



VIA ELECTRONIC SUBMISSION

July 15, 2021

Katharine Richards  
Office of Recovery Programs  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue NW  
Washington, DC 20220

**Re: Coronavirus State and Local Fiscal Recovery Funds; TREAS-DO-2021-0008;  
RIN 1505-AC77**

Dear Ms. Richards:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of the Treasury in response to the above-referenced interim final rule published in the *Federal Register* on May 17, 2021, at 86 Fed. Reg. 26786.

### **About Associated Builders and Contractors**

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors for private and government customers. Moreover, the vast majority of ABC's contractor members are classified as small businesses. This is consistent with the Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees<sup>1</sup>) and industry workforce employment (more than 82% of the construction industry is employed by small businesses).<sup>2</sup> In fact, construction companies that employ fewer than 100 construction professionals compose 99% of construction firms in the United States; they build 63% of

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<sup>1</sup> U.S. Census Bureau 2019 County Business Patterns:

<https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

<sup>2</sup>2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3,

<https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

U.S. construction, by value, and account for 68% of all construction industry employment.<sup>3</sup>

In addition to small businesses that build public works projects, ABC also has large member companies that contract directly with federal, state and local governments to successfully build large-scale projects subject to government acquisition regulations and subcontract work to qualified small businesses that meet federal, state and local government small business contracting goals. For example, ABC members won 57% of the \$118 billion in direct federal construction contracts exceeding \$25 million awarded during fiscal years 2009-2020.<sup>4</sup>

Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

## **Background**

On March 11, President Biden signed into law the American Rescue Plan Act of 2021 (H.R. 1319),<sup>5</sup> which includes \$350 billion in fiscal recovery funds to help states, territories, tribal governments and localities respond to the ongoing COVID-19 public health emergency and its economic impacts.<sup>6</sup> Section 9901 of ARPA amended Title VI of the Social Security Act to add section 602, which establishes the Coronavirus State Fiscal Recovery Fund, and section 603, which establishes the Coronavirus Local Fiscal Recovery Fund.<sup>7</sup>

On May 17, the Treasury Department issued an interim final rule<sup>8</sup> providing guidance on eligible uses for the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund established under ARPA, known hereafter as the SLFRF program. The rulemaking, along with a fact sheet on the IFR,<sup>9</sup> details how SLFRF program money can be used to offset state and local budget shortfalls, support COVID-19 response efforts and address economic stabilization for households and businesses.

Of interest to ABC and the construction industry, the guidance specifically includes language promoting certain controversial labor provisions,<sup>10</sup> including project labor

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<sup>3</sup> U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, Available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

<sup>4</sup> USASpending.gov data (Accessed Dec. 22, 2020) cross-referenced with ABC membership list discussed in greater detail at TheTruthAboutPLAs.com: <https://thetruthaboutplas.com/2021/02/10/february-2021-update-abcs-fight-against-government-mandated-project-labor-agreements/>.

<sup>5</sup> <https://www.congress.gov/bill/117th-congress/house-bill/1319/text>.

<sup>6</sup> 86 Fed. Reg. 26816.

<sup>7</sup> *42 U.S.C. 801 et seq. Sections 602, 603 of the Act.*

<sup>8</sup> 86 Fed. Reg. 26802.

<sup>9</sup> <https://home.treasury.gov/system/files/136/SLFRF-Fact-Sheet-FINAL1-508A.pdf>.

<sup>10</sup> Language of concern from the Treasury IFR: "It is important that necessary investments in water, sewer, or broadband infrastructure be carried out in ways that produce high-quality infrastructure, avert disruptive and costly delays, and promote efficiency. Treasury encourages recipients to ensure that water, sewer, and broadband projects use strong labor standards,

agreements, community benefits agreements, prevailing wage and local hire requirements on eligible water, sewer and broadband infrastructure projects funded by the SLFRF program.<sup>11</sup>

Shortly after the rulemaking was issued, on May 24, ABC sent a letter<sup>12</sup> to U.S. Treasury Secretary Janet Yellen expressing concerns with the IFR's language encouraging state and local governments to mandate PLAs on eligible projects, which have historically needlessly increased taxpayer-funded construction costs and discouraged competition from many of our nation's small and large nonunion construction businesses and their employees, who comprise 87.3% of the private U.S. construction industry workforce and freely choose not to belong to a union.<sup>13</sup>

ABC's letter also encouraged the department to provide further guidance that clarifies that state and local governments are not required to mandate PLAs on eligible construction projects and that the federal government's encouragement of PLAs will not become a mandate or requirement at a later date.

