Agencies Release Rules on Special Financial Assistance for Multiemployer Pension Plans

On July 9, 2021, the Pension Benefit Guaranty Corporation (PBGC) released an interim final rule (IFR) implementing the Special Financial Assistance program (Program or SFA, as applicable) provided under Section 9704 of Title IX, Subtitle H of the American Rescue Plan (ARP) Act. The Program, as described in new Section 4262 of the Employee Retirement Income Security Act (ERISA), provides federal grants to certain financially troubled multiemployer pension plans.

Also released on July 9, was the IRS's Notice 2021-38 (Notice) providing guidance to plans that receive financial assistance funds. The Notice instructs plans on the reinstatement and make-up of benefits that had been suspended under an approved Multiemployer Pension Reform Act (MPRA) suspension application or due to plan insolvency. The Notice also addresses whether such make-up payments may be rolled over to an IRA or another plan, as well as the treatment of SFA for purposes of minimum funding requirements.

The PBGC has stated that it expects to provide approximately $94 billion in grants to up to 200 plans covering over three million participants.[1] As described more fully below, the amount of SFA provided to a plan is generally the amount needed to pay benefits through the end of 2051, determined by comparing the value of all of the plan's obligations to the value of the plan's resources.

Under the IFR, six priority groups have been established to manage the filing and processing of initial applications in the next two years. Plans in priority group 1 are those that are already insolvent or are projected to become insolvent before March 11, 2022, and may apply for assistance immediately. Plans in priority group 2 are plans that have implemented a MPRA suspension as of March 11, 2021, or that are expected to be insolvent within 1 year of the date an application for SFA is filed. These plans may apply for SFA beginning on January 1, 2022.

PBGC has targeted application dates for plans in priority groups 3-6 that phase-in beginning April 1, 2022, with the latest priority group application date being February 11, 2023. PBGC has indicated that it will start accepting applications from each group earlier than the group's target date if it is able to do so. Plans not otherwise currently described in a priority group may be added by PBGC and if so will be able to apply on a date specified by PBGC that will be no later than March 11, 2023.[2] Eligible plans not in or added to a priority group will be able to apply beginning March 11, 2023.

The IFR is effective as of July 12, 2021, and the Notice is effective as of July 9, 2021. Although the IFR provides for a 30-day comment period and may be subject to changes depending on the

[1] The number of plans the PBGC believes are eligible for SFA was stated during a July 9, 2021 webinar and that number appears in the Regulatory Impact Analysis section of the IFR. Of those plans, some of them may be eligible to apply but may have sufficient assets already to stay solvent until 2051 and therefore will receive no SFA.

[2] A description of the plans in each priority group and their application dates is provided in the appendix.

comments received, plan sponsors may rely on the IFR to determine plan eligibility, application procedures, and to determine the amount of assistance plans may request from the PBGC. No information has been provided regarding when a final rule is expected to be issued.

Neither the IFR nor the Notice addresses other multiemployer funding relief measures provided by ARP, including a delay in zone status designation, an extension of funding improvement and rehabilitation periods and adjustments to the funding standard account rules, as provided in Sections 9701 through 9703 of Title IX, Subtitle H. Guidance on those Sections will be issued at a later date.

Highlights of the IFR and the Notice

Provided below is an initial summary of the relevant provisions of the Program as provided in the IFR and an initial summary of the relevant provisions of related rules in the Notice reflecting our preliminary review of both the IFR and Notice. The details provided below are subject to revision as we learn more about the IFR and the Notice.

Federal funds to the PBGC

Federal funds are to be transferred from Treasury to the PBGC until September 30, 2030, in the amount necessary to pay the costs of the Program and the PBGC's related administrative expenses. Because there is no dollar limitation on the aggregate amount of funding that is permitted to be provided under the Program, the PBGC emphasized that plans will not be disadvantaged by having to wait until 2023 to file an application.

