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[Billing Code 7709-02-P]

## **PENSION BENEFIT GUARANTY CORPORATION**

### **29 CFR Parts 4000 and 4262**

### **RIN 1212-AB53**

### **Special Financial Assistance by PBGC**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Interim final rule; request for comments.

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**SUMMARY:** This document contains an interim final rule that sets forth the requirements for special financial assistance applications and related restrictions and conditions pursuant to the American Rescue Plan Act of 2021.

**DATES:** *Effective date:* This interim final rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

*Comment date:* Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*] to be assured of consideration.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Email:* [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov).
- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026.

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Commenters are strongly encouraged to submit public comments electronically. PBGC expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable.

All submissions must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and title for this rulemaking (Special Financial Assistance by PBGC) and the Regulation Identifier Number for this rulemaking (RIN 1212-AB53). Comments received will be posted without change to PBGC's website, *www.pbgc.gov*, including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026 or calling 202-229-4040 during normal business hours. TTY users may call the Federal relay service toll-free at 800-877-8339 and ask to be connected to 202-229-4040.

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## **SUPPLEMENTARY INFORMATION:**

### **Executive Summary**

#### *Purpose and Authority*

This interim final rule adds to the regulations of the Pension Benefit Guaranty Corporation (PBGC) a new part 4262 to implement the requirements under section 9704 of the American Rescue Plan Act of 2021, “Special Financial Assistance Program for Financially Troubled Multiemployer Plans.” This program enhances retirement security for millions of Americans by providing eligible multiemployer defined benefit pension plans with special financial assistance (SFA) in the amounts required for the plans to pay all benefits due during the period beginning on the date of payment of SFA through the plan year ending in 2051.

PBGC’s legal authority for this rulemaking comes from new section 4262 of the Employee Retirement Income Security Act of 1974 (ERISA) (Special Financial Assistance by the Corporation), which requires PBGC to issue regulations or guidance setting forth requirements for SFA applications by July 9, 2021, permits PBGC to provide for how SFA and earnings thereon are to be invested, and, in consultation with the Secretary of the Treasury, permits PBGC to impose reasonable conditions by regulation or other guidance on an eligible multiemployer plan that receives SFA. PBGC’s legal authority also comes from section 4002(b)(3) of ERISA, which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, and from section 4003(a) of ERISA, which authorizes PBGC to conduct investigations and audits.

#### *Major Provisions of the Regulatory Action*

This rulemaking sets forth what information a plan is required to file to demonstrate eligibility for SFA and the amount of SFA to be paid by PBGC to the plan. It identifies which plans will be given priority to file applications before March 11, 2023, and provides for a

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processing system, which will accommodate the filing and review of many applications in a limited amount of time. It also establishes permissible investments for SFA funds and restrictions and conditions on plans that receive SFA.

## **Background**

### *PBGC and the Multiemployer Insurance Program*

PBGC administers two insurance programs for private-sector defined benefit pension plans under title IV of ERISA: one for single-employer defined benefit pension plans and one for multiemployer defined benefit pensions plans (multiemployer plans). In general, a multiemployer plan is a collectively bargained plan involving two or more unrelated employers. The multiemployer insurance program protects the benefits of approximately 10.9 million workers and retirees in approximately 1,400 plans. This interim final rule deals with multiemployer plans.

The multiemployer insurance program provides PBGC with tools to help plans that are insolvent or approaching insolvency to be able to pay guaranteed benefits.<sup>1</sup> This help is primarily in the form of financial assistance loans under section 4261(a) of ERISA. Under that provision, when a multiemployer plan becomes insolvent, PBGC provides periodic financial assistance payments to the insolvent plan in amounts that, together with existing plan assets and any other plan income, are sufficient to pay guaranteed benefit amounts to participants and beneficiaries. In general terms, a plan is insolvent if it cannot pay benefits when due.

The Multiemployer Pension Reform Act of 2014 (MPRA) created pathways under ERISA to help improve solvency for plans that are likely to become insolvent. Plans that are in

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<sup>1</sup> Multiemployer plan guaranteed benefits are primarily nonforfeitable benefits and the maximum guarantee is set by law under section 4022A of ERISA.

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critical and declining status<sup>2</sup> may apply to the U.S. Department of the Treasury (Treasury Department) for a suspension of benefits under section 305(e)(9) of ERISA to avoid insolvency. Generally, under this process, these plans may propose a reduction of benefits to no less than 110 percent of PBGC’s guaranteed benefit amount if a plan is projected to become insolvent before paying all promised benefits when due. A plan may also request partition assistance from PBGC (under section 4233 of ERISA), which allows the plan to transfer responsibility for paying monthly guaranteed benefits for a portion of the plan’s participants and beneficiaries to a newly created successor plan that receives financial assistance from PBGC. When a partition is approved, the original plan has an ongoing obligation to pay and preserve benefits for all participants at levels above PBGC’s guaranteed amounts.

MPRA also allows critical and declining plans that are likely to become insolvent to request financial assistance from PBGC upon merging with another multiemployer plan (“facilitated mergers” under section 4231(e) of ERISA). Financial assistance to the merged plan may promote mergers with more viable plans and eliminate the need for benefit reductions.

In recent years, Congress considered a range of proposals to address the funding crisis in the multiemployer pension system, including proposals to expand PBGC’s partition authority, loan programs, and broader reforms to stabilize multiemployer plans and extend the solvency of PBGC’s multiemployer insurance program. In 2018, Congress created the Joint Select Committee on Solvency of Multiemployer Pension Plans to develop recommendations to address the problems in the multiemployer pension system. While the Committee did not issue recommendations before its term expired, it succeeded in creating a broader understanding of the

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<sup>2</sup> A plan is in critical and declining status if the plan satisfies the criteria for critical status under section 305(b)(2) of ERISA and is projected to become insolvent within the meaning of section 4245 during the current plan year or any of the 14 succeeding plan years (or 19 succeeding plan years if the plan has a ratio of inactive participants to active participants that exceeds 2 to 1 or if the funded percentage of the plan is less than 80 percent).

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issues and identifying potential reforms. While not a permanent solution, Congress enacted, and the President signed into law on March 11, 2021, the American Rescue Plan (ARP) Act of 2021 (Pub. L. 117-2), to address the immediate crisis facing severely underfunded multiemployer plans and the solvency of PBGC, and to assist plans by providing funds to reinstate suspended benefits.

*American Rescue Plan Act of 2021 – Special Financial Assistance Program for Financially Troubled Multiemployer Plans*

ARP creates a program to enhance retirement security for millions of Americans by providing SFA to financially troubled multiemployer plans. The SFA program is expected to assist plans covering more than 3 million participants and beneficiaries, including the provision of funds to reinstate suspended monthly benefits going forward, and for make-up payments to restore previously suspended benefits of participants and beneficiaries. In turn, the SFA program improves the financial condition of PBGC's multiemployer insurance program. It is expected that over 100 plans that would have otherwise become insolvent during the next 15 years will instead forestall insolvency as a direct result of receiving SFA.

Section 9704 of ARP amends section 4005 of ERISA to establish an eighth fund for SFA from which PBGC will provide SFA to multiemployer plans under the program created by the addition of section 4262 of ERISA. The eighth fund will be credited with amounts from time to time as the Secretary of the Treasury, in conjunction with the Director of PBGC, determines appropriate, from the general fund of the Treasury Department. Transfers from the general fund to the eighth fund cannot occur after September 30, 2030.

New section 4262 of ERISA sets forth the requirements for SFA, including specifying which plans are eligible to apply, the cutoff date for applications, actuarial assumptions, determinations on applications, restrictions on the use of SFA, and that certain plans with

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suspended benefits<sup>3</sup> must reinstate those benefits and provide make-up payments to restore previously suspended benefits. Unlike the financial assistance provided under section 4261 of ERISA, which is in the form of a loan and provided in periodic payments, a plan receiving SFA under section 4262 has no obligation to repay SFA, and PBGC must pay SFA in the form of a single, lump sum payment.

Section 4262 of ERISA requires PBGC to prescribe in regulations or other guidance the requirements for SFA applications, including an alternate application for plans with an approved partition under section 4233 of ERISA. PBGC also may prioritize applications during the first 2 years after March 11, 2021, prescribe how SFA funds are to be invested, and impose conditions on plans that receive SFA.

Although PBGC's rulemakings generally involve coordination and consultation with the other two agencies that have jurisdiction over pension plans (the Treasury Department and the U.S. Department of Labor (Department of Labor or Department)), section 4262 of ERISA specifically provides for consultation with the Treasury Department particularly on SFA applications involving a plan's reinstatement of suspended benefits.<sup>4</sup> The statute also provides for consultation with the Treasury Department with respect to a plan that proposes in its application to change assumptions, with respect to a plan that files an application under PBGC regulations or guidance prioritizing certain applications, and on the conditions imposed on plans that receive SFA.<sup>5</sup> This interim final rule is a result of that coordination and consultation, which will continue as the SFA program gets underway at PBGC and plans begin to apply.

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<sup>3</sup> Plans with suspended benefits pursuant to sections 305(e)(9) and 4245(a) of ERISA.

<sup>4</sup> See sections 4262(k) and 4262(n) of ERISA.

<sup>5</sup> See sections 4262(m) and 4262(n) of ERISA.

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## **Listening Sessions and Request for Comment**

After ARP was enacted, interested parties requested to share their views with PBGC, and PBGC held listening sessions at their request. Representatives of PBGC’s Board of Directors (the Secretaries of the Department of Labor, the Treasury Department, and the Department of Commerce) also participated in these listening sessions. Most of the requesters provided letters or agendas outlining their concerns. In addition, other interested parties sent PBGC letters communicating their views. PBGC considered the views and concerns expressed, which helped to inform this interim final rule.

PBGC has included a request for public comment in this rulemaking and encourages all interested parties to submit their comments, suggestions, and views concerning the rule’s provisions. PBGC is particularly interested in feedback on where any additional guidance may be needed.

## **Overview and Section-by-Section Discussion of Regulation**

### *Overview and purpose*

To implement section 4262 of ERISA, PBGC is adding a new part 4262 to its regulations, “Special Financial Assistance by PBGC.” The purpose of this new part is to prescribe rules governing applications for SFA and related requirements. Part 4262 provides guidance to multiemployer pension plan sponsors on eligibility, determining the amount of SFA, content of an application for SFA, the process of applying, PBGC’s review of applications, and restrictions and conditions.

### *Eligible multiemployer plans*

There are four types of multiemployer plans identified in section 4262(b)(1) of ERISA that are eligible to apply for SFA under § 4262.3 of PBGC’s regulation. This exclusive list consists of:



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(1) A plan in critical and declining status (within the meaning of section 305(b)(6) of ERISA) in any plan year beginning in 2020, 2021, or 2022.

(2) A plan with a suspension of benefits approved under section 305(e)(9) of ERISA as of the date ARP became law (March 11, 2021).

(3) A plan certified to be in critical status (within the meaning of section 305(b)(2) of ERISA) that has a modified funded percentage of less than 40 percent and a ratio of active to inactive participants which is less than 2 to 3, in any plan year beginning in 2020, 2021, or 2022.

(4) A plan that became insolvent for purposes of section 418E of the Internal Revenue Code (the Code) after December 16, 2014 (the date MPRA became law), has remained insolvent, and has not terminated under section 4041A of ERISA as of March 11, 2021.

PBGC notes that a plan that terminated by mass withdrawal in a plan year that ended before January 1, 2020, is not eligible for SFA under section 4262(b)(1)(A) of ERISA and § 4262.3(a)(1) (plans that are in critical and declining status (within the meaning of section 305(b)(6) of ERISA) in any plan year beginning in 2020, 2021, or 2022). This is because the additional funding rules for plans in endangered, critical, and critical and declining status under section 432 of the Code do not apply to such a plan in a plan year that begins in 2020, 2021, or 2022.<sup>6</sup> Accordingly, a plan that terminated by mass withdrawal before the plan year selected to

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<sup>6</sup> Section 412(a)(1) of the Internal Revenue Code (the Code) requires a pension plan to satisfy the minimum funding standard applicable to the plan for each plan year. In the case of a multiemployer defined benefit plan, section 412(a)(2)(C) provides that participating employers must make contributions under the plan for a plan year that, in the aggregate, are sufficient to ensure that the plan does not have an accumulated funding deficiency under section 431 as of the end of the plan year. Section 412(e)(4) provides that the minimum funding rules under section 412 apply until the last day of the plan year in which a plan terminates within the meaning of section 4041A(a)(2) of ERISA (that is, termination by mass withdrawal or a cessation of the obligation of all employers to contribute under the plan). Accordingly, the rules of section 431 of the Code do not apply to such a plan for periods after the plan year of termination.