On June 17, 2021, Treasury created a new SLFRF webpage<sup>14</sup> and released a document called the Compliance and Reporting Guidance for the Coronavirus State and Local Fiscal Recovery Funds,<sup>15</sup> which provides "additional detail and clarification for each recipient's compliance and reporting responsibilities under the SLFRF program," including eligible infrastructure projects and additional detailed project-level information required for water, sewer and broadband infrastructure projects.<sup>16</sup>

### **Summary of ABC's Comments in Response to Treasury's Interim Final Rule**

ABC is concerned Treasury's promotion of government-mandated PLAs on eligible water, sewer and broadband infrastructure projects will undermine the SLFRF program's goal of providing "a substantial infusion of resources to communities working

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including project labor agreements and community benefits agreements that offer wages at or above the prevailing rate and include local hire provisions, not only to promote effective and efficient delivery of high-quality infrastructure projects but also to support the economic recovery through strong employment opportunities for workers. Using these practices in construction projects may help to ensure a reliable supply of skilled labor that would minimize disruptions, such as those associated with labor disputes or workplace injuries. To provide public transparency on whether projects are using practices that promote on-time and on-budget delivery, Treasury will seek information from recipients on their workforce plans and practices related to water, sewer, and broadband projects undertaken with Fiscal Recovery Funds. Treasury will provide additional guidance and instructions on the reporting requirements at a later date." 86 Fed. Reg. 26802.

<sup>11</sup> 86 Fed. Reg. 26802.

<sup>12</sup> <https://abc.org/Portals/1/2021%20Files/ABC%20Letter%20to%20Treasury%20Opposing%20PLA%20Language%20in%20ARPA%20IFR.pdf?ver=2021-05-24-103830-317&timestamp=1621867123750>.

<sup>13</sup> <https://www.bls.gov/news.release/pdf/union2.pdf>.

<sup>14</sup> <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds/recipient-compliance-and-reporting-responsibilities>.

<sup>15</sup> Compliance and Reporting Guidance for the Coronavirus State and Local Fiscal Recovery Funds (Version 1.1, published June 24, 2021) available at <https://home.treasury.gov/system/files/136/SLFRF-Compliance-and-Reporting-Guidance.pdf>.

<sup>16</sup> See pages 20-22 of Part H.. Required Programmatic Data for Infrastructure Projects (EC 5) of Section B. Project and Expenditure Report of the SLFRF's June 24 Compliance and Reporting Guidance document.

to turn the tide on the pandemic, address its economic fallout, and lay the foundation for a strong and equitable recovery.”<sup>17</sup>

In fact, ABC’s comments raise concerns that Treasury’s encouragement of government-mandated PLAs on federally assisted construction projects will harm small and minority-owned businesses and their diverse employees, reduce competition, needlessly increase construction costs by 12% to 20% per project, exacerbate the construction industry’s skilled labor shortage and create a rigged procurement process benefitting special interests that will not help with America’s recovery from the economic challenges caused by the COVID-19 pandemic or efficiently improve America’s infrastructure.

