



EMPLOYEE TRUSTEES
CHARLES A. WHOBREY
GARY DUNHAM
TREVOR LAWRENCE
JOSEPH GRONEK

EMPLOYER TRUSTEES
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ROBERT WHITAKER
MARK F. ANGERAME
RICHARD K. ELLIS

EXECUTIVE DIRECTOR
THOMAS C. NYHAN

February 28, 2024

The Honorable Julie Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220

Dear Acting Secretary Su and Secretary Yellen:

We write on behalf of Central States, Southeast and Southwest Areas Pension Fund (the “Fund”) with an urgent request for guidance. As you know, the Fund received Special Financial Assistance (“SFA”) from the Pension Benefit Guaranty Corporation (“PBGC”), and the PBGC Office of Inspector General (“OIG”) subsequently concluded that PBGC’s process for reviewing SFA applications was flawed in some respects. Some Members of Congress and others are now urging the Fund to return approximately \$127 million of the SFA award.

The Fund has always worked constructively with Congress and the executive branch because we share a common goal of ensuring that the Fund’s participants and beneficiaries receive the pension benefits they were promised. The SFA program saved the benefits of approximately 360,000 participants and prevented the collapse of the multiemployer pension insurance system. The Fund’s trustees and staff remain grateful for the efforts by PBGC to implement the SFA program and by Congress to be prudent stewards of taxpayer dollars.

The Fund takes seriously concerns from Members of Congress about the SFA award, and we can assure you that the Fund never intended to receive more than it was entitled to under the SFA program. The Fund cooperated fully with PBGC’s Office of Inspector General (“OIG”) while the OIG conducted its evaluation, and the Fund agrees with the OIG’s findings. That said, the Fund is bound to comply with federal law, so we need your assistance in determining whether fiduciaries for the Fund can return a portion of the SFA without violating either the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), or the Internal Revenue Code of 1986, as amended (the “Code”).

Below, we have provided the factual background as well as a summary of potential issues under ERISA and the Code. The Fund will continue to cooperate fully with Congress and the Administration to ensure that taxpayer dollars and plan assets are protected while you consider this guidance request. Additionally, we can assure you that the Fund is safeguarding the \$127 million of SFA at issue by holding the assets in trust where they are managed conservatively in accordance with ERISA and the SFA regulations by an independent named fiduciary.

I. Factual Background

The Fund submitted a revised application for SFA to PBGC on August 12, 2022. The Fund submitted its application in accordance with the final SFA regulation and application filing instructions, including recognizing all participant deaths identified prior to the January 1, 2021 census date pursuant to a death audit performed in January 2022 by the Fund's commercial vendor. After a rigorous application review process, PBGC approved the Fund's application on December 5, 2022, and paid the Fund approximately \$35.8 billion in January 2023. Notably, the final SFA award was lower than the amount originally calculated by the Fund in its initial application.

After the Fund's receipt of SFA, the PBGC OIG conducted a "Limited Scope Evaluation of Projected Benefit Payments in Selected [SFA] Applications" and issued a "management alert" on November 1, 2023 (the "Management Alert"). The Management Alert concluded that the census data used to determine the amount of the Fund's SFA award included 3,479 deceased participants, which accounted for approximately \$127 million, or roughly 0.35%, of the SFA award. The OIG stated that this miscalculation was due to the fact that –

While the [PBGC's] review process required Central States to provide a list of all Plan participants and proof of a search for deceased participants (death audit), [PBGC] did not cross-check the information against the Social Security Administration's (SSA) Full Death Master File [(the "Full DMF")] – the source recommended by the U.S. Government Accountability Office for reducing improper payments to deceased people.

OIG Management Alert at p. 2.

The Fund, other pension plans, and their commercial vendors, do not have access to the Full DMF. As stated on page 9 of the June 12, 2023 White Paper: Searching Plan Records for Deceased Participants issued by the PBGC OIG: "Federal and state law considers the SSA's Full Death Master File as private, and the data from this file can only be shared with federal benefits paying agencies." Recognizing the legal limitations on the death data that funds may obtain, the PBGC OIG Management Alert and the PBGC OIG's September 27, 2023 memorandum closing its evaluation did not allege that the Fund did anything improper. In fact, the Management Alert appends an October 17, 2023 memorandum from PBGC that states as follows:

PBGC appreciates... OIG's concurrence with PBGC's legal analysis... that the funds... were not improperly paid, were not paid to deceased individuals or beneficiaries, and should not be subject to recovery actions.

PBGC Response to OIG Management Report dated October 17, 2023, at p. 1.

The Fund has gone to great lengths to cooperate with PBGC and the OIG over the past year, and there is no dispute that the Fund complied with all applicable rules and regulations issued by PBGC. Unfortunately, the Fund simply did not have access to any information or

resources that would have allowed it to identify the deceased participants prior to submitting its application for SFA. To its credit, PBGC adjusted its SFA application rules in response to the OIG's recommendations and has begun using the Full DMF to verify data provided in SFA applications. However, the changes were prospective in nature.

