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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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February 25, 2024

VIA ELECTRONIC TRANSMISSION

Karen Morris
General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005

Dear General Counsel Morris:

On March 6, 2021, at President Biden's urging, Democrats in the Senate passed the American Rescue Plan Act of 2021, which authorized the Pension Benefit Guaranty Corporation (PBGC) to provide billions of dollars in bailout funding to long-mismanaged union pension plans.¹ Since then, PBGC has accepted applications for and approved upwards of \$90 billion in Special Financial Assistance (SFA) bailouts, with over one-third of that allocated money going exclusively to the Central States Pension Fund (Central States).²

On December 5, 2021, PBGC approved Central States' application for \$35.8 billion of SFA bailout funding. According to your staff, PBGC was not required to cross-check or verify any of the information Central States or any other applicant provided against the Social Security Administration's Death Master File (DMF) for accuracy, despite numerous recommendations from the Government Accountability Office to do so.³ As a result, PBGC did not discover the 3,479 dead participants included in the census Central States provided in its SFA bailout application.⁴ Instead, PBGC relied entirely on Central States' certification that the information provided was true and correct. As a result, PBGC approved Central States' application in its entirety, which resulted in Central States receiving a \$127 million overpayment for nearly 3,500 applicants who were dead at the time of application.⁵

In April 2023, after Central States filed its SFA bailout application, PBGC began asking plans that applied for bailouts to audit their own applications to ensure their censuses did not include dead

¹ American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

² Greg Iacurci, *Covid Relief Bill Gives \$86 Billion Bailout to Failing Union Pension Plans*, CNBC (Mar. 8, 2021), <https://www.cnbc.com/2021/03/08/covid-relief-bill-gives-86-billion-bailout-to-failing-union-pension-plans.html>.

³ PENSIONS BENEFIT GUARANTY CORPORATION OFFICE OF INSPECTOR GENERAL, REPORT NO. EVAL-2024-01, *Management Alert: Deceased Participants in The Central States' Special Financial Assistance Calculation*, at 2 (Nov. 1, 2023), <https://oig.pbgc.gov/pdfs/EVAL-2024-01.pdf>.

⁴ *Id.*

⁵ *Id.*

participants. At that time, however, PBGC did not make any internal rule changes or formal changes to its SFA application process.

On November 1, 2023, PBGC OIG issued a report to PBGC Director Gordon Hartogensis detailing the inaccurate information Central States provided in support of its SFA bailout application and the \$127 million overpayment.⁶ Central States denied any allegation of wrongdoing on its own behalf, claiming that its application was based on “actuarial calculations . . . based on census data, asset values, and other information known as of the measurement date.”⁷ Notwithstanding its belief that its census data was correct at the time it filed its application, Central States acknowledged that the “additional SFA amount” paid to it was exclusively on account of the nearly 3,500 dead participants included in its application, and that those funds would constitute a “Fund asset.”⁸ In other words, the extra \$127 million Central States received as a result of its own failure to provide accurate census information was a windfall to the fund to which it was not otherwise entitled.

Central States also implied to PBGC, and further alluded to HELP minority staff, that if it has to give back this windfall payout—which constitutes roughly one-third of one percent of its total bailout—it will lack sufficient funds to cover all of its liabilities, notwithstanding the exorbitant amount of bailout funding it received.⁹

Because the vast majority of Central States’ plan participants are current or retired members of the International Brotherhood of Teamsters, I asked Sean O’Brien, President of the Teamsters union, to return the overpaid funds during the Committee’s November 14, 2023 hearing. Mr. O’Brien responded, “I assume it would [refund the overpaid money to the American people] . . . I will go on record as saying that if someone was given something they weren’t entitled to they should refund it.”¹⁰ Since that time, however, Central States’ attorneys have refused my staff’s requests to return the overpaid SFA bailout funding to the American taxpayers, and PBGC has claimed that it lacks the authority to force Central States to repay those funds. Despite Central States’ refusal to return the money, your office also stated that PBGC has not made any request that Central States return the overpaid funds to the federal government voluntarily.