The Internal Revenue Service (IRS) has informed PBGC that section 432 of the Code, which provides additional funding rules for multiemployer plans in endangered status or critical status, likewise does not apply to a multiemployer plan for periods after the plan year of termination within the meaning of section 4041A(a)(2) of ERISA. This is consistent with section 301(c) of ERISA (over which the IRS has interpretive jurisdiction pursuant to section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713)), which provides that part 3 of title I of ERISA,

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determine eligibility under § 4262.3(a)(1) is not in critical and declining status for that year and therefore is not eligible for SFA. For example, if a plan in critical and declining status terminated by mass withdrawal in 2019, the plan would not be eligible for SFA under § 4262.3(a)(1) because it was not in critical and declining status in 2020, 2021, or 2022.

However, if a plan in critical and declining status terminated by mass withdrawal in 2020, the plan would be eligible for SFA.

With respect to critical status plans, PBGC provides some clarifications on eligibility. Section 4262.3(c)(1) clarifies that a plan that has elected to be in critical status under section 305(b)(4) of ERISA but is not certified to be in critical status under section 305(b)(2) is not an eligible multiemployer plan. To ensure uniformity for applications and clarify what data to use to satisfy eligibility requirements for critical status plans under section 4262(b)(1)(C), § 4262.3(a)(3) and (c)(2) specify the data that is used for this purpose, including specifying line items entered on the Form 5500 Schedule MB to determine the “modified funded percentage,” and line items entered on the Form 5500 to determine the ratio of active to inactive participants.

Under the regulation, the conditions for eligibility do not need to be satisfied for the same plan year. PBGC adds this flexibility in recognition that the filing dates for the certification of plan status and the Form 5500 are not the same. Generally, the due date for filing the certification of plan status is well over a year before the due date for filing the Form 5500 for the same plan year. In addition, data used for the certification of plan status for a plan year may be from a different year than the data used for the Form 5500 for the same plan year, and section 4262 of ERISA is unclear as to the date within a plan year as of which data used to satisfy the conditions is determined.

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including the minimum funding rules parallel to sections 412, 431, and 432 of the Code, applies until the last day of the plan year in which the plan terminates within the meaning of section 4041A(a)(2) of ERISA.

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Section 4262(b)(2) of ERISA defines “modified funded percentage” to mean the percentage equal to a fraction the numerator of which is the current value of plan assets (as defined in section 3(26) of ERISA) and the denominator of which is current liabilities (as defined in section 431(c)(6)(D) of the Code).

The numerator for the plan’s funded percentage under § 4262.3(c)(2) is calculated using the current value of assets on line 2a of Schedule MB,<sup>7</sup> which is also required to be reported on line 1l, column (a) of the Schedule H,<sup>8</sup> and adding to it the current value of withdrawal liability payments due to be received by the plan on an accrual basis reflecting a reasonable allowance for amounts considered uncollectible<sup>9</sup> (if not already included in the current value of net assets reported on line 2a). The value calculated for the numerator is consistent with the meaning of current value of assets under section 3(26) of ERISA.<sup>10</sup> The current value of assets includes total cash contributions due to be received on an accrual basis.

The denominator for the plan’s funded percentage under § 4262.3(c)(2) is calculated using the current liability measurement from line 2b(4) column (2). This entry requires current liability to be calculated using the assumptions, including interest rate, in the instructions for line 1d(2)(a) of the Schedule MB. Those instructions provide how to calculate current liability under section 431(c)(6)(D) of the Code and provide specifically that the interest rate used to compute current liability must be in accordance with guidelines issued by the Treasury Department and the Internal Revenue Service (IRS) and within the interest rate rules referred to under section

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<sup>7</sup> All line references in this section are to the 2020 Form 5500 and schedules.

<sup>8</sup> The 2020 Form 5500 instructions provide that, with certain exceptions, assets reported on line 2a of Schedule MB should be the same as reported on line 1l, (column a) of the Schedule H.

<sup>9</sup> PBGC notes that Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) 960, Plan Accounting – Defined Benefit Pension Plans 960-310-25-3A states: “A multiemployer plan may also have a receivable for a withdrawing employer’s share of the plan’s unfunded liability. The plan should record the receivable, net of any allowance for an amount deemed uncollectible, when entitlement has been determined.”

<sup>10</sup> The withdrawal liability payments due to be received by the plan are not included in the actuarial value of assets or the market value of assets for purposes of sections 431 and 432 of the Code and the corresponding sections 304 and 305 of ERISA.

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431(c)(6)(D), which are outlined under section 431(c)(6)(E). PBGC notes that the current liability is a measure derived using an interest rate chosen by the actuary within a “permissible range” under section 431(c)(6)(E). Since the selection of the interest rate by the actuary is part of the determination of current liability, for purposes of measuring the modified funded percentage PBGC has chosen to accept the interest rate selected by the actuary and not to require the use of an alternate interest rate.

As explained earlier in this section of the preamble, section 4262(b)(1)(C) of ERISA requires as one of the conditions of eligibility, for critical status plans to have a ratio of active to inactive participants that is less than 2 to 3. The statute does not specify what participant count to use. To fill in this gap, the regulation refers to end-of-year participant counts on the Form 5500. On the 2020 Form 5500, these are the number of participants identified on line 6a(2) (for total number of active participants) and the sum of lines 6b, 6c, and 6e (for inactive participants: retired or separated participants receiving benefits, other retired or separated participants entitled to future benefits, and deceased participants whose beneficiaries are receiving or are entitled to receive benefits). Requiring the use of these counts provides for uniformity among applications in the use of participant counts to determine the ratio.

#### *Assumptions for determining eligibility*

A plan’s eligibility for SFA is determined by PBGC in accordance with § 4262.3(d) of the regulation, which incorporates the actuarial assumptions for determining eligibility found in sections 4262(e)(1) and (e)(4) of ERISA. When a plan sponsor applies for SFA claiming the plan’s eligibility based on a certification of either critical status or critical and declining status completed before January 1, 2021, PBGC is required to accept the assumptions incorporated into that certification unless the assumptions are clearly erroneous.

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When a plan sponsor applies for SFA and claims the plan is eligible based on a certification of plan status for a plan year that was not completed before January 1, 2021, the sponsor must determine whether the plan is in critical status or critical and declining status using the assumptions that were used in the plan’s most recently completed certification before January 1, 2021, unless those assumptions (excluding the plan’s interest rate) are unreasonable. A plan sponsor that determines that one or more of the assumptions used in the plan’s most recently completed certification before January 1, 2021, is unreasonable may propose changes to the assumptions in the plan’s application (except to the interest rate) by disclosing the changes, describing why such assumptions are no longer reasonable, and demonstrating that the changed assumptions are reasonable.

The information required to be included as part of an application, including to support changes to assumptions, is described in §§ 4262.6 through 4262.8 of the regulation. PBGC’s review of the assumptions used by a plan are described in § 4262.5 of the regulation.

#### *Amount of Special Financial Assistance*

Under section 4262(a)(1) of ERISA, PBGC is to provide SFA to an eligible multiemployer plan upon application. Under section 4262(j)(1), the amount of SFA to be provided is the “amount required for the plan to pay all benefits due during the period beginning on the date of payment of the special financial assistance payment...and ending on the last day of the plan year ending in 2051...” This is referred to in section 4262(i)(1) as “the amount necessary as demonstrated by the plan sponsor.” PBGC believes that the plain meaning of the statutory language is that SFA is the amount by which a plan’s resources fall short of its obligations, taking all plan resources and obligations into account.

The heart of the matter is found in the requirement that SFA be “*the amount necessary*” or “*required* for the plan to pay all benefits due.” To the extent that a plan has other means

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available to pay benefits, it does not *require* or *need* SFA for that purpose.<sup>11</sup> Thus, all of a plan’s resources must be considered in determining the amount of SFA for the plan. Moreover, since the determination must be made by looking through the end of the last plan year ending in 2051, the resources to be considered must include plan assets and income (contributions, investment returns, etc.). If Congress had contemplated the exclusion of these resources in the calculation of the amount of SFA “*required* for the plan,” it would have done so explicitly.

Additionally, all of a plan’s benefits must be considered, as the statute says clearly “all benefits.” And, because plan expenses must be paid to keep the plan in operation and capable of paying benefits, all expenses must likewise be taken into account. In short, the statutory language, by *requiring* the payment of *all* benefits due, mandates by clear implication the consideration of all plan obligations and resources in determining the amount of SFA that is needed or is “necessary.”

Some interested parties commented to PBGC on section 4262(j)(1) of ERISA that, in determining the amount of SFA, PBGC should exclude from consideration all or a portion of one or more plan obligations or resources, such as existing assets, expected benefit payments, earnings on assets, contributions, withdrawal liability, and administrative expenses. The items to be disregarded, and the theories on which they are to be ignored, differ from one commenter to another.

The common thread among these comments is that they advance a particular policy goal or desired outcome and an approach designed to fit that desired policy goal or outcome. Such desired goals include providing generous assistance, long-term sustainability, avoiding a

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<sup>11</sup> Furthermore, it would not be a reasonable result if the amount of SFA were to be calculated under a formula that disregards the plan’s available resources, which could lead to a windfall for a plan that needs only a small amount of SFA to pay benefits. PBGC estimates that under such an approach, the total amount of SFA distributed under the program would increase by 2 to 4 times the estimated \$94 billion amount projected under PBGC’s ME-PIMS model. See section (4), Estimated Impact of Regulatory Action, of the Regulatory Impact Analysis section.

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recurrence of the current crisis, protection of retirees, and simplicity. The approaches advanced to achieve such goals vary among commenters, but include disregarding resources such as current assets, or the portion thereof needed to fund post-2051 payments; future contributions; and other sources of revenue. In considering these comments, PBGC has concluded that the approaches recommended in these comments could be supported only by a strained reading of the clear language of section 4262(j)(1), which defines the SFA amount as the “amount required for the plan to pay all benefits due during the period beginning on the date of payment of the special financial assistance payment under this section and ending on the last day of the plan year ending in 2051....”

The inability to project resources and obligations with absolute precision for 30 years prompted another objection to the plain meaning of the language in question from some interested parties. The benefits projected to be paid into the future will rarely turn out to be the same as the benefits that actually will be paid (which can only be determined in hindsight). These interested parties argued that the amount of SFA is insufficient unless it enables a plan to pay “all benefits” actually due through the last plan year in 2051, for example by assuming zero mortality for that period. However, this approach would be a radical departure from accepted actuarial practice and would be at odds with the pattern of actuarial determinations that underlies section 4262 of ERISA. PBGC thus considers this suggestion to be contradictory to the statute.

#### *Calculating the amount of SFA*

Section 4262.4(a) provides that the amount of SFA for a plan is the amount (if any), subject to adjustment for the date of payment as described in § 4262.12, by which the value of all plan obligations exceeds the value of all plan resources, determined as of the plan’s SFA measurement date and limited to the SFA coverage period (the period ending on the last day of



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the last plan year ending in 2051). The SFA measurement date is the last day of the calendar quarter immediately preceding the date the plan's application was filed.

The value of plan obligations under § 4262.4(b) is the sum of the present value of specified benefit payments and administrative expenses. The value of benefit payments is calculated as the present value of benefit payments expected to be paid during the SFA coverage period including any reinstatement of benefits attributable to the elimination of reductions in a participant's or beneficiary's benefit due to a suspension of benefits under sections 305(e)(9) or 4245(a) of ERISA as required under § 4262.15 or restoration of benefits under 26 CFR 1.432(e)(9)-1(e)(3). The reinstatement of benefits must be calculated assuming such reinstatements are paid beginning as of the SFA measurement date instead of the date SFA is paid. The value of administrative expenses is calculated as the present value of administrative expenses expected to be paid during the SFA coverage period (excluding the amount owed to PBGC under section 4261).

