

DATE: July 19, 2021
TO: National Electrical Contractors Association
FROM: Brownstein Hyatt Farber Schreck
RE: American Rescue Plan Act: Multiemployer Pension Assistance Implementation

The American Rescue Plan Act (ARPA) created a special financial assistance (SFA) program for multiemployer pension programs at risk of insolvency. The program, which will be carried out by the Pension Benefit Guaranty Corporation (PBGC) in consultation with the Department of Treasury, is expected to provide around \$86 billion in assistance to allow multiemployer pensions to cover benefit payments and plan expenses through 2051. This memo provides an overview of the proposed guidance the PBGC and Treasury have released to begin the process of implementing SFA program.

PBGC Implementation Guidance

On July 12, the PBGC published an interim final rule outlining how the agency will implement the SFA program established by ARPA for multiemployer pension plans. The rule outlines the eligibility requirements for receiving SFA, the materials that must be submitted as part of the application, the calculation of SFA, and conditions related to withdrawal liability.

Eligibility

There are four types of multiemployer pension plans eligible for SFA: (i) plans that are in critical and declining status in any plan year beginning in 2020, 2021 or 2022; (ii) plans with a suspension of benefits approved before March 11, 2021 (the date of ARPA's enactment); (iii) plans certified to be in critical status that have (1) a modified funded percentage of less than 40% and (2) a ratio of active to inactive participants which is less than 2:3 in any plan year beginning in 2020, 2021 or 2022 (with participant count measured at the end of the plan year); and (iv) plans that became insolvent after December 16, 2014 (the date of enactment of the Multiemployer Pension Reform Act), have remained insolvent, and have not been terminated as of March 11, 2021. Under these requirements, plans that were terminated before January 1, 2020 are not eligible, as are plans that elected to be in critical status but are not certified to be in critical status.

The following table lists the application priority categories for eligible plans as established by PBGC, plus the date each category of plan may apply for SFA:

| Priority Group | Description of Priority Group | Date Plans May Apply for SFA |
|-----------------------|---|--|
| 1 | Plans already insolvent or projected to become insolvent before March 11, 2022 | Beginning on July 9, 2021 |
| 2 | Plans that implemented a benefit suspension under section 305(e)(9) of ERISA as of March 11, 2021 Plans expected to be insolvent within 1 year of the date an application for SFA is filed | Beginning on January 1, 2022, or earlier date specified on PBGC's website |
| 3 | Plans in critical and declining status that had 350,000 or more participants | Beginning on April 1, 2022, or earlier date specified on PBGC's website |
| 4 | Plans projected to become insolvent before March 11, 2023 | Beginning on July 1, 2022, or earlier date specified on PBGC's website |
| 5 | Plans 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 section 4261 of ERISA 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 | Additional plans that may be added by 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 |

Information to be Filed with Application

The guidance describes the information that must be included in an application for SFA. All information filed with PBGC for an application may be made publicly available at the agency's discretion unless considered confidential under the Privacy Act. PBGC is required to process applications within 120 days. There is no limit to the number of times a plan sponsor may submit a revised application, as long as the final revised application is submitted by December 31, 2026.

Applications must include basic information about the plan and the amount of assistance requested, including the name of the plan, Employer Identification Number (EIN) and three-digit Plan Number (PN); the name of the individual filing the application and role of the individual with respect to the plan; the name, address, email and telephone number of the plan sponsor and

authorized representatives; and the total amount of SFA requested. Plans must identify the eligibility requirements that they satisfy and prove that these requirements are met, as well as the priority group that they fall under (see table above). If a plan previously suspended benefits, the application must include a description of how it will reinstate benefits and a proposed schedule showing the aggregate amount and timing of payments to participants and beneficiaries.

The following documentation must be included in the application:

- The most recent plan document or restatement of the plan document and all subsequent amendments adopted, including a copy of the executed plan agreement
- A copy of the proposed plan amendment and certification that the amendment will be timely adopted
- The most recent trust agreement or restatement of the trust agreement and all subsequent adopted amendments (if any)
- The most recent IRS determination letter
- An actuarial valuation report completed for the 2018 plan year and each subsequent valuation report completed before the date the application was filed
- The most recent rehabilitation plan or funding improvement plan, including all amendments and updates, and the percentage of total contributions received under each schedule of the plan for the most recent plan year available
- The most recent Form 5500 and all schedules and attachments, including the audited financial statement
- The plan actuary's certification of plan status completed for the 2018 plan year and each subsequent annual certification completed before the application was filed, with supporting documentation
- The most recent statement for each of the plan's cash and investment accounts
- The most recent plan financial statement (audited, or unaudited if the audited statement is not available)
- Bank account and other information necessary for electronic payment of funds
- All written policies and procedures governing withdrawal liability determination, assessment, collection, settlement, and payment

The following actuarial and financial information must also be included:

- For each plan year from the 2018 plan year until the most recent plan year for which the Form 5500 is required to be filed, the projection of expected benefit payments as required to be attached to the Form 5500 Schedule MB if the response to the question at line 8b(1) of the Form 5500 Schedule MB is "Yes"
- For plans with 10,000 or more participants, a listing of the 15 largest contributing employers and the contribution amounts for each for the most recently completed plan year
- Historical plan financial information for each of the most recent 10 plan years preceding the date of the application that identifies total contributions; total contribution base units; average contribution rates; number of active participants at the beginning of each plan year; and other sources of non-investment income, including, if applicable, withdrawal liability payments

collected, contributions from reciprocity agreements, and other sources of contributions or income not already identified

