for funding purposes. Failure of the Interim Final Regulation to recognize the implausibility of 30 years of contributions at industry financial limits will decrease the likelihood of participants receiving all benefits accrued during that 30-year Special Financial Assistance period is inappropriate and frustrates the goals of Congress in passing ARPA Special Financial Assistance.