The value of plan resources under § 4262.4(c) is the total of the fair market value of assets on the SFA measurement date and the present value of future contributions, withdrawal liability payments, and other payments expected to be made to the plan (excluding the amount of financial assistance under section 4261 of ERISA and the amount of SFA to be received by the plan) during the SFA coverage period.

The amount of financial assistance owed to PBGC under section 4261 of ERISA, if any, is excluded in the calculation of SFA in the plan's application. Instead, it is added to the amount of SFA to be paid to the plan under § 4262.12 as of the date PBGC sends payment of SFA, offset by the value of financial assistance payments under section 4261 received by the plan following the SFA measurement date, accumulated with interest.



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The projections in § 4262.4(b)(1) and (2) and (c)(2) must be performed on a deterministic basis using a single set of assumptions as provided in § 4262.4(d). The deterministic projections must be based on recent participant census data. Participant census data must be as of the first day of the plan year in which the plan's initial application is filed, or, if the date on which the plan's initial application is filed is less than 270 days after the beginning of the current plan year and the actuarial valuation for the current plan year is not complete, the projections may instead be based on the participant census data as of the first day of the plan year preceding the year in which the plan's initial application is filed. If a plan experiences a significant event between the date of the plan's most recent participant census date and the date the application is filed, PBGC's assumptions guidance (issued on PBGC's website at [www.pbgc.gov/guidance](http://www.pbgc.gov/guidance)) provides guidelines on how to reflect that significant event. Plans may, but are not required to, use the guidelines if they are reasonable for the plan.

The SFA measurement date, which is the beginning date for the deterministic projections, is a date certain in the past instead of a payment date in the future because the SFA payment date (described under § 4262.12) is unknown at the time the plan sponsor files the application. This approach of using a date certain in the past instead of a date in the future simplifies the calculation but does not change the SFA amount that would otherwise be calculated as of the payment date because: (i) both the SFA-eligible plan resources and SFA-eligible plan obligations will be reduced equally by the benefit payments and expenses between those two dates, (ii) the contributions between those two dates would typically need to be estimated either way, and (iii) the SFA amount is adjusted for interest between those two dates at the interest rate used to calculate the present values as of the SFA measurement date.

Section 4262.4(e)(1) of the regulation specifies the interest rate assumption a plan must use to calculate the amount of SFA in the plan's application. Section 4262(e)(2)(A) of ERISA

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requires a plan to use an interest rate that is based on the rate used in the plan’s most recently completed certification of plan status before January 1, 2021, subject to an interest rate limit, but does not consider that there are potentially two rates used in a certification of plan status: a short-term rate (used for projecting plan assets) and a long-term rate (used to determine plan liabilities and for interest adjustments in the funding standard account). As the determination of the SFA amount involves long-term projections, the regulation specifies that the SFA amount is calculated based on the long-term rate that was used for funding standard account purposes in the plan actuary’s projections that are part of the certification of plan status.

The interest rate limit specified in section 4262(e)(3) of ERISA is the rate that is 200 basis points higher than the rate specified in section 303(h)(2)(C)(iii) (disregarding modifications made under clause (iv) of such section) “for the month in which the plan’s application for SFA is filed or the 3 preceding months.” This provision places a “cap” on the interest rate, and that the cap is any permissible rate for a month during the 4-month period ending with the month in which the plan’s application was filed.

Section 4262(f) of ERISA suggests that a plan may have multiple filing dates by providing two applications deadlines: one for initial applications and one for revised applications. There is no limit to the number of times that a plan sponsor may file revised applications as long as the last revised application is filed by the statutory deadline of December 31, 2026. Once PBGC has accepted an application for processing, PBGC believes that it is in the best interest of all parties to avoid the duplicative work and delays that would result if a revised application were to use a different interest rate. To prevent multiple filings for purposes of changing the interest rate, PBGC establishes a rule in § 4262.11(c) that the assumed interest rate will always be the rate used in the plan’s initial application.

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Accordingly, under § 4262.4(e)(1), the assumed interest rate is the interest rate that is the lesser of the rate used by the plan for funding standard account projections in the plan's most recently completed certification of plan status before January 1, 2021, or the rate that is 200 basis points higher than the rate specified in section 303(h)(2)(C)(iii) of ERISA (disregarding modifications made under clause (iv) of such section) for any month selected by the plan in the 4-month period ending with the month in which the plan's application was filed (or the month in which the initial application was filed if there was more than one filing date). If an application is revised as provided under § 4262.11 of the regulation, the interest rate used for the revised application must be the same as the interest rate used for the initial application.

Some interested parties commented that the interest rate required under section 4262(e) of ERISA should only apply to the earnings on current plan assets and that PBGC should allow a separate rate to be used to determine the amount of SFA required to pay for benefits not provided by current plan assets. Of those commenters, some contend that because the 2020 certifications of plan status did not include an interest rate assumption for SFA, the interest rate should reflect expected returns for investment grade bonds. To determine eligibility, for certifications of plan status completed after December 31, 2020, section 4262(e)(1) requires a plan to use its most recently completed certification of plan status before January 1, 2021, unless such assumptions, *excluding the plan's interest rate*, are unreasonable (emphasis added). To determine the amount of SFA, section 4262(e)(2) mandates that a plan must "use the interest rate used by the plan in its most recently completed certification of plan status before January 1, 2021, provided that such interest rate may not exceed the interest rate limit." These provisions do not require the interest rate used under the certification of plan status to be reasonable for purposes of eligibility or determining the amount of SFA. Under section 4262(e)(4), if a plan determines that use of one or more prior assumptions is unreasonable, the plan may propose to change such assumption.

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This provision specifically states that the plan may not propose a change to the interest rate required for eligibility or SFA amount. In addition, PBGC does not have authority to provide a different rate or bifurcate the statutorily mandated interest rate.

For assumptions other than the interest rate, § 4262.4(e)(2) provides that a plan must use the assumptions that the plan used in its most recently completed certification of plan status before January 1, 2021, unless such assumptions are unreasonable. If a plan determines that use of one or more of the assumptions in its most recently completed certification of plan status before January 1, 2021, is unreasonable, the plan may propose in its application to change the assumptions as provided in § 4262.5 of the regulation.

The information required to be included as part of an application, including to support changes to assumptions, is described in §§ 4262.6 through 4262.8 of the regulation. PBGC's review of the assumptions used by a plan is described in § 4262.5 of the regulation.

#### *Calculating the amount of SFA with respect to certain events*

Section 4262.4(f) addresses the possibility that a plan may implement certain changes that could entitle the plan to more SFA than was intended under section 4262 of ERISA. In these situations, the amount of SFA that would apply to a plan is limited to the amount of SFA determined as if the events described in § 4262.4(f) had not occurred. These events include mergers, transfers of assets or liabilities (including spinoffs), certain increases in accrued or projected benefits, and certain reductions in contribution rates. The limitation applies to events that occur between July 9, 2021, and the SFA measurement date. To accommodate the possibility of multiple events, the limitation does not apply on an event-by-event basis but is based on comparing the amount of SFA a plan applies for with the amount of SFA a plan (or all plans in the case of a merger) would have received had the events not occurred.

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Section 4262(b)(1) of ERISA establishes criteria for eligibility of a multiemployer plan for SFA, and section 4262(j) provides for determining the amount of the SFA, but these provisions do not address the situation in which a multiemployer plan has engaged in a transaction that affects the amount of SFA to which a plan is entitled, including through the manipulation of the eligibility criteria. Moreover, section 4262(e)(2)(B) provides, as a general rule, that the actuarial assumptions to be used by a plan are the assumptions used in the plan's actuarial certification for the most recently completed certification of plan status before January 1, 2021 (unless those assumptions are unreasonable), indicating that the plan applying for SFA must have been in existence and had an actuarial certification as to its status before January 1, 2021. The provisions regarding interest rate assumptions under section 4262(e)(2)(A) are specific to the plan in its most recent certification of plan status completed before January 1, 2021, and, under the terms of section 4262(e), those assumptions cannot be changed. A manipulation of those rates via a merger would not be consistent with that requirement. Although the statute does not directly address plan mergers, each plan's assumptions from the most recently completed pre-2021 certification of plan status must be maintained in order for section 4262(e) to have meaning with respect to the plans that merged. This rule fills the gap left in the statute for the calculation of SFA for plans that have been involved in a merger.

It is likewise appropriate for PBGC, as a prudent steward of taxpayer funds, and with responsibility for carrying out the purposes of the title IV insurance program,<sup>12</sup> to impose conditions on plans receiving SFA designed to ensure that plans receive no more than the amount of SFA to which they are entitled. PBGC concludes that, to achieve that end, it is reasonable not to give effect to changes made to a plan's structure or terms on or after July 9,

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<sup>12</sup> PBGC's inherent authority under section 4002(b)(3) of ERISA allows PBGC to adopt regulations to carry out the purposes of the title IV insurance program.

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2021, if such changes either artificially inflate the amount of SFA to which a plan is entitled or convert an ineligible plan into an eligible plan.

Section 4262(m)(1) of ERISA expressly authorizes PBGC, in consultation with the Secretary of the Treasury, to impose reasonable conditions “on an eligible multiemployer plan that receives special financial assistance” relating to certain aspects of plan terms or operations. Such conditions include those relating to the diversion of contributions to, and allocation of expenses to, other benefit plans; increases in future accrual rates and any retroactive benefit improvements; and reductions in employer contribution rates. PBGC's authority to impose reasonable conditions under section 4262(m)(1) is not limited to restrictions on a plan following its receipt of SFA given that these conditions apply to a plan that “receives” SFA, rather than a plan that has received SFA. That understanding of section 4262(m)(1) finds further support in section 4262(m)(2), which restricts the conditions that PBGC can impose not only “following receipt of” SFA, but also “as a condition of” SFA. That broad prohibition would be unnecessary if PBGC's authority under section 4262(m)(1) was limited to only post-receipt conditions.

Accordingly, pursuant to section 4262(m) of ERISA, in conjunction with sections 4002(b)(3) and 4262(e), PBGC is authorized to impose reasonable conditions that ensure that SFA is provided to plans in an amount that is not inflated by way of contrived events.

*(a) Mergers*

The rule provides that if two or more plans are merged, then the SFA is limited so that it does not exceed the sum of the SFA that would have been calculated for all of the plans involved in the merger had the plans applied separately for SFA. Thus, a plan that would not have been entitled to any SFA if not for a merger that occurs on or after July 9, 2021, cannot become entitled to SFA by merging with a plan that also would not otherwise be entitled to any SFA.

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Further, a plan may not increase the amount of SFA to which it is entitled by merging with another plan or plans on or after July 9, 2021.

As explained earlier in this section of the preamble, this condition fills the gap in the rules for the calculation of SFA for plans that merge after the most recent certification of plan status completed before January 1, 2021. In addition, this requirement is consistent with PBGC’s authority under section 4262(m)(1) of ERISA to impose reasonable conditions relating to the “diversion of contributions to, and allocation of expenses to, other benefit plans.” When two or more plans merge, a predecessor plan has diverted its contributions and allocated its expenses to the merged plan. Specifically, a merged plan, which combines assets and liabilities of two or more plans, each with its own set of participants and beneficiaries, and to all of whom all the assets (and, thus, all the contributions) must be available following the merger, is, in effect, diverting contributions intended to benefit one set of participants to another.

*(b) Transfers*

The rule provides that where assets or liabilities are transferred, an applicant plan’s SFA is limited based on the amount of SFA the plan would be entitled to if the transfer did not occur. Similar to mergers, this requirement is premised on PBGC’s authority under section 4262(m)(1) of ERISA to impose reasonable conditions relating to the “diversion of contributions to, and allocation of expenses to, other benefit plans.”