- Information used to determine the amount of requested SFA, including:
 - The assumed interest rate
 - The fair market value of plan assets as of the SFA measurement date, with certification from the plan sponsor; and a reconciliation of the fair market value of plan assets from the date of the most recent plan financial statement to the measurement date showing contributions, withdrawal liability payments, benefit payments, administrative expenses, and investment income
 - SFA determined as a lump sum as of the SFA measurement date
 - The projected amount of contributions, withdrawal liability payments, and other payments expected for each plan year in the SFA coverage period
 - Benefit payments expected to be paid during each year of the SFA coverage period attributable to the reinstatement of benefits that were previously suspended through the SFA measurement date
 - The projected amount of benefit payments for each plan year in the SFA coverage period, separated for current retirees and beneficiaries in pay status, terminated participants not yet in pay status, current active participants, and new entrants
 - Administrative expenses expected to be paid using plan assets in each plan year in the SFA coverage period, excluding amounts owed to PBGC
 - The projected investment income based on the assumed interest rate and the projected fair market value of plan assets at the end of each plan year for each year of the SFA coverage period
- Projected contributions and withdrawal liability payments used to calculate the requested SFA amount
- A description of the development of the assumed future contributions and future withdrawal liability payments
- For plans with 350,000 or more participants, the participant census data utilized by the plan actuary in developing the cash flow projections included in the application

Calculation of Special Financial Assistance Amount

The interim final rule details how PBGC will calculate the amount of SFA provided to eligible plans. The amount of assistance provided must equal the amount the plan requires to pay all benefits due during the period beginning on the date of payment through the 2051 plan year. The assistance received by a plan will be calculated as the present value of plan obligations (liabilities) minus the present value of plan resources (assets). Plan expenses are included in the calculation of plan obligations, as a plan is required to incur expenses in order to operate and must operate in order to pay benefits. The calculation of SFA disregards benefit increases, contribution reductions, mergers, spin-offs, and asset or liability transfers occurring after July 9, 2021. The amount of financial assistance owed to PBGC in repayment of previous financial assistance, if any, is excluded from the calculation of SFA, and is instead added to the amount of SFA to be paid to the plan, offset by the value of financial assistance payments received following the SFA measurement date.

Plans must continue to use all available and projected resources to pay benefits, with the rationale being that special financial assistance under ARPA is not required to the extent the plan has resources. Included in a plan's resources are existing assets and projected earnings, employer contributions and withdrawal liability (which is treated as a plan receivable). In order to receive assistance, plan resources must be calculated through 2051 based on recent participant census data.

Withdrawal Liability

PBGC makes clear in the interim final rule that special financial assistance under ARPA will not be used to reduce employer withdrawal liability. Withdrawal liability must be calculated using a market rate of interest projected forward or at least 10 years. Any settlement of withdrawal liability between an employer and a plan in an amount greater than \$50 million must be approved by the PBGC.

For withdrawals that occur after the plan year in which a plan receives SFA, the interest assumptions used to determine unfunded vested benefits for purposes of determining withdrawal liability must be the mass withdrawal interest assumptions under the PBGC's regulation on Duties of Plan Sponsor Following Mass Withdrawal (29 CFR § 4281.13(a)). These interest assumptions must be used until 10 years after the end of the plan year in which the plan receives SFA payments or the last day of the plan year in which the plan no longer holds SFA or any earnings thereon in a segregated account, whichever is later.

Treasury Application Required

New Code § 432(k) requires the reinstatement of previously suspended pension benefits, if any, as a condition of receiving SFA from the PBGC. Plans that must reinstate benefits as a condition of receiving SFA qualify to apply in Priority Group 2 and must file the SFA application with both the PBGC and the Treasury Department.

Treasury guidance issued in coordination with the PBGC guidance, IRS Notice 2021-38 (July 9, 2021), provides guidance for multiemployer plan sponsors that are required to file SFA applications with Treasury. Where a plan is filing under one of the priority categories, PBGC will forward the SFA application to Treasury and Treasury will accept such applications.

Makeup Pension Payments

Plans that reinstate pension benefits also must provide retroactive makeup payments to affected participants or beneficiaries in pay status as of the effective date of the SFA. The Treasury guidance requires a plan receiving SFA to be amended to reinstate suspended benefits. The guidance sets forth the permissible form and timing of required makeup payments and whether the payments qualify as eligible rollover distributions.

The plan amendment must specify whether the required makeup payments will be distributed in (1) monthly installments over five years, or (2) a lump sum. Makeup payments must be paid commencing within three months of the effective date of the SFA.

The guidance provides that makeup payments that are paid in monthly installments are not eligible rollover distributions because they are treated as part of a series of substantially equal periodic payments. Monthly payments are subject to taxes and withholding.

Lump sum reinstatement payments in excess of a *de minimis* amount, by contrast, are treated as eligible rollover distributions. A *de minimis* amount is a payment equal to the greater of \$750 or 10% of the annualized monthly payment.

The plan administrator must provide an individual who is receiving a lump sum makeup payment with an election to make a direct rollover to an eligible retirement plan or IRA. Unless the individual elects to roll over the makeup payment, the payment will be subject to immediate taxes and withholding. Taxes on rollover distributions are deferred until subsequently paid from the retirement plan or IRA.

Employer Contributions

SFA received by a plan is not considered in determining employer contributions to the plan. Thus, IRS Notice 2021-38 provides that SFA amounts are not included in the plan's assets for purposes of determining required employer contributions.