As outlined in these comments, opponents of PLA mandates can point to federal and federally assisted construction projects subject to PLA schemes that have suffered from increased costs, reduced competition,<sup>18</sup> strikes,<sup>19</sup> safety violations,<sup>20</sup> delays, litigation,<sup>21</sup> poor local hiring outcomes and a lack of workforce diversity.<sup>22</sup>

These arguments undermine the Treasury’s assertion that “Using these practices in construction projects may help to ensure a reliable supply of skilled labor that would minimize disruptions, such as those associated with labor disputes or workplace injuries,” and will “promote effective and efficient delivery of high-quality infrastructure projects but also to support the economic recovery through strong employment opportunities for workers.”<sup>23</sup>

ABC and a diverse coalition of construction and employer groups<sup>24</sup> support fair and open competition and oppose government-mandated PLAs on federal and federally assisted projects because hardworking taxpayers deserve more efficient and effective policies that will encourage all qualified contractors and their skilled workforce to compete to build long-lasting, quality projects at the best price.

## **Understanding the Negative Impacts of Government-Mandated PLAs**

PLAs, when mandated or encouraged by government agencies, are inherently anti-small business. Any policy encouraging or mandating the use of PLAs has the practical effect of restricting small businesses’ ability to win a federal or federally assisted construction contract and participate in economic recovery resulting from the SLFRF

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<sup>17</sup> U.S. Treasury Recipient Compliance and Reporting Responsibilities website: <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds/recipient-compliance-and-reporting-responsibilities>.

<sup>18</sup> [Research on Government-Mandated Project Labor Agreements](#), Dec. 28, 2012, TheTruthAboutPLAs.com.

<sup>19</sup> [Do Project Labor Agreements Stop Strikes on Construction Jobsites?](#) March 29, 2021, TheTruthAboutPLAs.com.

<sup>20</sup> [Setting the Record Straight: Do Government-Mandated Project Labor Agreements Really Improve Safety Performance?](#) March 16, 2021, TheTruthAboutPLAs.com.

<sup>21</sup> [2021 Update: Courts Rule in Favor of #NoPLA Laws Promoting Fair and Open Competition](#), Feb. 17, 2021, TheTruthAboutPLAs.com.

<sup>22</sup> [Government-Mandated Project Labor Agreement Failures on Federal and Federally Assisted Construction Projects](#), March 10, 2021, TheTruthAboutPLAs.com.

<sup>23</sup> 86 Fed. Reg. 26802.

<sup>24</sup> Visit [BuildAmericaLocal.com](https://www.buildamericalocal.com) to access coalition letters to the Biden administration and Congress opposing PLA mandates.

program's investment in infrastructure. Even though all small and large businesses are technically allowed to compete to win contracts subject to PLAs under current policies, the practical negative impact of PLA mandates on small business is real and cannot be understated. The anti-competitive and costly effects of PLA mandates must be addressed proactively by the Treasury with a revised policy that allows firms to voluntarily enter into PLAs but curtails encouragement and pressure on state and local governments to require PLAs and the use of union labor on federally assisted projects funded by taxpayers.

A PLA typically forces contractors and subcontractors to agree to recognize specific unions as the representatives of employees on that job; use union hiring halls to obtain most or all craft workers; obtain apprentices exclusively through union apprenticeship programs; follow inefficient union work rules; and pay into union benefits and multi-employer pension plans even if companies have their own plans. Employees would have to join a union and/or pay union dues as a condition of employment, even if they already work for a nonunion business, and will never access contributions to union benefit and pension plans unless they join a union and meet vesting schedules.

These problematic provisions included in a typical PLA, which are discussed in greater detail later in these comments, discourage competition from the best-qualified, most experienced small, large and disadvantaged contractors that can build taxpayer-funded projects for federal, state and local government at the best possible price and their diverse local workforce.

In a 2018 ABC member survey,<sup>25</sup> 98% of respondents said they would be less likely to bid on a taxpayer-funded construction contract if a PLA was imposed as a condition of winning a contract, and 89% said a government-mandated PLA would result in decreased hiring of minority, women, veteran and disadvantaged business enterprises. In addition, 94% of respondents said they would expect less competition from subcontractors for construction contracts subject to a government-mandated PLA, and 97% said a PLA would result in worse local hiring outcomes for a project.