Eligible plans

Under ARP, four types of plans are eligible for SFA:

- Plans certified to be in critical and declining zone status for a plan year beginning in 2020-2022;[3]
- Plans with an approved suspension under MPRA as of March 11, 2021;
- Plans that in any of the three plan years beginning in 2020 through 2022 have been certified to be in critical zone status, are under 40% funded on a current liability basis,[4] and have an active/inactive ratio which is less than 2 to 3;[5] or
- Plans that became insolvent after December 16, 2014, have remained insolvent and have not terminated as of March 11, 2021

[3] The IFR confirms that plans that terminated by mass withdrawal in a plan year that ended before January 1, 2020 are not eligible for SFA. Plans in critical and critical and declining status that terminate by mass withdrawal in calendar years 2020-2022 appear to be eligible.

[4] The IFR notes that current liability is a measure derived using an interest rate chosen by the actuary within a "permissible range" under IRC §431(c)(6)(E). Because the selection of the interest rate by the actuary is part of the determination of current liability, the PBGC will accept the interest rate selected by the actuary and will not require the use of an alternative interest rate.

[5] The ratio is determined by looking at the end-of-year participant counts on Form 5500. On the 2020 Form 5500, these are the number of participants identified on line 6a(2) (total number of actives) plus the sum of lines 6b, 6c and 6e (total number of inactives including retired or separated participants receiving benefits, other retired or separated participants entitled to receive future benefits, and deceased participants whose beneficiary is receiving benefits or is entitled to benefits).

Actuarial assumptions for purposes of eligibility

The PBGC must accept the assumptions used in critical status and critical and declining status certifications completed before January 1, 2021, unless such assumptions are clearly erroneous. For certifications completed after December 31, 2020, the determination as to critical or critical and declining status must be made using assumptions that the plan used in its most recently completed certification before January 1, 2021, unless such assumptions (excluding the plan's interest rate) are unreasonable.

Additional eligibility rules for plans in critical status

Plans that have elected to be in critical status but have not been certified as such are not eligible for SFA. In addition, for critical status plans, the various conditions for eligibility do not need to be satisfied for the same year.

Mergers, transfers and spinoffs

The IFR also includes rules regarding mergers, transfers and spinoffs. Transactions completed on or after July 9, 2021 are ignored in the determination of the amount of SFA. This also applies to benefit increases or contribution rate reductions adopted after that date. These rules are intended to preclude an artificial inflation in the amount of SFA to which a plan is entitled and to prevent the conversion of an ineligible plan into an eligible plan.

Application for SFA

Application process

- Applications are required to be submitted electronically using the PBGC's e-filing portal
- The IFR and the Notice provide that plans applying for priority consideration will satisfy the requirement to submit an application to the PBGC and to Treasury by just submitting to the PBGC, which will transmit a copy of the application to Treasury
- Plans with a partition that was approved prior to March 11, 2021 must use an alternative application provided by the PBGC
- All applications must be submitted no later than December 31, 2025 (with revised applications required to be filed by December 31, 2026)
- A plan sponsor may contact the PBGC to informally discuss a potential application for SFA

Priority groups established for consideration of applications

As mentioned above, most plans will have to wait to until mid-2022 or early 2023 to file an application. As new priority groups open, the PBGC will continue to accept applications from earlier priority groups. Note, however, that applications are processed based on the PBGC's capacity and temporary "holds" on acceptance of new applications may be instituted. [6] The IFR provides that an application is considered filed if it meets the applicable priority requirement and can be accommodated by the PBGC.

[6] Presumably, this requirement is intended to limit or prevent applications beyond the PBGC's processing capacity from being deemed approved within the 120-day review period.

In the event that a plan experiences unexpected circumstances that bring the plan within a year of insolvency or a plan has implemented a MPRA suspension as of March 11, 2021, the IFR provides for emergency filings from these plans beginning on January 1, 2022, unless the PBGC specifies an earlier date. The plan sponsor must notify the PBGC before submitting the application that the application qualifies as an emergency filing.