*(c) Other events*

Similar considerations apply to benefit increases and contribution reductions. These events are also described in section 4262(m)(1) of ERISA, which permits PBGC to impose conditions on the receipt of SFA relating to “increases in future accrual rates and retroactive benefit improvements” and on “reductions in employer contribution rates.” These events are ordinarily thought of as increasing burdens on plans, and changes of this type are not commonly

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adopted with respect to plans in financial distress. Because SFA is designed to relieve financial distress, creating or increasing burdens could be a net plus for a plan. In other words, absent an effective condition in this regulation, these events would create artificial financial stress on the plan with the expectation that the plan would be compensated through the payment of additional SFA. To prevent this manipulation of the standards for determining the amount of SFA, the rule provides that SFA is limited to the amount that would have applied had the event not occurred.

There is an exception to this rule. One possible benefit increase could arise from the restoration of benefit suspensions of retirees and beneficiaries in pay status that satisfies the requirements of 26 CFR 1.432(e)(9)-1(e)(3). Under that Treasury Department regulation, the restoration of benefits is not subject to the benefit increase restrictions under sections 432(e)(9)(E) or 432(f)(1)(B) of the Code, and an amendment restoring benefits that satisfies the requirements of 26 CFR 1.432(e)(9)-1(e)(3) can be adopted at any time. Because a major goal of the SFA program is the prompt resumption of payment of suspended benefits, the restoration of these benefits should be encouraged and the exception in these regulations (under which benefit increases pursuant to such an amendment are taken into account in determining the amount of SFA) facilitates that goal. If an amendment that satisfies 26 CFR 1.432(e)(9)-1(e)(3) is adopted before the SFA measurement date, it is taken into account in determining the amount of the SFA (as the benefits attributable to the restoration would be if the amendment were adopted later), and the adoption is not an event that is subject to the limitation on SFA arising from potential abuses.

Finally, if two or more plans are merged and any of the plans involved in the merger also experienced a transfer of assets or liabilities, a benefit increase, or a reduction in contributions that would be subject to the limitation in § 4262.4(f) during the period described in § 4262.4(f)(1)(i), the amount of SFA for the merged plan must be determined by applying the limitation in § 4262.4(f)(1)(i) to the plan that experienced the other applicable event.



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### *PBGC review of plan assumptions*

PBGC’s review of an application for SFA will focus on the reasonableness of the plan’s and the plan actuary’s demonstration regarding the amount of SFA for the plan. Section 4262.5 sets forth how PBGC will review plan assumptions.

As described earlier, instead of prescribing actuarial assumptions to be used for determining SFA, or calling on PBGC to prescribe assumptions, section 4262 of ERISA generally looks to plan assumptions previously selected by the plan actuary for determining eligibility for and calculating the amount of SFA. A mechanism is provided for a plan to propose changes to actuarial assumptions if it determines that the use of one or more of its original assumptions (other than the interest rate) is unreasonable.

Actuarial assumptions under section 4262 of ERISA are derived from a plan’s certification of plan status under section 305 of ERISA. In general, PBGC believes that a plan’s actuarial assumptions adopted for the certification of plan status (and not for entitlement to SFA) represent a neutral view of circumstances, unbiased by the prospect of receiving a substantial sum of money based on those assumptions. Accordingly, PBGC expects to give far less intensive scrutiny to “original” assumptions than to changed assumptions.

PBGC is to accept actuarial assumptions incorporated in a plan’s certification of plan status completed before 2021 for purposes of eligibility under § 4262.3(d)(1) unless PBGC determines that such assumptions are “clearly erroneous.”

For all other purposes, PBGC will accept the assumptions used unless PBGC determines that they are unreasonable. Each of the actuarial assumptions and methods used for the actuarial projections (excluding the interest rate), must be reasonable in accordance with generally

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accepted actuarial principles and practices,<sup>13</sup> taking into account the experience of the plan and reasonable expectations. To be reasonable, among other things, an actuarial assumption or method must be appropriate for the purpose of the measurement, reflect the actuary's professional judgment, take into account current and historical data that is relevant to selecting the assumption for the measurement date, reflect the actuary's estimate of future experience, and reflect the actuary's observation of the estimates inherent in market data (if any). In addition, an actuarial assumption or method must be expected to have no significant bias (i.e., it is not significantly optimistic or pessimistic).

If a plan determines that one or more original assumptions are unreasonable and must be changed, § 4262.5(c) provides that the plan's application must describe why the original assumption is no longer reasonable, disclose the changed assumption, and demonstrate that the changed assumption is reasonable. If there is a change in assumptions, each of the actuarial assumptions and methods (other than the interest rate) must be reasonable and the combination of those actuarial assumptions and methods (excluding the interest rate) must also be reasonable. With large amounts of SFA at stake, PBGC will be called on to perform a more searching analysis of any changed assumptions. While PBGC expects actuaries to be conscientious in setting assumptions, it is a process that presents many opportunities for judgment calls that may be influenced by the goal of maximizing SFA.

Concurrent with this interim final rule, PBGC has issued guidelines for changes to certain assumptions that plans may use for purposes of determining eligibility for SFA and the amount of SFA. Plans may, but are not required to, use the guidelines if they are reasonable for the plan.

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<sup>13</sup> Actuarial Standards of Practice (ASOPs) are issued by the Actuarial Standards Board and are available at <http://www.actuarialstandardsboard.org/standards-of-practice>. Certain ASOPs, including ASOPs Nos. 4, 23, 27, 35, 41, and 56 may be relevant to the actuary's work related to special financial assistance, including the assessment of the reasonableness of the actuary's assumptions and methods.

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Guidelines are available for contribution base units (CBUs), administrative expenses, mortality, contribution rates, and new entrant profiles, and can be found in the guidance issued on PBGC’s website at [www.pbgc.gov/guidance](http://www.pbgc.gov/guidance).

Additionally, PBGC acknowledges that plans may have a gap in the assumption for projected CBUs and administrative expenses used in the prior certification of plan status such that the assumption cannot be used “as is” for determining SFA. This is because plans generally do not project these assumptions more than 20 years in the future. In addition, before the enactment of ARP, if a plan was projected to become insolvent within 20 years, then the plan is unlikely to have assumptions for CBUs or plan-related administrative expenses for years after the projected insolvency date. These are natural practices for purposes of a certification of plan status, but a significant deficiency where those assumptions are needed to determine the amount of SFA. A plan can fill this gap with any reasonable extension of its CBU assumption and administrative expense assumption, but that will generally mean a “change” in assumptions, triggering a more intensive (and time-consuming) review by PBGC. To assist applicants and aid in the review of a plan’s CBU assumption and administrative expense assumption, PBGC has developed “standard” extensions that plans can use to complete the assumption set for a plan that otherwise can use its original assumptions. These assumptions are described in the guidance mentioned earlier in this section of the preamble.

#### *Information to be filed*

Sections 4262.6 through 4262.8 of the regulation describe the information that must be included in a plan’s SFA application. Section 4262.6 summarizes the requirements for an application to be considered complete, including plan information; actuarial and financial information (including the amount of SFA requested); a completed checklist (per the SFA instructions on PBGC’s website at [www.pbgc.gov](http://www.pbgc.gov)); the signature of an authorized trustee who is

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a current member of the board of trustees; a signed penalties of perjury statement; a copy of the executed plan amendment providing that, beginning with the SFA measurement date, the plan must be administered in accordance with the restrictions and conditions specified in section 4262 of ERISA and this regulation; a copy of the proposed plan amendment to reinstate benefits and pay make-up payments and certification by the plan sponsor that the plan amendment will be adopted timely; and information required by PBGC to clarify or verify the information in a filed application. If any of the information required under this part and in the SFA instructions is missing from the filed application, the application will not be considered complete.

The SFA instructions, including templates, supplement the regulation and provide guidance to plan sponsors and practitioners on how to prepare and file the required application information.

Sections 4262.6 through 4262.8 and the instructions specify the minimum necessary plan, actuarial, and financial information that PBGC requires to approve or deny an application for SFA and to verify the amount of SFA within the short 120-day review window permitted under section 4262(g) of ERISA. As described in the *Paperwork Reduction Act* section of this preamble, the application instructions and checklist have been submitted to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act. OMB's decision regarding this information collection request will be available at <http://www.Reginfo.gov>.

Unless confidential under the Privacy Act, all information that is filed with PBGC for an application for SFA may be made publicly available, at PBGC's sole discretion, on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) or otherwise publicly disclosed. Except to the extent required by the Privacy Act, PBGC provides no assurance of confidentiality in any information or documentation included in an application for SFA.

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### *Application for plans with a partition*

Under section 4233 of ERISA, a plan may apply to PBGC for a partition to fund a portion of the plan's benefits to avoid insolvency. Upon PBGC's approval of an application for partition, PBGC issues a partition order to provide: (1) for a transfer from the original plan to the plan created by the partition order (the successor plan), the minimum amount of benefit liabilities necessary for the original plan to remain solvent, and (2) financial assistance from PBGC under section 4261 to pay those benefits. The successor plan is but a creature of PBGC's partition order, terminated and insolvent from its inception. The original and successor plans are required by section 4233(d)(2) to have the same plan sponsor and administrator.

Section 4262(c)(3) of ERISA requires PBGC to provide an alternative application for SFA that may be used for a plan approved for a partition before March 11, 2021. Section 4262.9 of PBGC's regulation describes this application.

The plan sponsor of a partitioned plan must apply for SFA using the alternative application, which contemplates PBGC's rescission of the partition order as prescribed under § 4262.9(c) and other conditions particular to a partitioned plan as described under § 4262.9(b). One of these conditions is that the plan sponsor must file a single application for SFA consisting of information about the original plan and the successor plan. The combined information must reflect that, on the date SFA is transferred to the plan, PBGC will rescind the order that created the successor plan, and the plan sponsor will remove plan provisions and amendments that were required to be adopted under the order.

Another condition is that the application must include a statement that the plan was partitioned and a copy of the provisions or amendments that the plan was required to adopt under the partition order. A partitioned plan's application must include all the required information described in §§ 4262.6 through 4262.8 for applications generally. However, if the plan sponsor

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of a partitioned plan has filed any of the required information with PBGC already, the sponsor is not required to include that information again with its SFA application. Instead, the sponsor must only note on the checklist described under § 4262.6(a) that the information was already filed.

Partitioned plans also have benefit suspensions that must be reinstated if the plan is approved for SFA. Under § 4262.15, a plan receiving SFA must reinstate benefits suspended under section 305(e)(9) of ERISA and provide make-up payments to participants and beneficiaries, to restore previously suspended benefits, in accordance with guidance issued by the Treasury Department and the IRS. This requirement applies to both the original plan and the successor plan created by a partition where benefits under the original plan were suspended. Having the original and successor plans apply as one will ensure coordinated benefit reinstatements for all participants in the partitioned plan.

The filing of an application for a partitioned plan falls under priority group 2 for purposes of § 4262.10(d) (explained in *Processing applications*), consistent with other plans that are eligible for SFA because they have implemented a suspension of benefits under section 305(e)(9) of ERISA as of March 11, 2021. The plan sponsor of a partitioned plan, therefore, may file an application for SFA beginning on January 1, 2022, or earlier date specified on PBGC's website.

Partitioned plans have also been receiving financial assistance from PBGC with repayment obligations under section 4261 of ERISA. How financial assistance under section 4261 is repaid is prescribed under § 4262.12(b) of the regulation.

### *Processing applications*

PBGC expects the SFA program to attract many applicants, and the statute makes clear that PBGC is expected to process applications quickly. PBGC is required to hold application processing times to within 120 days and is given authority to manage that process.

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Under section 4262(c) of ERISA, PBGC must issue regulations or guidance setting forth requirements for SFA applications. Applications are considered timely filed under section 4262(g) only if they are filed in accordance with PBGC’s regulations. PBGC’s inherent authority under section 4002(b)(3) of ERISA allows PBGC to adopt regulations relating to the conduct of its business and to carry out the purposes of the title IV insurance program. Under section 4262(d) of ERISA, PBGC also may limit the filing of SFA applications to filings for plans that are in one or more of four “priority” categories during a period limited to within the first 2 years after March 11, 2021.