My staff also learned that your office prepared a legal memorandum on June 30, 2023 discussing whether the SFA bailout funds paid to Central States constituted an “improper payment” under the current law and whether PBGC possesses the authority to claw that money back from Central States. My staff requested a copy of that memorandum on December 13, 2023, at which time your staff asserted that the document was protected from disclosure by attorney-client privilege. Your staff has since asserted this privilege on two additional occasions: once on January 5, and again on January 17. On each occasion, my staff explained that common law claims such as claims of attorney-client privilege do not apply to Congress due to its “inherent constitutional prerogative to

⁶ *Id.*

⁷ *Id.* at 17 (emphasis added).

⁸ *Id.* at 18.

⁹ *Id.* at 23.

¹⁰ Hearing on Standing Up Against Corporate Greed: How Unions are Improving the Lives of Working Families, 118th Cong. (Nov. 14, 2023).

investigate” and to perform oversight functions.¹¹ Nonetheless, your staff have maintained its right to this privilege.

As a general, bedrock principle, congressional committees may choose to honor common law privileges such as the attorney-client privilege, but are under no obligation to do so.¹² This discretion remains regardless of whether a court of law would recognize that privilege in the context of civil litigation.¹³ The only claims of privilege Congress must recognize are those that are constitutionally mandated, such as the Fifth Amendment right not to answer incriminating questions.¹⁴

Here, PBGC has asserted no constitutional ground to withhold the June 30th legal memorandum, and exclusively bases its decision not to disclose it in inapplicable common law privileges. Furthermore, in light of Congress’ “constitutional prerogative to investigate” agencies within the executive branch, its right to gather information relevant and necessary to its legislative function, and its inability to obtain the information contained in your memorandum from other sources, your staff’s claim of privilege is unfounded.

In order to understand PBGC’s claims that the “additional SFA amount” paid to Central States was not an improper payment and that it lacks the necessary authority to recoup the funds paid to Central States for dead plan participants, as well as the effects of PBGC’s subsequent administrative changes, I request that you answer the following questions on a question-by-question basis, **by close of business on March 11, 2024**:

1. Please produce an electronic copy of the legal memorandum your office prepared on or about June 30, 2023 in unredacted form.
2. Provide the difference between the aggregate amount of yet-to-be approved SFA bailout funding requested before April 21, 2023 and the aggregate amount requested after PBGC began requesting each applying plan to audit its own application information for dead participants. Included in your response, please also provide:
 - a. The number of plans that revised their census information following PBGC’s April 21, 2023 request;
 - b. The names of the plans that submitted revised application information after April 21, 2023.

¹¹ See CRS Report 95-464, *Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, at 35, CONGRESSIONAL RESEARCH SERVICE (Apr. 7, 1995), <https://sgp.fas.org/crs/misc/95-464.pdf#page=35>.

¹² See *Precedent Regarding Claims of Attorney-Client Privilege in Congressional Investigations*, at 1, COEQUAL (Oct. 2019), https://assets-global.website-files.com/5cd036eb776bf651fcf12ee9/63fe10a03b5b52906ccc2540_Precedent%20Regarding%20Claims%20of%20Attorney-Client%20Privilege%20in%20Congressional%20Investigations.pdf (citing CRS Report 95-464, *Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, at 32, CONGRESSIONAL RESEARCH SERVICE (Apr. 7, 1995), <https://sgp.fas.org/crs/misc/95-464.pdf#page=35>).

¹³ CRS Report 95-464, at 32.

¹⁴ *Precedent Regarding Claims of Attorney-Client Privilege in Congressional Investigations*, at 1.

3. Since PBGC amended its internal rules in November 2023 to require all SFA applications to be cross-checked against the DMF, how many applications have been found to include requests for funding using censuses with dead participants listed? Included in your response, please also provide:
 - a. The number of plans that provided census information to PBGC as part of an SFA application that included dead participants after November 1, 2023;
 - b. The names of the plans that submitted census information to PBGC as part of an SFA application that included dead participants after November 1, 2023.

Thank you for your prompt attention to this very important matter.

Sincerely,



Bill Cassidy, M.D.

Ranking Member

U.S. Senate Committee on Health,
Education, Labor, and Pensions