Amount of SFA

Interest rate and other assumptions

- In determining the amount of financial assistance, plans must use the interest rate and other assumptions used in its most recent zone certification completed before January 1, 2021, except that the interest rate used cannot exceed the “interest rate limit.”
  - The IFR confirms that the “interest rate limit” is defined as the 3rd segment bond rate of the 24-month average yield curve, without applying the 25-year corridor, for the month in which the application is filed or the preceding three months, plus 200 basis points. That interest rate limit is currently just below 5.5% and is trending downward.

Determination of Amount

- The amount of SFA provided to a plan is intended to be the amount needed to pay benefits through the end of 2051. This is determined as the excess of the value of all of the plan’s obligations (the present value of all benefit payments and administrative expenses through the end of the 2051 plan year), less the plan’s resources (the fair market value of existing plan assets and the present value of expected future contributions, withdrawal liability payments and other payments expected to be made to the plan through the 2051 plan year). Special rules apply if the plan is receiving “regular” financial assistance under ERISA §4261.
- Based on this formula, it is clear that:
  - SFA is only intended to maintain plan solvency through the 2051 plan year[7]
  - Many eligible plans in critical but not critical and declining status will not be entitled to receive any SFA
- Participants’ benefits are not required to be reduced (other than as otherwise provided under a rehabilitation plan)
- Deterministic projections are required to determine the amount of SFA needed to pay benefits due through 2051
  - The SFA measurement date, which is the beginning date for projections, is the end of the calendar quarter immediately preceding the date the SFA application is filed, rather than a presumed SFA payment date

Reinstatement of suspended benefits and make-up payments

- The amount of SFA determined by the plan sponsor includes amounts required to reinstate benefits that had been suspended under an approved MPRA suspension or due to plan insolvency. Plans that receive SFA must reinstate benefits effective as of the month in which SFA is paid to the plan as if the reduction in benefits had not occurred

[7] After ARP was enacted and before the issuance of the IFR, interested parties urged the PBGC to adopt an interpretation of the required interest rate assumption such that it would apply only to earnings on current plan assets and a separate rate would be assumed for SFA required to pay for benefits not provided by current plan assets. The PBGC declined to adopt that approach. As a result of this decision to not bifurcate the assumed interest rate, the amount of SFA provided is unlikely to be sufficient to pay benefits through 2051.

- The amount of SFA also includes make-up payments to individuals who are participants or beneficiaries on, and who have commenced benefits by, the date SFA is paid to the plan. Make-up payments are equal to the total amount of benefits that were not paid to an individual because of the MPRA suspension or due to plan insolvency
  - Make-up payments are to be paid in a single, lump sum or in equal installments over a five-year period (without adjustment, including no adjustment for interest), as decided by the plan sponsor. The Notice provides that certain lump-sum payments may be rolled over but the payments made over five years may not. A notice to participants is required to be provided
- Plan amendments may be required regarding the reinstatement of benefits and make-up payments

Changes in interest rate or assumptions

- For purposes of determining eligibility and amount of SFA, a plan may change prior assumptions in its application if use of one or more of those assumptions is unreasonable. The PBGC, in consultation with Treasury, must approve the proposed change. However, plans are precluded from changing the interest rate required to be used to determine eligibility for and the amount of SFA
  - Concurrent with the IFR, the PBGC posted Special Financial Assistance Guidance on its website for changes to certain assumptions that plans and their actuaries may use for determining eligibility and amount of SFA. Plans are not required to follow the Guidance
  - Support for changes must be submitted and changed assumptions must be individually reasonable and reasonable in the aggregate