While PBGC is confident in its ability to process an application within the mandated 120 days, it might not be able to process all applications timely if many applications must be processed within a brief period. Thus, PBGC is concerned about the rate at which applications are submitted for processing. Relying on the aforementioned authorities that allow PBGC to administer the SFA application process, PBGC has developed a “metering” system to manage the filing and processing of applications. The goal of this system is to process the large number of expected applications within the 120 days mandated by the statute, while avoiding both “floods” of applications that could cause applications to be deemed approved (as described in § 4262.11) without sufficient PBGC review, and “droughts” when processing capacity is sitting idle. The risks of an insufficiently reviewed application are varied, including, but not limited to, SFA payments that are insufficient to meet program requirements, and SFA payments that are higher than necessary to meet program requirements. These risks are exacerbated by the lump sum form of payment required by ARP. To manage these risks and ensure the success, integrity, and proper stewardship of the program, it is important that PBGC thoroughly review each application.

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The electronic filing system described in § 4262.10 of the regulation is based on three mechanisms. The first mechanism permits PBGC to accept applications in a manner that in PBGC’s estimation allows for sufficient review and processing within 120 days of filing. The inherent authority provided by section 4002(b)(3) of ERISA to issue regulations related to the conduct of its business, and the directive under section 4262(c) to set forth requirements for applications, clearly authorize PBGC to limit the number of applications it will accept at any one time, and to close the filing window to avoid choking the processing system, provided that every prospective submitter has a fair opportunity to file its application by December 31, 2025 (or December 31, 2026, for a revised application).

The second mechanism is a priority system permitted by section 4262(d) of ERISA. PBGC is establishing “priority” periods during which an application will be accepted only for a plan that is in the category (or one of the categories) to which the period is limited. This mechanism is consistent with section 4262(d), although not a direct implementation of that provision, which (by its use of the disjunctive “or”) indicates that priority status may be extended to any one or more subgroups of priority-status plans and which does not limit the number of priority submission windows. Accordingly, PBGC has designed this mechanism to prioritize the most impacted plans and participants first. For example, the highest priority is given to applications of plans that are projected to become insolvent under section 4245 of ERISA by March 11, 2022, so that they will not have to reduce participant benefits, and plans that are already insolvent, to enable them to reinstate benefits and provide make-up payments to participants and beneficiaries, to restore previously suspended benefits. The objective is to accept and process as many applications in the highest priority group as possible before opening the submission process to the next priority group. Ultimately — no later than March 11, 2023 — the submission process will be opened to all eligible plans, to ensure that every prospective



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submitter has a fair opportunity to file its application during the statutory period. As described earlier in this section of the preamble, PBGC will continue to meter the flow of applications to avoid exceeding its capacity to process them within 120 days.

PBGC will accept applications for filing for priority group 1 beginning on July 9, 2021. The second highest priority is given to applications of plans that have implemented a suspension of benefits under section 305(e)(9) of ERISA as of March 11, 2021, to enable them to reinstate benefits and provide make-up payments to participants and beneficiaries to restore previously suspended benefits, and plans expected to be insolvent within 1 year of the date an application for SFA is filed. PBGC will accept applications for filing for priority group 2 beginning no later than January 1, 2022. The filing dates for applications from the remaining four priority groups (groups 3 – 6) are provided for in § 4262.10(d)(2)(iii) through (vi), with filings for priority groups 5 and 6 beginning no later than February 11, 2023. In addition, PBGC will specify on its website, at least 21 days in advance, the date the last 2 priority groups (groups 5 and 6) may file.

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This table shows when applications for each priority group may begin to be filed.

<b>Priority Group</b>	<b>Description of Priority Group</b>	<b>Date Plans May Apply for SFA</b>
<b>1</b>	Plans already insolvent or projected to become insolvent before March 11, 2022	Beginning on July 9, 2021
<b>2</b>	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
<b>3</b>	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
<b>4</b>	Plans projected to become insolvent before March 11, 2023	Beginning on July 1, 2022, or earlier date specified on PBGC’s website
<b>5</b>	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
<b>6</b>	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
<b>7</b>	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

As priority groups open, PBGC will continue to accept applications from plans in earlier priority groups. While the priority mechanism may entail a relatively short deferral of an application for a given plan until its respective priority group opens, the amount of SFA ultimately awarded will reflect the amount required to pay all benefits due pursuant to the statute.<sup>14</sup>

Applications of plans in a priority category must also be submitted to the Secretary of the Treasury under section 432(k)(1)(D) of the Code. If that requirement applies to an application,

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<sup>14</sup> For instance, the value of plan assets may fluctuate during a deferral period and the amount of SFA will adjust based on that experience.

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PBGC will transmit the application to the Treasury Department on behalf of the plan, and the Treasury Department has provided in guidance (Notice 2021-38) that it will treat the requirement under section 432(k)(1)(D) as satisfied.

The third mechanism is a notification system on PBGC's website to keep prospective applicants apprised of when a filing window opens or closes and (if applicable) to what priority groups filing is limited. This mechanism will enable applicants to know when the system is accepting their priority group's filing.

In sum, the system works like this:

- Applications will be accepted initially only from plans in the highest priority group.

PBGC will begin accepting applications from the other priority groups as of the dates described earlier in this section of the preamble (and set forth in § 4262.10(d)(2) of the regulation) and posted on PBGC's website at *www.pbgc.gov*.

- Applications are processed based on capacity. An application will be considered filed on the date it is electronically submitted to PBGC if the application meets any applicable priority requirements and can be accommodated in accordance with the processing system. Otherwise, PBGC will not consider the application filed and will notify the applicant that the application must be filed in accordance with the processing system and instructions on PBGC's website.

PBGC will accept as many applications as the agency estimates it can process in 120 days. Once the number of applications reaches that level, the filing window will temporarily close until PBGC has capacity to process more applications. PBGC will maintain a dedicated webpage for applications on its website at *www.pbgc.gov* to inform prospective applicants about the current status of the filing window, as well as to provide advance notice of when PBGC expects to open or temporarily close the filing window. PBGC will contact interested

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prospective applicants via email when such new information is available. PBGC will also post information about the status of filed applications.

A plan sponsor may contact PBGC informally to discuss a potential application for SFA.

#### *Emergency filings*

PBGC recognizes that in rare circumstances a plan may experience an event that brings it closer to insolvency than previously projected. Consistent with section 4262(d)(1)(D) of ERISA, which allows PBGC to add priority categories as it determines appropriate based on other similar circumstances, PBGC is including an emergency filing process to accept priority applications from a plan that is insolvent or expected to be insolvent under section 4245(a) of ERISA within 1 year of filing an application, or a plan that has implemented a suspension of benefits under section 305(e)(9) of ERISA as of March 11, 2021. Beginning with PBGC's acceptance of "priority group 2" filings, PBGC will accept emergency filings from these plans during periods when PBGC would not otherwise accept such applications. A filer submitting an application under the emergency filing process must substantiate the claim of emergency status and notify PBGC, in accordance with the SFA instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov), before submission of the impending application.

#### *PBGC action on applications*

Section 4262(g) of ERISA provides that PBGC can either approve or deny an application for SFA and establishes a short time period during which PBGC must act or an application is deemed approved. As described under § 4262.11 of the regulation, PBGC must act on an application within 120 days after the date an initial or revised application is properly and timely filed. If PBGC approves an application, it will notify the plan sponsor of the payment of SFA in accordance with § 4262.12.

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If PBGC denies an application, it will notify the plan sponsor in writing of the reasons for the denial. An application may be denied because it is incomplete (it does not accurately include the information required to be filed); because an assumption is unreasonable, a proposed change in assumption is individually unreasonable, or the proposed changed assumptions are unreasonable in the aggregate; or because the plan is not an eligible multiemployer plan. For example, pending approval of an application if PBGC determines that documentation supporting a certification of critical and declining status is missing or the plan sponsor has not responded to a PBGC request for information to clarify an item in that documentation, PBGC's notice will identify the missing information or documentation required to complete the application. If PBGC denies an application, the plan sponsor may choose to submit a revised application or withdraw the denied application. If the plan sponsor submits a revised application, the revised application must not differ from the denied application except to the extent necessary to address the reasons stated in PBGC's notification for the denial. In other words, PBGC is not requiring a plan sponsor to refile the entire application. PBGC only needs the information that cures the reasons specified in the denial notice.

The plan sponsor may withdraw an application (in writing and in accordance with the SFA instructions on PBGC's website, *www.pbgc.gov*) at any time before or after PBGC denies the application, but not after PBGC has approved the application. If an application is withdrawn, the plan sponsor may refile the application as a revised application.

For any revised application, PBGC requires that the "base data" (the SFA measurement date, participant census data, and interest rate assumption) remain the same as reported on the plan's initial application to guard against multiple filings for purposes of changing this data. Once PBGC has accepted an initial application for processing, PBGC believes that it is in the best interest of all parties to avoid the duplicate work and delays associated with changes to the

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base data. Accordingly, if the plan sponsor withdraws an application and submits a revised application it must use the base data from its initial application, but it may make other changes.

PBGC's decision on an application for SFA is a final agency action for purposes of judicial review under the Administrative Procedure Act (5 U.S.C. 704).

#### *Payment of special financial assistance*

Section 4262(j) of ERISA provides that SFA is the amount required for an eligible plan to pay all benefits due from the date PBGC pays the SFA to the plan until the last day of the plan year ending in 2051. But as described earlier in this preamble, a plan sponsor does not know when SFA will be paid at the time the sponsor prepares an application. The SFA amount supported by an application and approved by PBGC will be the amount appropriate to a date in the past. The amount of SFA could be recomputed as of the date of payment, yet the result would still be an estimate and the burden of computation would be significant. Instead, § 4262.12 provides that PBGC will pay a plan the amount demonstrated under the plan's application, determined as of the SFA measurement date, plus interest on that amount, representing the time differential between the computation and the date PBGC sends payment (not the bank settlement date) and using the interest rate equal to the rate required under § 4262.4(e)(1).

Section 4262.12(d) of the regulation provides that PBGC will pay SFA to a plan in a lump sum or substantially so<sup>15</sup> as soon as practicable upon approval of the plan's SFA application. PBGC expects payment to be made usually within 60 days, but no later than 90 days after the plan's SFA application is approved by PBGC or deemed approved (and in any event not later than September 30, 2030). Payment will be made in accordance with payment

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<sup>15</sup> For example, if a plan's SFA payment exceeds the statutory limitation for a federal wire of \$10 billion, the plan will receive multiple Fedwire payments that will equal the approved lump sum amount.

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instructions provided by the plan in its application. Payment will be considered made when, in accordance with the plan's payment instructions, PBGC no longer has ownership of the amount being paid. Any adjustment for delay will be borne by PBGC only to the extent that it arises while PBGC has ownership of the funds.

For a plan with an obligation to repay financial assistance under section 4261 of ERISA, the regulation describes the process for that repayment.

Unlike assistance under section 4261, section 4262(a)(2) of ERISA provides that payment of SFA is not a loan subject to repayment obligations. However, PBGC clarifies in § 4262.12(d)(1) that SFA is subject to recalculation or adjustment to correct a clerical or arithmetic error. PBGC will, and plans must, make payments as needed to reflect any such changes in a timely manner. SFA is also subject to debt collection if PBGC determines that a payment for SFA to a plan exceeded the amount to which the plan was entitled. Section 4262.12(d)(2) provides the rules for payment of a debt owed to the Federal Government.

#### *Restrictions on special financial assistance*

Section 4262(l) of ERISA places restrictions on the use of SFA. These restrictions are described in § 4262.13 of the regulation. SFA received, and any earnings thereon, must be segregated from other plan assets and may only be used to make benefit payments and pay plan expenses (but SFA may be used before other plan assets are used for these purposes). In addition, SFA (and earnings) must be invested by plans in investment-grade bonds or other investments as permitted by PBGC in § 4262.14. These limitations on the use of SFA reflect the purpose of SFA. As provided for under section 4262(j)(1) of ERISA and in § 4262.4, SFA is the amount required for the plan to pay all benefits due during the SFA coverage period taking into account all plan resources and obligations. SFA should not be used in a manner that would divert SFA funds to other purposes—for instance, reducing sources of plan income, such as

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employer contributions or withdrawal liability, or increasing plan obligations, such as to pay for additional future increases in benefits.

### *Permissible investments*

Section 4262(l) of ERISA requires that SFA received, and any earnings thereon, may be used to make benefit payments and pay plan expenses, and such SFA and earnings must be held separately from other plan assets. Section 4262(l) also requires that SFA funds be invested in investment-grade bonds or other investments permitted by PBGC.

