COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

September 30, 2022

The Honorable Gordon Hartogensis
Director
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005

Dear Director Hartogenesis:

We write to bring to your attention *West Virginia v. Environmental Protection Agency* (EPA), a recent Supreme Court decision that clarified the limitations of certain agency action.[1] Although Article I, Section 1, of the Constitution vests "all legislative powers" in Congress, the Biden administration has largely relied on executive action to advance its radical agenda. For example, in his first year in office, President Biden issued more executive orders[2] and approved more major rules[3] than any recent president. Such reliance on the administrative state undermines our system of government. Our founders provided Congress with legislative authority to ensure lawmaking is done by elected officials, not unaccountable bureaucrats. Given this administration's track record, we are compelled to underscore the implications of *West Virginia v. EPA* and to remind you of the limitations on your agency's authority.

In *West Virginia v. EPA*, the Court invoked the "major questions doctrine" to reject an attempt by the EPA to exceed its statutory authority.[4] As the Court explained, "precedent teaches that there are 'extraordinary cases' … in which the 'history and breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[5] Under this doctrine, an agency "must point to 'clear congressional authorization' for the power it claims."[6] However, the

[1] 142 S. Ct. 2587 (2022).
[2] FED. REGISTER, EXECUTIVE ORDERS, https://www.federalregister.gov/presidential-documents/executive-orders.
[3] *How Biden Has Made Policy With Short-Term, Costly Rules: Charts*, BLOOMBERG L. (May 31, 2022), https://news.bloomberglaw.com/environment-and-energy/how-biden-has-made-policy-with-short-term-costly-rules-charts.
[4] *West Virginia*, 142 S. Ct. at 2608-2614.
[5] *Id.* at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 129, 159-160 (2000)).
[6] *West Virginia*, 142 S. Ct. at 2609 (citation omitted).

EPA could not point to such authorization. Rather, the EPA "'claim[ed] to discover … an unheralded power' representing a 'transformative expansion in [its] regulatory authority' … in the vague language of an 'ancillary provision' of the Act … that was designed to function as a gap filler."[7] Notably, such discovery "allowed [EPA] to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."[8] As a result, the Court rejected the EPA's attempt to exceed its statutory authority so plainly.

Unfortunately, EPA's attempt to invent new authorities is not unusual for the Biden administration. Recently, the Court struck down both the Centers for Disease Control and Prevention's attempt to impose an eviction moratorium[9] and the Occupational Safety and Health Administration's attempt to impose a vaccine or testing mandate.[10] Thankfully, in *West Virginia v. EPA*, the Court made clear that such reliance on the administrative state will no longer be allowed. To be clear, "the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives."[11] In the United States, it is "the peculiar province of the legislature to prescribe general rules for the government of society."[12]

The management of defined benefit pension plans is a priority for Committee Republicans. Conducting oversight on the Pension Benefit Guaranty Corporation's (PBGC) policymaking, rulemaking, and implementation of recently passed laws is part of that effort. We are aware that PBGC has been and continues to be active in its rulemaking under the Biden administration. Its current regulatory agenda lists 10 items in various stages of the rulemaking process.[13] Additionally, PBGC is charged with implementing the *American Rescue Plan Act*'s (ARPA) multibillion-dollar taxpayer bailout of failing and insolvent multiemployer pension plans.[14]

On July 8, PBGC published a final rule titled "Special Financial Assistance by PBGC," which establishes requirements and restrictions for multiemployer pension plans applying for special financial assistance (SFA) pursuant to ARPA.[15] The final rule allows plans to use two separate interest rates when calculating the total amount of SFA: one for calculating non-SFA assets and one for calculating SFA assets. The final rule's calculation of SFA assets disregards ARPA's statutory interest rate limit for determining the amount of SFA,[16] granting plans access to additional federal dollars than originally estimated. This is especially concerning given that the interim final rule explicitly states, "PBGC does not have authority to provide a different rate or bifurcate the statutorily mandated interest rate."[17] The regulation also includes a special rule for calculating the amount of SFA for plans that reduced benefits pursuant to the *Multiemployer Pension Reform Act of 2014* (MPRA), which also disregards the statute's interest rate limit.

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[7] *Id*. at 2610 (citations omitted).
[8] *Id*.
[9] Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021).
[10] NFIB v. OSHA, 142 S. Ct. 661 (2022).
[11] *West Virginia*, 142 S. Ct. at 2626 (Gorsuch, J., concurring).
[12] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).
[13] OFF. OF INFO. & REG. AFF., AGENCY RULE LIST—SPRING 2022, https://www.reginfo.gov/public/do/eAgendaMain.
[14] American Rescue Plan Act of 2021, Pub. L. No. 117-2 (2021).
[15] Special Financial Assistance by PBGC, 87 Fed. Reg. 40,968 (July 8, 2022).
[16] 29 U.S.C. § 1432(e)(3).
[17] Special Financial Assistance by PBGC, 86 Fed. Reg. 36,603 (July 12, 2021).

Further, we are disappointed by the final rule's expansion of SFA permissible investments, which allows plans to invest up to 33 percent of SFA assets in "return-seeking" assets.[18] Following the introduction of the interim final rule, we warned PBGC that multiemployer plan trustees have mismanaged their plans for decades and "cannot be trusted to invest their existing assets prudently, let alone the billions of taxpayer dollars they will receive through SFA."[19] Rather than erring on the side of certainty and safety of investments, the final rule allows irresponsible plan trustees to throw good money after bad.

As the committee of jurisdiction overseeing PBGC, we assure you we will exercise our robust investigative and legislative powers not only to reassert our Article I responsibilities forcefully but also to ensure the administration does not continue to exceed Congressional authorizations. Accordingly, to assist in this effort, please provide the following information no later than October 17, 2022:

1. A list of all pending rulemakings and the specific Congressional authority for each pending rulemaking;

2. A list of all expected rulemakings and the specific Congressional authority for each expected rulemaking;

3. The specific Congressional authority for the July 2022 final rule's use of two separate interest rates for calculating SFA under ARPA;

4. The specific Congressional authority for the July 2022 final rule's calculation of the SFA amount for plans that reduced benefits pursuant to MPRA.

Sincerely,

Virginia Foxx
Ranking Member

Rick W. Allen
Ranking Member
Subcommittee on Health, Employment, Labor, and Pensions

Cc: The Honorable Martin J. Walsh, Secretary of Labor
The Honorable Janet L. Yellen, Secretary of the Treasury
The Honorable Gina M. Raimondo, Secretary of Commerce

[18] Special Financial Assistance by PBGC, 87 Fed. Reg. at 41,016.
[19] Letter from Reps. Virginia Foxx and Rick Allen to Gordon Hartogensis, Dir., PBGC (Aug. 11, 2021), https://republicans-edlabor.house.gov/uploadedfiles/pbgc_letter.pdf.