Determinations on applications

- Applications that are timely filed are deemed approved unless the PBGC notifies the plan within 120 days that the application is incomplete, proposed changes or assumptions are unreasonable or that the plan is ineligible. Revised applications are subject to the same rules
- The PBGC expects to pay SFA in a single, lump-sum payment within 60 days of the approval of the application but not later than the earlier of 90 days from the date of approval or September 30, 2030

Restrictions on use of SFA and permissible investments

The following restrictions on the use of SFA apply:

- SFA and earnings on such amounts are considered plan assets but are required to be segregated from other plan assets and must be invested in investment-grade bonds[8] or other permissible investments
  - Permissible investments are those held directly though a portfolio of individual fixed income securities or through permissible fund vehicles with a similar risk profile, including commingled funds (such as exchange traded funds), mutual funds, pooled trusts or other commingled securities whose assets are invested solely in fixed income securities. The PBGC seeks additional input on permissible investments

[8] The IFR provides for a 5% sleeve that allows a plan to hold investments that were considered investment grade at the time of purchase but are no longer of that credit quality.

Conditions on SFA

The following conditions apply during the period plans receive SFA:

- Plans may use either existing plan assets or SFA in any order to pay benefits and administrative expenses
- Benefit increases (excluding benefits that have been reinstated) may not be adopted unless the actuary certifies that such increases are paid for by additional employer contributions
- The IFR does not place significant restrictions on the allocation of existing plan assets. Note, however, that plan assets, including amounts attributable to SFA, must be invested so that the plan is able to pay at least one year of projected benefit payments and administrative expenses
- SFA is included for purposes of determining withdrawal liability. Plans are required to use the PBGC's "mass withdrawal liability" interest rate assumptions for withdrawals occurring after the plan year the plan receives SFA, for 10 years or until the last day of the plan year the plan no longer holds SFA or earnings on that amount, whichever is later
  - Settlements of withdrawal liability amounts over $50 million must be approved by the PBGC
- Plans are subject to new reporting and audit requirements
- Depending on plan and trust language, certain amendments may be required
- Plans receiving SFA are deemed to be in critical status until 2051, are precluded from applying for a MPRA suspension and, in the event of insolvency, are subject to benefit reductions

Additional resources

The PBGC has posted additional resources and guidance on a designated page on its website, including application instructions, templates, FAQs and checklists. The website also includes information as to applicable filing dates for the priority groups.

This summary is for informational purposes only and does not constitute legal, tax or investment advice. Plan sponsors are encouraged to discuss the issues raised here with their Segal consultants as well as their legal, tax, investment and other advisors before determining how the issues apply to specific situations.

APPENDIX

Priority Group	Description of Priority Group	Date Plan May Apply
1	Plans already insolvent or projected to become insolvent before March 11, 2022	Immediately (beginning July 9, 2021)
2	Plans that have implemented a MPRA suspension as of March 11, 2021 and plans that are expected to be insolvent within one year of the date the SFA application is filed	Beginning on January 1, 2022, or earlier date specified on PBGC's website
3	Consists of a plan in critical and declining status with more than 350,000 participants	Beginning on April 1, 2022, or earlier date specified on PBGC's website
4	Plans that are projected to become insolvent before March 11, 2023	Beginning on July 1, 2022, or earlier date specified on PBGC's website
5	Plans that are projected to become insolvent before March 11, 2026	Date to be specified on PBGC's website at least 21 days in advance of such date, but no later than February 11, 2023
6	Plans for which PBGC computes the present value of financial assistance under ERISA §4261 to be in excess of $1 billion (in the absence of SFA)	Date to be specified on PBGC's website at least 21 days in advance of such date, but no later than February 11, 2023
7[9]	Additional plans that may be added by the PBGC based on other circumstances similar to those described for priority groups 1-6	Date to be specified on PBGC's website no later than March 11, 2023

[9] It appears that this priority group has been "reserved" by PBGC so that, if needed, PBGC can assign, no later than March 11, 2023, priority status to plans, if any, not described in priority groups 1-6.