Given the statute’s requirement that SFA funds, and any earnings on investment of those funds, be used solely to pay benefits and plan expenses, PBGC understands that SFA funds should be invested in relatively safe vehicles that will help ensure that short-term needs to pay benefits and plan expenses can be met. That section 4262(l) of ERISA refers to investment-grade bonds first, supports this view. The allowance under section 4262(l) for “other investments permitted by the corporation” could provide some flexibility (as well as limited exposure to other assets), but PBGC in this interim final rule is reluctant to allow for investment vehicles with fundamentally different characteristics without further input from the public.

Section 4262.14 of the regulation describes the permitted investments of SFA, referred to as permissible investments. To give effect to the evident intention that SFA be invested in relatively safe investments, the regulation permits SFA and earnings on SFA to be invested only in fixed income securities that must be considered investment grade except for a 5 percent sleeve that allows a plan to hold on to investments that were considered investment grade at the time of purchase but are no longer of that credit quality. Thus, SFA funds will be fairly protected and plans will have clear expectations about what the income return will be.

Permissible investments may be held in individual fixed-income securities or in commingled funds, such as Exchange Traded Funds (ETFs), mutual funds, pooled trusts, or other



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commingled securities (which are defined in the regulation as permissible fund vehicles). To ensure the quality of the securities that may be invested with SFA, the regulation provides that permissible investments are considered investment grade if a fiduciary, within the meaning of section 3(21) of ERISA, who is or seeks the advice of an experienced investor (such as an Investment Advisor registered under section 203 of the Investment Advisor's Act of 1940) makes such a determination.

For purposes of the regulation, investment grade means publicly traded securities for which the issuer has at least adequate capacity to meet the financial commitments under the security for the projected life of the asset or exposure. Adequate capacity means that the risk of default by the obligor is low and the full and timely repayment of principal and interest on the security is expected. These definitions are consistent with other Federal agency regulations that make reference to investment grade securities in compliance with Section 939A of the Dodd Frank Act of 2010.<sup>16</sup> Further, the requirement that securities be considered investment grade by an experienced investor acknowledges that plans receiving SFA, and their advisors, have the requisite investment knowledge and experience to make sound investment decisions.

Plans may be able to access fixed-income securities from overseas so long as the securities are denominated in U.S. dollars. In practice, this would mean that such securities are accessible mainly within publicly traded markets.

To acknowledge that securities held in ETFs, mutual funds, other commingled funds, or directly through a portfolio of individual securities, often are supplemented by derivatives that replicate exposure to physical bonds or that implement hedging strategies to protect against downside risk, the regulation permits investment in vehicles allowing for such strategies so long as any derivative or leveraging strategy does not increase the interest rate risk or credit risk of the

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<sup>16</sup> See, e.g., 12 CFR 16.2

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investments beyond the risk in a similar portfolio of physical securities (i.e., non-derivative securities) with the same market value. Further, any notional derivative exposure<sup>17</sup> on permissible investments that are held in separate accounts (i.e., not through a permissible fund vehicle), must be supported by liquid assets that are cash or cash equivalents denominated in U.S. dollars. This will ensure that the plan or the investment manager will be able to cover the derivative exposure with little risk to SFA assets.

In listening sessions with interested parties, PBGC heard concerns about how overly restrictive requirements on how SFA assets could be invested could have significant adverse impacts on overall plan financial health. For instance, with interest rates on fixed income securities remaining at historically extremely low levels, both SFA and other plan assets could be depleted and be unable to pay plan benefits long before 2051. PBGC agrees with such concerns. Because PBGC thought it important for plans exploring whether to apply for SFA to know what restrictions could be placed on investment of SFA funds, PBGC is providing a starting point for discussion on permissible investments of SFA assets in this interim final rule. With an eye toward finding a more appropriate balance between certainty and safety of investments on the one hand, and the opportunity for plans to have flexibility to decide appropriate overall investment policies on the other, PBGC seeks public input for refining § 4262.14. In particular, PBGC requests responses, with corresponding data, on the following:

1) PBGC is interested in understanding the potential benefits and risks of investing SFA assets in other vehicles that are or have the nature of fixed income. These might include synthetic replications of fixed income securities, insurance contracts, hybrid securities, preferred stock or other vehicles. In this regard, the following questions are of interest:

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<sup>17</sup> Notional value is a term often used to value the underlying asset in a derivatives trade. It can be the total value of a position, how much value a position controls, or an agreed-upon amount in the contract. Definition provided on "Investopedia" at <https://www.investopedia.com/terms/n/notionalvalue.asp>.

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- What are the advantages of investing in such vehicles, relative to a portfolio of investment grade fixed income, in terms of expected returns, reduced risk or other improved outcomes?

- What are the disadvantages of investing in such vehicles relative to a portfolio of investment grade fixed income, including lower returns, higher risk, inequitable outcomes amongst participants or other issues?

- What are the implementation and management costs of investing in such vehicles?

- Which organizations are qualified to manage and advise on these vehicles?

- Can the vehicles, as they might be used in multiemployer plan portfolios or in the pool of SFA assets, be clearly defined and easily used?

2) Should permissible investments of SFA assets be limited to fixed income securities?

For instance, should the rule permit investment of a percentage of SFA assets in certain stock ETFs or mutual funds that have investment profiles that are not materially riskier than fixed income-based investment grade securities?

3) What is the appropriate amount of SFA assets that may be permitted to be invested in non-investment grade securities?

4) What is the proper relationship to restrictions on SFA asset investments to other plan asset allocations?

#### *Conditions for special financial assistance*

To ensure that SFA is used for the purpose of paying benefits and the expenses related to those benefit payments, section 4262(m)(1) of ERISA gives PBGC authority, in consultation with the Secretary of the Treasury, to impose reasonable conditions on an eligible multiemployer plan that receives SFA. Conditions may relate to increases in future accrual rates and any

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retroactive benefit improvements, allocation of plan assets, reductions in employer contribution rates, diversion of contributions to, and allocation of expenses to, other benefit plans, and withdrawal liability. In determining what conditions to impose, in consultation with the Treasury Department, PBGC considered, among other things, the potential actions of contributing employers and the security of the accrued benefits of plan participants. These considerations are discussed in greater detail in the regulatory impact analysis section of the rule.

Under certain circumstances, a plan sponsor may request approval from PBGC for an exception to conditions relating to reductions in employer contribution rates, transfers or mergers, and settlement of withdrawal liability. These exceptions are explained later in this section of the preamble. PBGC is soliciting public comment on whether there are other circumstances relating to the conditions described under § 4262.16 where PBGC should consider providing approval for exceptions.

*(a) Benefit increases*

Section 4262.16(b) imposes reasonable conditions on a plan that receives SFA with respect to the types of benefits and benefit increases described in section 4022A(b)(1) of ERISA, without regard to the time the benefit or benefit increase has been in effect. These conditions are intended to prevent excessive increases in benefits that would result in a transfer of SFA beyond the payment of benefits at the level that participants were promised as of the date of enactment of section 4262, without being overly restrictive. The condition does not apply to the required reinstatement of benefits suspended under sections 305(e)(9) or 4245(a) of ERISA or any restoration of benefits under 26 CFR 1.432(e)(9)-1(e)(3).

The condition in § 4262.16(b)(1) restricts retrospective benefit increases by providing that a benefit or benefit increase must not be adopted during the SFA coverage period (defined in § 4262.2 of the regulation) if it is in whole or in part attributable to service accrued or other

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events occurring before the adoption date of the amendment. This condition is needed because retroactive increases in benefits harm the funded position of the plan without improving expected future plan income.

The condition in § 4262.16(b)(2) restricts prospective benefit increases by providing that a benefit or benefit increase must not be adopted during the SFA coverage period unless the plan actuary certifies that employer contribution increases projected to be sufficient to pay for the benefit increase have been adopted or agreed to, provided that these increased contributions were not included in the determination of SFA. The plan sponsor must demonstrate that a benefit increase is paid for in the statement of compliance described under § 4262.16(i). This condition is intended to guard against plans implementing significant benefit increases that may accelerate plan insolvencies and hasten an inability to pay plan-level benefits. However, plans still have the flexibility to offer active participants more attractive benefit accruals when the plan is able to afford them.

These conditions on benefit increases are in addition to the limitations under section 305(f)(1)(B) of ERISA (and corresponding section 432(f)(1)(B) of the Code) applicable to plans in critical status.

*(b) Allocation of plan assets*

Section 4262.16(c) imposes a condition on a plan that receives SFA relating to the allocation of plan assets. This condition requires that, during the SFA coverage period, plan assets, including SFA, must be invested in permissible investments as described in § 4262.14 sufficient to pay for at least 1 year (or until the date the plan is projected to become insolvent, if earlier) of projected benefit payments and administrative expenses.

By imposing investment constraints on SFA assets in section 4262(l) of ERISA and providing PBGC the authority to impose additional constraints on asset allocation in section

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4262(m), the statute contemplates a desire to prevent excessive risk-taking by plans that receive SFA. PBGC views the gradual increase in the proportion of assets allocated to fixed income as a plan approaches insolvency as a sensible and prudent approach to investing over a gradually shortening time horizon. However, PBGC is interested in whether this condition is seen as preventing plans from achieving reasonable investment objectives. PBGC encourages interested parties to respond, and provide supporting data, to the following questions:

- Will the requirement to maintain 1 year (or until the date the plan is projected to become insolvent, if earlier) of benefit payments and administrative expenses in investment grade fixed income assets result in an allocation that is significantly different from the allocation that the plan's investment policy (after receiving SFA) would otherwise attain?

- What are the advantages and disadvantages of PBGC not imposing any conditions under section 4262(m) of ERISA on asset allocation compared to the proposed condition requiring 1 year (or until the date the plan is projected to become insolvent, if earlier) of benefit payments and administrative expenses in investment grade fixed income?

- Could an alternative condition, or modification of the condition under § 4262.16(c), better achieve the objective of preventing excessive risk-taking by plans while allowing plans to meet their investment objectives?

*(c) Contribution decreases, allocating contributions and other practices*

Section 4262.16(d) of the regulation imposes reasonable conditions on a plan that receives SFA relating to contribution decreases to ensure that SFA is used for the exclusive purpose of paying benefits and reasonable administrative expenses and is not effectively transferred to contributing employers through decreased contribution obligations. Similarly, § 4262.16(e) imposes reasonable conditions relating to allocation of income or expenses with another employee benefit plan and other practices.

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For the condition on contribution decreases, § 4262.16(d) provides that during the SFA coverage period, the contributions required for each CBU must not be less than, and the definition of the CBUs must not be different from, those set forth in collective bargaining agreements or plan documents in effect on March 11, 2021 (including agreed to contribution rate increases through the expiration date of the collective bargaining agreements).

The regulation provides an exception to this condition where the plan sponsor determines that the risk of loss to plan participants and beneficiaries is lessened by the reduction. Where the reduction affects annual contributions over \$10 million and over 10 percent of all employer contributions, PBGC must also determine that the change lessens the risk of loss to participants and beneficiaries. Information required to be submitted to PBGC for a request for approval of a proposed change is described in § 4262.16(d)(2). The exception is intended, for example, to allow a contributing employer to reduce contributions below collectively bargained rates so that the employer may continue in business and not be forced to withdraw in conjunction with a bankruptcy. This condition generally is intended to prevent reductions in contribution rates that may accelerate plan insolvencies, while providing limited flexibility for employers with extenuating financial circumstances.

With respect to the allocation of contributions and other practices during the SFA coverage period, § 4262.16(e) prohibits a decrease in the proportion of income (contributions, investment returns, etc.) or an increase in the proportion of expenses allocated to a plan that receives SFA. This prohibition applies to written or oral agreements or practices (other than a written agreement in existence on March 11, 2021, to the extent not subsequently amended or modified) under which income or expenses are divided or to be divided between a plan that receives SFA and one or more other employee benefit plans.

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Among the practices covered by this prohibition is any allocation or reallocation of contribution rates from the plan receiving SFA to a newly formed pension plan. Similarly, plan expenses can be paid by a plan only if they are properly allocable to that plan. Accordingly, another prohibited practice is a change in the allocation of expenses with other benefit plans that serves to increase the proportion of expenses to be paid by the plan receiving SFA.