When governments mandate or encourage PLAs on taxpayer-funded construction projects, the American people suffer from inefficient, anti-competitive and discriminatory procurement policies that studies have found raise the cost of projects between 12% and 20%,<sup>26</sup> which results in fewer infrastructure improvements and reduced construction industry job creation.

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<sup>25</sup> [Survey: ABC Members Strongly Oppose Government Mandated PLAs](https://abc.org/Portals/1/Newsline%202017/Newsline%202018/ABC%20National%20Member%20Survey%20Results%20on%20Project%20Labor%20Agreements%20Published%20013019.pdf?ver=2019-01-30-135945-283). Jan. 30, 2019, ABC Newsline. Survey results available here:

<https://abc.org/Portals/1/Newsline%202017/Newsline%202018/ABC%20National%20Member%20Survey%20Results%20on%20Project%20Labor%20Agreements%20Published%20013019.pdf?ver=2019-01-30-135945-283>.

<sup>26</sup> Most recently, [a study published in January 2020](#) found Connecticut school projects subject to government-mandated PLAs were 19.8% more expensive compared to school projects not built with PLA mandates. Multiple studies measuring the impact of government-mandated PLAs on school construction in California, Massachusetts, New Jersey, New York and Ohio (all states with school construction prevailing wage laws) made similar conclusions and are available at [TheTruthAboutPLAs.com](http://TheTruthAboutPLAs.com), [Research on Government-Mandated Project Labor Agreements](#), updated March 2020. Anecdotal examples of federal, state and local public works projects built with and without PLA requirements also support the premise that PLA mandates increase costs.

According to an ABC economic model, every \$1 billion in extra overall construction spending generates an average of at least 5,700 construction jobs, and every \$1 billion in extra construction spending on infrastructure generates an average of at least 3,000 construction jobs.<sup>27</sup>

As the construction industry faces a 7.5% unemployment rate<sup>28</sup> due to the recession caused by the COVID-19 pandemic and America's infrastructure faces an estimated \$2.6 trillion investment gap by 2029,<sup>29</sup> lawmakers need to do everything possible to maximize taxpayer investments in infrastructure while helping all construction workers find quality jobs to rebuild their communities.

Further, government-mandated PLAs effectively prevent qualified contractors and the 87.3% of the U.S. construction workforce that chooses not to join a labor union<sup>30</sup> from fairly competing for contracts to build taxpayer-funded projects.

The U.S. construction industry needs to hire and upskill an estimated 430,000 construction workers in 2021<sup>31</sup> to meet current industry demand, which does not include additional short- and long-term investment in infrastructure. Divisive PLA mandate policies will exacerbate the industry's skilled workforce shortage by creating opportunity for just 12.7% of the construction workforce employed by certain unionized firms. It will also choke off merit shop and community apprenticeship and workforce development pipelines not offered by unions and joint labor/management programs from opportunities created by investment of taxpayer dollars in infrastructure. The construction industry is directly harmed by anti-competitive and costly government-mandated PLA policies. And without strong participating from the industry, federal, state and local governments will not meet their infrastructure objectives.

For these reasons, 24 states<sup>32</sup> have passed inclusive laws restricting government-mandated PLAs and preferences on state, state-assisted and local public works projects<sup>33</sup> to some degree, allowing all qualified firms and their construction workers to fairly compete to build their communities. These fair and open competition laws are likely to prevent government-mandated PLAs on projects receiving federal money from the Treasury, presuming state and/or local money is also invested in these infrastructure projects.

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<sup>27</sup> [The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021](#), March 23, 2021, ABC News Release.

<sup>28</sup> BLS construction industry unemployment rate for June 2021, <https://www.bls.gov/iag/tgs/iag23.htm>.

<sup>29</sup> [Failure to Act: Economic Impacts of Status Quo Investment Across Infrastructure Systems](#), the American Society of Civil Engineers' 2021 report on infrastructure funding gap.

<sup>30</sup> [Union Members Summary](#), January 2021, U.S. Bureau of Labor Statistics.

<sup>31</sup> [The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021](#), March 23, 2021, ABC News Release.