II. Request for Guidance

The Fund takes seriously the requests it has received from Members of Congress and others to return approximately \$127 million of SFA. Although PBGC's regulations provide the agency authority to reclaim SFA payments in certain circumstances, PBGC has stated that it lacks the authority to recoup the \$127 million at issue. Consequently, the Fund has considered whether it can voluntarily return a portion of the SFA but has concerns that doing so could potentially have severe consequences, including personal liability for the Fund's fiduciaries and the loss of the Fund's tax-exempt status. Therefore, we request formal guidance answering two key questions.

Would the Fund violate the exclusive benefit rule under ERISA Section 403 and Code Section 401(a)(2) by returning a portion of the SFA?

Section 403(c) of ERISA requires all plan assets to be "held [in trust] for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." Similarly, Code section 401(a)(2) provides that no portion of the corpus or income of an employee benefit trust shall be used for "purposes other than for the exclusive benefit of ... employees or their beneficiaries." These rules are collectively referred to as the "exclusive benefit rule."

The exclusive benefit rule makes clear that funds paid to a plan under a *mistake of fact* or as an *overpayment* constitute plan assets subject to the exclusive benefit rule once the payment is deposited in the plan's trust. This is clear from the very specific statutory *exceptions* from the exclusive benefit rule that permits a transfer out of the plan's trust for purposes other than paying benefits or defraying reasonable expenses of administering the plan. These statutory exceptions include the following applicable to multiemployer plans.

First, employer contributions made to a multiemployer plan under a "mistake of fact or law" may be returned to the employer within 6 months of determining that a mistake occurred. ERISA § 403(c)(2)(A)(ii); Code § 401(a)(2). Second, an employer's "overpayment" of withdrawal liability may be returned to the employer within 6 months of determining that an overpayment occurred. ERISA § 403(c)(3); Code § 401(a)(2). These two exceptions make clear that payments made to a multiemployer plan under a mistake of fact or as an overpayment cannot be returned to the payor *unless* an exception from the exclusive benefit rule is available.

Would the fiduciaries of the Fund violate their duties of prudence and loyalty under ERISA Section 404 by returning a portion of the SFA?

We are concerned that the Fund’s trustees will violate their duties of prudence and loyalty under ERISA section 404 if they were to ignore ERISA’s exclusive benefit rule and cause the \$127 million in properly paid SFA to be returned to the PBGC. We have considered two potential circumstances under which the Fund’s trustees may, consistent with their ERISA obligations, cause the \$127 million to be returned to the PBGC – both involving situations where the return of the \$127 million could be characterized as a proper expenditure of plan assets to pay a plan expense. However, as explained below, neither of the two circumstances is applicable here.

First, if the \$127 million in SFA constituted a loan to the Fund, then we believe that the Fund’s trustees may, consistent with their ERISA fiduciary obligations, cause the \$127 million to be returned to the PBGC (which should not be a party in interest with respect to the Fund). However, the \$127 million was not a loan to the Fund. ERISA section 4262(a)(2) provides that “[a] plan receiving special financial assistance pursuant to this section shall not be subject to repayment obligations with respect to such special financial assistance.” Although one could argue that an overpayment by its nature creates a loan, ERISA section 403(c)(3)’s explicit reference to “overpayments” made to a multiemployer plan (as described above) clearly demonstrate that overpayments do not create a loan that the plan is obligated to pay back. Further, in the reverse situation of a plan making an overpayment, multiple Supreme Court decisions on the topic do not treat the plan as a creditor to the payee. *See, e.g., Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

Second, if PBGC had a viable enforceable legal claim against the Fund for the return of \$127 million in SFA, the Fund’s trustees may have an argument that they can, consistent with their ERISA fiduciary obligations, cause the \$127 million to be returned to the PBGC as a settlement of a legal dispute. *See, e.g., Prohibited Transaction Exemption 2003-39* (supporting the argument that a trustee may expend plan assets to settle a viable claim against a plan). Here, however, PBGC has neither made a request for the return of the \$127 million of SFA nor asserted a legal basis for doing so. In fact, the PBGC has publicly stated that the amounts “were *not* improperly paid, were *not* paid to deceased individuals, and should *not* be subject to recovery actions.” PBGC Response to OIG Management Report dated October 17, 2023, at p. 1 (emphasis added).

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At every step of the process, the Fund’s trustees and other fiduciaries have only tried to do what is in the best interest of the approximately 360,000 participants who depend on the Fund to retire with dignitary and financial independence. There was never an intent to receive SFA in excess of what Congress approved in the SFA legislation, and it is deeply regrettable that Fund finds itself in this situation through no fault of its own. We remain committed to working constructively with the Administration and Congress to resolve this issue and appreciate your

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consideration of our request to help address the legal issues raised in this letter. Please do not hesitate to contact us if you need additional information. In the meantime, the Fund will continue to safeguard the \$127 million of SFA at issue by holding it in trust pursuant to ERISA and the SFA regulations.

Sincerely,

A handwritten signature in black ink, appearing to read 'T.C. Nyhan', with a stylized flourish at the end.

Thomas C. Nyhan
Executive Director

CC: The Honorable Lisa Gomez, Assistant Secretary, DOL (EBSA)
Helen Morrison, Benefits Tax Counsel, Treasury
The Honorable Gina Raimondo, Secretary of Commerce
The Honorable Gordon Hartogensis, Executive Director, PBGC
Karen Morris, General Counsel, PBGC
Nicholas Novak, Inspector General, PBGC