However, the prohibition under § 4262.16(e) does not apply to a good faith allocation of contributions pursuant to a reciprocity agreement. (If the principal purpose of entering into, amending, or modifying a reciprocity agreement after March 11, 2021, is to circumvent § 4262.16(e), any allocation made pursuant to such reciprocity agreement will not be considered as made in good faith.) The prohibition also does not apply to a good faith allocation of contributions where the contributions to a plan that receives SFA required for each base unit are not reduced (except if the reduction is approved by PBGC). It also does not apply to a good faith allocation of the costs of securing shared space, goods, or services, where such allocation does not constitute a prohibited transaction under ERISA or is otherwise exempt from the prohibited transaction provisions pursuant to section 408(b)(2), 408(c)(2), or 408(a) of ERISA, or of the actual cost of services provided to the plan by an unrelated third party. As with the other conditions under § 4262.16, the condition under § 4262.16(e) is intended to ensure that plans receiving SFA do not engage in transactions that may accelerate plan insolvency.

*(d) Transfers or mergers*

Section 4262.16(f) provides that during the SFA coverage period, a plan must not engage in a transfer of assets or liabilities (including a spinoff) or merger except with PBGC's approval. Notwithstanding anything to the contrary in PBGC's regulation on mergers and transfers between multiemployer plans (29 CFR part 4231), the plans involved in the transaction must request approval from PBGC. A request for approval must contain information that would be



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required to be submitted under § 4231.10 and the additional actuarial and financial information described in § 4262.16(f)(2). PBGC will approve a proposed transfer or merger if: (1) the transaction complies with section 4231(a)-(d) of ERISA, (2) the transfer or merger, or the larger transaction of which the transfer or merger is a part, does not unreasonably increase PBGC's risk of loss respecting any plan involved in the transaction, and (3) the transfer or merger is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans involved in the transaction. An example of a larger transaction is where the trustees of a plan receiving SFA arrange a transfer of assets and liabilities from the plan and amend the plan to substantially or completely end benefit accruals in connection with the plan's active participants beginning to accrue benefits under another existing or newly formed plan.

*(e) Withdrawal liability*

Under sections 4201 through 4225 of ERISA, when a contributing employer withdraws from an underfunded multiemployer plan, the plan sponsor assesses withdrawal liability against the employer. Withdrawal liability represents a withdrawing employer's proportionate share of the plan's unfunded benefit obligations and is an important source of income for the plan. To assess withdrawal liability, the plan sponsor must determine the withdrawing employer's (1) allocable share of the plan's unfunded vested benefits (the value of nonforfeitable benefits that exceeds the value of plan assets) as of the end of the plan year before the employer's withdrawal as provided under section 4211, and (2) annual withdrawal liability payment as provided under section 4219. Under section 4219(c)(1), an employer's withdrawal liability may be reduced if the period required to amortize the liability exceeds 20 years.

To preserve SFA for the payment of benefits and expenses and avoid an indirect transfer of SFA to a withdrawing employer by reducing the employer's withdrawal liability, in § 4262.16 PBGC uses its authority under section 4262(m) of ERISA to place reasonable conditions relating

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to withdrawal liability on a plan that receives SFA. PBGC determined that a reasonable condition on a plan that receives SFA is to require specified interest assumptions to be used for purposes of determining withdrawal liability.<sup>18</sup>

Under § 4262.16(g), for withdrawals that occur after the plan year in which the plan receives SFA, the interest assumptions used in determining unfunded vested benefits for purposes of determining withdrawal liability must be mass withdrawal interest assumptions under § 4281.13(a) of PBGC's regulation on Duties of Plan Sponsor Following Mass Withdrawal (29 CFR part 4281). PBGC's interest assumptions used for mass withdrawal liability approximate the market price insurance companies charge to assume a pension-benefit-like liability. Using mass withdrawal interest assumptions for purposes of calculating withdrawal liability is reasonable because withdrawal liability is the final settlement of the withdrawing employer's obligation to pay for unfunded vested benefits. Doing so is particularly important for plans that have developed an adverse demographic structure, with a small contribution base relative to their unfunded vested benefits, which is the condition of many of the plans that are or will become eligible for SFA.

The prescribed interest assumptions must be used until the later of 10 years after the end of the plan year in which the plan receives payment of SFA or the last day of the plan year in which the plan no longer holds SFA or any earnings thereon in a segregated account. The minimum 10-year period for using these required assumptions is similar to the time period for the special withdrawal liability rules for benefit suspensions under MPRA.

PBGC determined that these are reasonable conditions because SFA does not result from employer contributions, and, without such conditions, the receipt of SFA could substantially

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<sup>18</sup> PBGC intends to propose a separate rule of general applicability under section 4213(a) of ERISA to prescribe actuarial assumptions which may be used by a plan actuary in determining an employer's withdrawal liability.

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reduce withdrawal liability owed by a withdrawing employer. That could cause more withdrawals in the near future than if the plan did not receive SFA, which would reduce plan income and be an additional burden for these plans. Congress specified in section 4262 of ERISA that SFA and earnings thereon may be used by a plan to make benefit payments and pay plan expenses. Payment of SFA was not intended to reduce withdrawal liability or to make it easier for employers to withdraw.

In addition, under § 4262.16(h) any settlement of withdrawal liability during the SFA coverage period must be made only with PBGC approval if the present value of the liability settled is greater than \$50 million (calculated as described under § 4262.16(h)(1)). Approval ensures that any negotiated settlements of material size are in the best interests of the participants in the plan, and do not create an unreasonable risk of loss to PBGC. The information required to be submitted for a request for approval of a proposed withdrawal liability settlement is under § 4262.16(h)(3).

*(f) Reporting and audit*

In order to monitor compliance with the conditions imposed on plans that receive SFA, PBGC requires under § 4262.16(i) that plan sponsors file with PBGC each plan year, beginning with the plan year after the payment of SFA and through the last day of the last plan year ending in 2051, a statement of compliance with the terms and conditions of SFA. The statement must be filed with PBGC no later than 90 days after the end of the plan year and in accordance with the statement of compliance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

PBGC may conduct periodic audits of plans that have received SFA to review compliance with the terms and conditions of the SFA program.

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### *Reinstatement of benefits previously suspended*

Section 4262(k) of ERISA imposes two conditions on a plan that receives SFA and previously suspended benefits in accordance with sections 305(e)(9) or 4245(a) of ERISA. A plan must reinstate any benefits that were suspended and must provide payments to certain participants or beneficiaries to make up past amounts of benefits previously suspended.

As provided under section 4262(k) of ERISA,<sup>19</sup> § 4262.15 requires plans to reinstate these previously suspended benefits as of the month in which SFA is paid, and to provide make-up payments with respect to the previously suspended benefits, in accordance with guidance issued by the Treasury Department and the IRS. This guidance has been issued as Notice 2021-38. Section 4262(k) and § 4262.15 give the plan sponsor flexibility to design payment of make-up amounts as a single lump sum within 3 months of the payment date of SFA, or in equal monthly installments over a period of 5 years, commencing within 3 months of the payment date, with no installment payment adjusted for interest.

The plan sponsor of a plan with benefits that were suspended under section 305(e)(9) or 4245(a) of ERISA is required in § 4262.15(c) to furnish a notice of reinstatement to participants and beneficiaries whose benefits were previously suspended and then reinstated in accordance with section 4262(k) of ERISA. The requirements for the notice, including content requirements, are in notice of reinstatement instructions, in an addendum to the SFA application instructions, available on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

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<sup>19</sup> Section 4262(k) of ERISA contains rules that are parallel to section 432(k) of the Code. Under section 9704(d)(3) of ARP, the Secretary of the Treasury has interpretive jurisdiction over the rules for determining the benefit reinstatement and make-up payments that must be made by a multiemployer plan receiving SFA, for purposes of ERISA as well as the Code. Under section 4262(k), the Secretary of Labor, in coordination with Secretary of the Treasury, must ensure benefits are reinstated and previously suspended benefits paid.

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PBGC is providing for this notice of reinstatement so that participants and beneficiaries are adequately informed about the amount (and calculation) of reinstatement and make-up payments, taking into account any restoration of benefits under 26 CFR 1.432(e)(9)-1(e)(3), and know when to expect the reinstatement and make-up payments. The notice also informs participants and beneficiaries how to contact the Department of Labor if they need assistance in understanding their rights under the reinstatement process. The Department has advised that if participants and beneficiaries better understand the benefits they will be receiving as a result of the plan receiving SFA, it will help the Department meet its obligations under section 4262(k) of ERISA to ensure that suspended benefits are reinstated and make-up payments made.

Section 4262(k) of ERISA states that “the Secretary, in coordination with the Secretary of the Treasury, shall ensure that an eligible multiemployer plan that receives special financial assistance” reinstates suspended benefits and provides make-up payments required by the statute. The Department of Labor notes that it will need access to, and if requested, copies of records to ensure that plans receiving SFA reinstate the suspended benefits of participants and beneficiaries as required by section 4262(k). Plan fiduciaries have an obligation under title I of ERISA to maintain complete and accurate records, including information the Department may need to ensure the timely reinstatement of suspended benefits and payment of make-up payments under section 4262(k) of ERISA. The Department has advised that a plan’s failure to maintain adequate and complete records could result in violations of sections 107, 209, and 404 of ERISA. The Department is considering issuing guidance to address the records and information that plans receiving SFA will need to maintain and retain to comply with title I of ERISA.

#### *Other provisions*

Section 4262 of ERISA contains other provisions that apply to SFA and plans receiving SFA. These provisions are enumerated under § 4262.17 of the regulation:

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- SFA must not be capped by the guarantee under section 4022A of ERISA.
- A plan receiving SFA is required to continue to pay premiums due under section 4007 of ERISA for participants and beneficiaries in the plan.
- A plan that receives SFA is deemed to be in critical status within the meaning of section 305(b)(2) of ERISA until the last plan year ending in 2051.
- A plan that receives SFA and subsequently becomes insolvent under section 4245 of ERISA will be subject to the rules and guarantee for insolvent plans in effect when the plan becomes insolvent.
- A plan that receives SFA is not eligible to apply for a suspension of benefits under section 305(e)(9) of ERISA.

Section 4262.17 also provides that a plan that receives SFA and meets the eligibility requirements for partition of the plan under section 4233(b) of ERISA may apply for partition under section 4233. One of those requirements, in section 4233(b)(2), provides that a multiemployer plan is eligible for partition if “the corporation determines, after consultation with the Participant and Plan Sponsor Advocate..., that the plan sponsor has taken (or is taking concurrently with an application for partition) all reasonable measures to avoid insolvency, including the maximum benefit suspensions under section 305(e)(9), if applicable[.]” Section 4262(m)(6) provides that a plan that receives SFA is not eligible to apply for a subsequent suspension of benefits under MPRA. Therefore, for a plan that has received SFA, a suspension of benefits under section 305(e)(9) is not “applicable” within the meaning of section 4233(b)(2) and is not a reasonable measure available to the plan.

Finally, § 4262.17 includes a severability provision that provides that if any of the provisions of this interim final rule are found to be invalid or stayed pending further agency action, the remaining portions of the rule would remain operative.

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## **Compliance with Rulemaking Guidelines**

### *Administrative Procedure Act*

The Administrative Procedure Act at 5 U.S.C. 553(b) provides that notice and comment requirements do not apply when an agency, for good cause, finds that they are impracticable, unnecessary, or contrary to the public interest. An exception is also provided at 5 U.S.C. 553(d)(3) to the requirement of a 30-day delay before the effective date of a rule “for good cause found and published with the rule.” Section 9704 of the American Rescue Plan (ARP) Act of 2021 set up a “Special Financial Assistance Program for Financially Troubled Multiemployer Plans.” PBGC is issuing this rule without advance notice and public comment as an interim final rule to allow for immediate implementation of this program.

Under new section 4262(c) of ERISA, PBGC is mandated to issue regulations or guidance setting forth the requirements for eligible plans to apply for special financial assistance (SFA) within a short 120 days of the date of enactment of ARP (March 11, 2021). Moreover, PBGC must review applications within only 120 days of filing and plans must apply by the statutory cutoff date of December 31, 2025 (December 31, 2026, for revised applications). The compressed timeline for issuing rules, applying for assistance, and processing applications expresses a clear urgency to get appropriate assistance to eligible plans as quickly as possible.