<sup>32</sup> Map of 24 FOCA states available at TheTruthAboutPLAs.com: <https://thetruthaboutplas.com/wp-content/uploads/2021/06/24-FOCA-States-Restricting-Government-Mandated-Project-Labor-Agreements-as-of-050121.pptx>.

<sup>33</sup> See database of 24 FOCA states available at TheTruthAboutPLAs.com: <https://www.abc.org/Portals/1/2021%20Files/Current-State-FOCA-Laws-GMPLA-Bans-through-Virginia%20Repeal-Updated-June-2021.xlsx?ver=2021-06-29-120347-173>.



Unfortunately, eight states have enacted pro-PLA policies that have led to PLA mandates on federally assisted projects. Small and large contractors pursuing work in pro-PLA states such as California, Connecticut, Hawaii, Illinois, New Jersey, New York and Washington, in addition to states without a formal PLA policy, have expressed concerns to policymakers about being shut out of numerous state and local government-mandated PLA projects supported by federal funding.

The Biden administration and some members of Congress's support of proposals,<sup>34</sup> regulations,<sup>35</sup> executive orders<sup>36</sup> and legislation<sup>37</sup> expanding the federal government's current policy<sup>38</sup> of encouraging and promoting government-mandated PLAs would restrict federal and federally assisted contracting opportunities for small, minority-, women- and veteran-owned businesses and their diverse workforces who want nothing more than to rebuild their local community and America.

### **Common PLA Provisions That Reduce Competition**

Government-mandated PLAs are commonly replete with provisions that have the effect of eliminating competition from quality small and large contractors and needlessly increasing costs. There are five common requirements of PLAs that are the most problematic.

- **Problem 1: Prohibiting Use of Existing Employees**

PLAs typically require nonunion companies to obtain their workers from union hiring halls for each trade, respectively. This means that a nonunion company cannot use its existing workforce and must follow unfamiliar union work rules governing labor productivity. Some PLAs allow contractors to use a limited number of existing employees, but they must be sent to the union hiring hall and dispatched through a union hiring halls' individual rules and practices, which vary from union to union. In addition, because union hiring halls typically dispatch workers according to seniority and/or time out of work, out-of-town union members receive hiring preference on PLA jobs at the expense of local nonunion workers.

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<sup>34</sup> [White House Fact Sheet: The American Jobs Plan](#), March 31, 2021 (Accessed June 10, 2021).

<sup>35</sup> [See language](#) in the U.S. Department of Transportation Build America Bureau Feb. 17, 2021, announcement that the FY 2021 Infrastructure for Rebuilding America (INFRA) grant program, which provides \$889 million to fund state and locally procured transportation projects of national and regional significance, encourages grant applicants to mandate PLAs. See Notice of Funding Opportunity for the Department of Transportation's Infrastructure For Rebuilding America (INFRA) Program for Fiscal Year 2021, 86 Fed. Reg. 11572 and <https://www.transportation.gov/buildamerica/financing/infra-grants/infrastructure-rebuilding-america>.

<sup>36</sup> [Biden Administration Circulates Pro-PLA Executive Order for Interagency Review](#), June 30, 2021, ABC Newsline.

<sup>37</sup> [House Energy and Commerce Committee's CLEAN Future Act](#) and Rep. Dingell amendment to House INVEST Act.

<sup>38</sup> On Feb. 6, 2009, President Obama signed [Executive Order 13502, Use of Project Labor Agreements for Federal Construction Projects](#), which encourages federal agencies to mandate PLAs on federal construction projects exceeding \$25 million in total value on a project-by-project basis, and permits states and localities to mandate PLAs on projects receiving federal dollars. It also rescinded President George W. Bush's PLA-neutral policy, Executive Orders [13202](#) and [13208](#), which permitted firms to voluntarily enter into PLAs but prohibited government-mandated PLAs on federal and federally assisted construction projects from 2001 to 2009. On April 13, 2010, the FAR [issued a final rule](#), effective May 13, 2010, implementing President Obama's executive order.

Large and small nonunion construction companies that cannot use all or most of their existing skilled workforce may be unable to deliver a quality project to government customers on time, on budget and safely with an unfamiliar workforce governed by unfamiliar union work rules and multiple collective bargaining agreements. This increased risk and uncertainty needlessly increases bid costs and/or discourage contractors from pursuing projects subject to a PLA requirement.

- **Problem 2: Required Use of Union Apprentices**

PLAs typically require nonunion companies to obtain apprentices exclusively from union apprenticeship programs.<sup>39</sup> This means participants in federal or state government-approved nonunion apprenticeship programs cannot work on a typical PLA job, which will ultimately undermine industry efforts to address the construction industry's skilled workforce shortage, which is estimated to be 430,000 skilled workers in 2021 alone.<sup>40</sup>

Some PLAs can be somewhat more inclusive by inviting all participants in federal and state government-registered construction apprenticeship programs, regardless of their program's affiliation with unions. However, these programs only graduated about 40,000 completers in 2020, according to U.S. DOL<sup>41</sup> and state government data. Government registered apprenticeship programs are an important part of a broader all-of-the-above solution to the industry's skilled worker shortage, but they cannot meet the construction industry's workforce development needs alone. The truth is, the vast majority of the construction industry workforce is not upskilled via registered apprenticeship programs and the vast majority of contractors do not participate in registered apprenticeship programs, but instead upskill their employees via a variety of other workforce development pathways. Small businesses are less likely to participate in government-registered apprenticeship programs because of the paperwork and costs associated with setting up and participating in a program when simpler, cost-effective, practical local workforce development alternatives are available.

- **Problem 3: Requiring Union Membership and Payment of Union Dues**

PLAs often require nonunion workers to join a union and/or pay union dues and fees to the union, even if they are not members of the union, as a condition of employment on a PLA project. Yet nearly nine in 10 U.S. construction workers chooses to work for a nonunion employer. The marketplace has spoken. Construction workers are able to apply for union membership and work for union-signatory employers through union hiring halls at any time. Nothing prevents workers from joining a union in the construction industry, which is why lawmakers and regulators mandating union membership and union dues as a condition of employment is especially problematic and unnecessary.

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<sup>39</sup> [Government-Mandated Project Labor Agreements Exacerbate Construction Industry's Skilled Labor Shortage](#), March 30, 2021, TheTruthAboutPLAs.com.

<sup>40</sup> [The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021](#), March 23, 2021, ABC news release.

<sup>41</sup> [Registered Apprenticeship National Results Fiscal Year 2020](#), U.S. Department of Labor Employment and Training Administration (Accessed June 25, 2021).



- **Problem 4: Costly Duplicative Fringe Benefits and Wage Theft**

PLAs often require nonunion companies to pay their workers' health and welfare benefits to union funds. This is true *even* if these companies have their own benefit plans which are more generous than the union benefit plan. Worse still, the money deducted from workers' paychecks and sent to union benefit and pension funds is, for all intents and purposes, a form of wage theft. Nonunion workers almost never vest in these pensions and thus are deprived of these funds which would otherwise be paid to them as wages. Studies have found that the wage theft associated with PLAs amounts to 20% of workers' take-home pay.<sup>42</sup> In addition, nonunion contractors sometimes cover the cost of this PLA wage theft to make employees whole. This duplicative payment of benefits increases labor costs and makes nonunion contractors less competitive because these are costs unionized contractors do not face under a PLA project.

- **Problem 5: Potential Multiemployer Pension Plan Withdrawal Liability**

Potential multiemployer pension plan withdrawal liability is a key reason that many nonunion construction companies will not bid on PLA projects. The Employment Retirement Income Security Act allows union-affiliated multiemployer pension plans to make assessments against employers *even after* they withdraw from those plans and no longer have an obligation to contribute. Employers that withdraw from a multiemployer pension plan, for example after ceasing work on a project covered by a PLA, can be required to pay the plan an additional amount to cover part of the plan's alleged "unfunded vested benefits" in certain circumstances.

Many multiemployer pension plans, particularly in the construction industry, are underfunded now or will be in the future. Hundreds<sup>43</sup> are listed as critical or endangered, according to the U.S. DOL,<sup>44</sup> and insolvent plans are backed by the U.S. Pension Benefit Guaranty Corporation, which unfortunately pays participating workers pennies on the dollar for benefits they have been promised through the collective bargaining process.

Nonunion construction companies, especially small and diverse businesses, are not likely to bid on a PLA project when it requires them to sign up for open-ended, unknowable financial liabilities.<sup>45</sup> The size of these potential financial liabilities are

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<sup>42</sup> McGowan, John R. PhD, [The Discriminatory Impact of Union Fringe Benefit Requirements on Non-Union Workers Under Government-Mandated Project Labor Agreements](#), 2012.

<sup>43</sup> Stakeholders interested in reviewing construction industry multiemployer pension plans in critical and declining, critical and endangered status from 2008 to March 16, 2021, can search this spreadsheet: <https://thetruthaboutplas.com/wp-content/uploads/2021/03/Troubled-Construction-Industry-MEPP-Notices-For-Plan-Years-2008-to-2021-031821.xlsx> (Accessed June 25, 2021).

<sup>44</sup> Critical, Critical and Declining, Endangered and WRERA Status Notices, U.S. Department of Labor Employee Benefits Security Administration, <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/public-disclosure/critical-status-notices> (Accessed July 1, 2021).

<sup>45</sup> The future liabilities and health of multiemployer pension plans has been further complicated by the injection of an estimated [\\$86 billion in federal cash into the multiemployer pension plan system and the PBGC](#) as a result of a provision in the American Rescue Plan Act of 2021 ([H.R. 1319](#)) and related rulemaking currently underway.

based on how well a pension plan is managed and funded, but the nonunion companies have no role in the management of the plan.

Concerning provisions in PLAs may not be limited to the five common provisions in typical PLAs outlined in this section. However, this overview should provide insights about why PLA mandates and encouragements increase costs, reduce competition and deny jobs to qualified local contractors and construction workers.

### **ABC Recommendations in Response to Treasury IFR, Guidance and Reporting**

For the reasons expressed in these comments, ABC recommends that Treasury eliminate all language and state and local reporting requirements related to government-mandated PLAs on water, sewer and broadband infrastructure projects funded by the SLFRF program. This policy change will expand the benefits of rebuilding America's infrastructure to the entire construction industry.

Ensuring fair and open competition on taxpayer-funded construction projects will ultimately result in savings to taxpayers, more opportunities for all qualified local small businesses, minorities and women in the construction industry, and the construction of more quality infrastructure projects so America can "Build Back Better."

In the absence of full repeal of these problematic provisions, Treasury should make it abundantly clear that PLA mandates and other labor provisions are not mandated as a condition of accessing SLFRF program funding. ABC is aware of state and local government officials contacting ABC with concerns that if they do not mandate a PLA, they may not get current or future tranches of SLFRF program funding, even though the language explicitly states Treasury is encouraging and not requiring PLAs on eligible projects.

In addition, we recommend that Treasury eliminate burdensome reporting requirements on state and local government recipients of SLFRF program funding if they choose not to require costly PLA mandates on eligible infrastructure projects exceeding \$10 million. SLFRF Program Compliance and Reporting Guidance<sup>46</sup> currently requires SLFRF recipients who choose not to mandate a PLA to provide a project workforce continuity plan detailing:

- How the recipient will ensure the project has ready access to a sufficient supply of appropriately skilled and unskilled labor to ensure high-quality construction throughout the life of the project;
- How the recipient will minimize risks of labor disputes and disruptions that would jeopardize timeliness and cost-effectiveness of the project; and
- How the recipient will provide a safe and healthy workplace that avoids delays and costs associated with workplace illnesses, injuries and fatalities;

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<sup>46</sup> Compliance and Reporting Guidance for the Coronavirus State and Local Fiscal Recovery Funds (Version 1.1 published June 24, 2021) available at <https://home.treasury.gov/system/files/136/SLFRF-Compliance-and-Reporting-Guidance.pdf>.

- Whether workers on the project will receive wages and benefits that will secure an appropriately skilled workforce in the context of the local or regional labor market; and
- Whether the project has completed a project labor agreement.

ABC is concerned by Treasury's unsaid assertion that a PLA will deliver these worthwhile objectives. If anything, PLA requirements may undermine some of the above objectives, while other objectives are not dependent on a PLA (or a lack of a PLA) and are already addressed through applicable local, state or federal laws and regulations and industry best practices.

Treasury's act of coercing private employers to enter into agreements with unions via PLAs as a condition of winning construction contracts procured by state and local governments receiving federal APRA money is not just bad policy, but is likely unlawful. This activity likely violates the U.S. Constitution, the National Labor Relations Act and antitrust laws.

Finally, ABC is concerned with the SLFRF program's encouragement for states and localities to require local hire on eligible construction projects.

Local hire policies enacted by states and localities have resulted in unintended consequences that have actually hurt the local workforce and contracting community even more than the status quo.

For example, local hiring preferences have led to retaliatory local hiring preferences by surrounding governments. This has resulted in less opportunity for the workforce in the original local hiring jurisdiction, as well as increased long-term construction workforce unemployment if there are not enough taxpayer-funded projects to keep them employed full-time. Contractors are forced to hire other local workers from neighboring zones to pursue contracts in neighboring zones, which disrupts the retention of a firm's high-quality and safe workforce and harms overall competition.

In addition, in many instances, local hiring rules do not result in net job creation for the local construction workforce the policy is intended to help. Some unions and contractors have reportedly engaged in a scheme called "checkerboarding," where they employ union members or local employees who live in the local hire jurisdiction but work at some other site in the jurisdiction not subject to a local hire policy. They then transfer them to the project covered by local hire rules just to boost numbers and replace those empty jobs with out-of-area union members or workers. Unfortunately, governments may be unaware that such practices are preventing net job creation for residents in the local hiring zones.<sup>47</sup>

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<sup>47</sup> <http://thetruthaboutplas.com/2010/08/05/project-labor-agreements-and-big-labor-fail-at-local-job-creation/>.

In addition, federal law prohibits the use of in-state or local geographic preferences in the evaluation of bids or proposals except where a federal statute mandates or encourages the use of such preferences.<sup>48</sup> The current prohibition was put in place to comply with the full and open competition requirements of 23 U.S.C. 112<sup>49</sup> and the U.S. Constitution, specifically the Commerce Clause,<sup>50</sup> the Privileges and Immunities Clause<sup>51</sup> and the Equal Protection Clause.<sup>52</sup> Nothing in the legislative text of ARPA authorizes local hire mandates or preferences and will subject states and localities and the Treasury to needless legal challenges.

## **Conclusion**

ABC appreciates your consideration of our comments and looks forward to your response. We would welcome the opportunity to discuss our concerns in greater detail in person or in a virtual setting and look forward to working with Treasury and other stakeholders on the additional issues raised by these comments.

Respectfully submitted,



Ben Brubeck  
Vice President of Regulatory, Labor and State Affairs

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<sup>48</sup> 80 Fed. Reg. 12092.

<sup>49</sup> 23 U.S.C. 112 requires full and open competition in the award of contracts under the Federal-aid highway program. As acknowledged in the NPRM, 80 Fed. Reg. at 12092, the Federal Highway Administration has long interpreted this provision as prohibiting the use of geographic hiring preferences. *See* 23 C.F.R. 635.117(b).

<sup>50</sup> U.S. Const., art. I, Sec. 8, cl.3, grants Congress the power to regulate interstate commerce and has been interpreted as a negative constraint upon the states, prohibiting them from discriminating against interstate commerce absent a positive authorization of Congress.

<sup>51</sup> U.S. Const., art. IV, Sec. 2, cl. 1 provides that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

<sup>52</sup> U.S. Const., Amend. XIV prohibits states from denying any person the equal protection of its laws.