Underscoring that urgency, Congress authorized PBGC to prioritize the filing of applications for eligible plans with the greatest need, but only during the first 2 years after March 11, 2021. Recognizing that need, PBGC in this interim final rule is prioritizing applications of plans, including soon-to-be insolvent plans and already insolvent plans that previously suspended benefits of participants and beneficiaries—benefits that must be reinstated and restored through make-up payments as a requirement of receiving SFA. Any delay of the effective date of the rule would be contrary to the financial interests of the participants and beneficiaries in these

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plans. If financial assistance is delayed and plans become insolvent, benefits for participants and beneficiaries will be reduced. For plans already insolvent with participant benefits that were already reduced, any delay will result in participants and beneficiaries having to wait longer to have their benefits reinstated and to receive their make-up payments.

Furthermore, the interim final rule imposes reasonable conditions on eligible plans that receive SFA, as permitted under section 4262(m)(1) of ERISA. PBGC finds good cause for making the conditions provided in the rule effective simultaneously with the application requirements. Plan sponsors need to know, before applying for SFA, what conditions will be imposed on the plan. The conditions may affect a plan sponsor's decision to apply for SFA or its determination of the amount of SFA. For example, the condition on withdrawal liability may affect the assumptions used to determine the amount of SFA in the plan's application. The conditions in the interim final rule are integral to the application requirements and decisions being made by plan sponsors, and, therefore, should be effective without delay.

Accordingly, because of the urgent need to get financial assistance to eligible plans as quickly as possible, PBGC has determined that prior notice and comment through the issuance of a notice of proposed rulemaking is impracticable and that the public interest is best served by issuing this interim final rule. Further, prior notice and comment is impracticable within the challenging statutory deadline under which PBGC must issue regulations to set forth requirements for special financial assistance applications, and within the limited statutory timeframe (already begun) in which PBGC has to prioritize the filing of applications of plans with the most urgent need for assistance. However, PBGC is requesting comments at the time this interim final rule is issued and may include changes in a final rule in response to those comments. For the same reasons discussed earlier, pursuant to 5 U.S.C. 553(d)(3), PBGC is



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making this rule effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

*Congressional Review Act*

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act or CRA) (5 U.S.C. 801 et seq.), the Office of Management and Budget (OMB) has designated this interim final rule as a “major rule,” as defined by 5 U.S.C. 804(2)(a), which is a rule likely to result in an annual effect on the economy of \$100 million or more. Section 808(2) of the CRA provides that, notwithstanding the effective date of a major rule defined under section 801, any rule which an agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal agency promulgating the rule determines. This good cause justification supports waiver of the 60-day delayed effective date for major rules under the CRA.

As discussed earlier, because of the urgent need for the SFA program, PBGC has determined that this interim final rule must take effect on the date of publication. This immediate effective date is necessary based on the mandate of section 4262(c) of ERISA to issue regulations or guidance setting forth the requirements for SFA applications within 120 days of the date of enactment of ARP. This short statutory deadline is to allow eligible plans, particularly plans that are close to insolvency or already insolvent, to begin applying for much needed financial assistance. Under the circumstances, PBGC has determined that prior notice and comment through the issuance of a notice of proposed rulemaking is impracticable and that the public interest is best served by making this interim final rule effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. PBGC does not want to unduly delay providing financial assistance to plans.

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## **Regulatory Impact Analysis**

### **(1) Relevant Executive Orders for Regulatory Impact Analysis**

Under Executive Order (E.O.) 12866, OMB reviews any regulation determined to be a “significant regulatory action.” Section 3(f) of E.O. 12866 defines a “significant regulatory action” as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

OMB has determined that this interim final rule is economically significant under section 3(f)(1) and has therefore reviewed this rule under E.O. 12866.

E.O. 13563 supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in E.O. 12866, emphasizing the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. It directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects, distributive impacts, and equity).

PBGC has provided an assessment of the potential benefits, costs, and transfers associated with this interim final rule.

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## **(2) Introduction and Need for Regulation**

As discussed earlier in the preamble, section 9704 of the American Rescue Plan (ARP) Act of 2021, “Special Financial Assistance Program for Financially Troubled Multiemployer Plans,” establishes a new section 4262 of ERISA. To implement section 4262, this interim final rule adds to PBGC’s regulations a new part 4262 (Special Financial Assistance by PBGC). It is through this program that PBGC will provide special financial assistance (SFA) to eligible multiemployer pension plans from a fund established by ARP<sup>20</sup> for SFA purposes and credited with transfers from the general fund of the Treasury Department.

Before the enactment of ARP on March 11, 2021, the Congressional Budget Office (CBO) projected the SFA program under section 4262 of ERISA to pay approximately \$86 billion in total assistance to on average (across model simulations) 185 plans.<sup>21</sup> PBGC has estimated the transfer amounts of the SFA program using ME-PIMS, PBGC’s stochastic modeling tool, and projects the aggregate SFA to be approximately \$94 billion in assistance payments to more than 200 plans and \$150 million to PBGC to administer the SFA program. PBGC further estimates that plans that received financial assistance from PBGC under section 4261 of ERISA in the form of loans will repay PBGC in aggregate approximately \$200 million.

SFA is expected to assist plans covering more than 3 million participants, including by providing funds for make-up payments to restore previously suspended benefits that total approximately \$150 million for currently insolvent plans and approximately \$550 million for plans that have adopted approved benefit suspensions under MPRA. Based on the average of 500 stochastic model simulations, ME-PIMS projects that over 100 plans that would have

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<sup>20</sup> Specifically, section 9704 of ARP establishes an eighth fund under section 4005 of ERISA.

<sup>21</sup> Congressional Budget Office Cost Estimate, February 17, 2021, <https://www.cbo.gov/system/files/2021-02/hwaysandmeansreconciliation.pdf>

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otherwise become insolvent during the next 15 years will instead forestall insolvency as a direct result of receiving SFA.

Section 4262(m) of ERISA provides PBGC with specific regulatory authority (in consultation with the Secretary of the Treasury) to impose reasonable conditions on eligible multiemployer plans that receive SFA (see *Conditions for special financial assistance* earlier in the preamble). Absent the imposition of any conditions, there would be a potential for employers and plan sponsors to take actions that could impair the financial health of their plans and thereby jeopardize the retirement security of plan participants and PBGC's multiemployer insurance program. Examples include actions that will increase plan obligations, such as amendments to increase benefit levels, or actions that could reduce future plan income, such as reductions to contribution rates or employer withdrawals. Each of these actions has the potential to accelerate plan insolvencies, which would bring about participant benefit cuts and increased future claims to PBGC's multiemployer insurance program that may impair PBGC's ability to pay financial assistance under section 4261.

### **(3) Regulatory Action**

PBGC strives to implement the SFA program established under this interim final rule in a manner that is consistent with the following key objectives: (1) to transfer to a plan the amount required under section 4262 of ERISA as soon as practicable; (2) to prioritize the applications of plans in imminent need of financial support and where participants' suspended benefits are to be restored; (3) to establish an efficient system for processing applications; and (4) to ensure prudent stewardship of taxpayer-funded appropriations for SFA, including the prevention of waste, fraud, and abuse in the SFA program.

Section 4262(m) of ERISA gives PBGC authority, in consultation with the Secretary of the Treasury, to impose reasonable conditions on an eligible multiemployer plan that receives

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SFA relating to increases in future accrual rates and any retroactive benefit improvements, allocation of plan assets, reductions in employer contribution rates, the allocation of contributions and other practices, and withdrawal liability. In determining what conditions to impose, in consultation with the Treasury Department, PBGC evaluated the regulatory alternatives under section 4262(m) to set conditions based on the following objectives: (1) meeting the goals of ARP in providing for the SFA program; (2) stewardship of taxpayer-funded appropriations for SFA; (3) maintaining the security of the accrued pension benefits (current and future accruals) of participants in plans that receive SFA; and (4) preservation of the solvency of the PBGC multiemployer insurance program.

The regulatory action and related economic considerations for each condition are described as follows.

*Conditions related to future benefit accruals*

The interim final rule provides that, during the SFA coverage period (beginning on the plan's SFA measurement date through the last day of the last plan year ending in 2051), plans that receive SFA can only accept a collective bargaining agreement (CBA) that increases future benefit accruals unless the plan actuary certifies that employer contribution increases projected to be sufficient to pay for the benefit increase have been adopted or agreed to, and provided that such increased contributions were not included in the determination of SFA.

Plans in critical status are already subject to constraints on increasing future benefit accrual levels. Under section 305(f)(1) of ERISA, they must be able to fund any benefit improvements using contributions that are not already contemplated within their rehabilitation plans.

The interim final rule similarly would prohibit plans from implementing significant benefit increases that likely could accelerate insolvencies after receiving taxpayer-funded

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assistance. However, it is evident that attracting and retaining active members to these financially troubled plans is critical to ensuring that the plans retain contribution income levels sufficient to sustain plan assets. Accordingly, the interim final rule allows plans to provide benefit increases when these increases can be paid for by additional employer contributions. The condition also does not apply to the required reinstatement of benefits suspended under section 305(e)(9) or 4245(a) of ERISA or to any restoration of benefits under 26 CFR 1.432(e)(9)-1(e)(3).

#### Conditions related to retroactive benefit improvements

The interim final rule provides that, during the SFA coverage period, plans that receive SFA are strictly prohibited from adopting an amendment to provide any retroactive benefit improvements. Unlike increases to the level of future accruals, which incentivize active members to participate in the plan and can thereby improve the expected contribution income, increases to retroactive benefit levels harm the funded position of the plan without improving expected future plan income.

#### Conditions related to allocation of plan assets

The interim final rule provides that, during the SFA coverage period, plans must hold a sufficient portion of total plan assets, which includes all segregated accounts (including SFA), in permissible investments (described in § 4262.14) to meet expected plan benefit payments and administrative expenses for at least 1 year (or until the date the plan is projected to become insolvent, if earlier). This requirement is in addition to the restrictions on investments under § 4262.14. For plans with a large proportion of plan assets as SFA, this additional condition is not likely to result in any additional restrictions on asset allocation until the plan's SFA account is depleted.

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The interim final rule provides plans that receive SFA with the opportunity to invest in a portfolio that can benefit from risk and illiquidity premiums over the long-term investment horizon. This flexibility to invest in other assets is likely to extend the solvency of these plans, and the limit on that flexibility will only constrain plans that would otherwise accept an inappropriate level of risk after receiving taxpayer assistance.

#### Conditions related to reductions in employer contribution rates

The interim final rule provides that, during the SFA coverage period, the contributions required for each CBU must not be less than, and the definition of the CBUs used must not be different from, those set forth in the CBA or plan documents (including agreed to contribution increases to the end of the collective bargaining agreements) in effect on March 11, 2021. However, an exception is provided where a plan sponsor determines that the risk of loss to plan participants and beneficiaries is lessened by the reduction. Where the reduction affects annual contributions over \$10 million and over 10 percent of all employer contributions, the plan sponsor must request approval from PBGC, which must also determine that the change lessens the risk of loss to participants and beneficiaries. Plans in critical status are already subject to constraints on reducing future contribution rates and must abide by the terms of their rehabilitation plans. The interim final rule is intended to broadly prevent reductions in contribution rates that may accelerate the future insolvencies of plans, while still providing very limited flexibility for employers with extenuating financial circumstances.

#### Conditions related to the allocation of contributions and other practices

Under the interim final rule, during the SFA coverage period, a decrease in the proportion of income (contributions, investment returns, etc.) or an increase in the proportion of expenses allocated to a plan that receives SFA is prohibited. This prohibition applies to written or oral agreements or practices (other than a written agreement in existence on March 11, 2021, to the

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extent not subsequently amended or modified) under which income or expenses are divided or to be divided between a plan that receives SFA and one or more other employee benefit plans.

However, the prohibition does not apply to a good faith allocation of contributions pursuant to a reciprocity agreement. (If the principal purpose of entering into, amending, or modifying a reciprocity agreement after March 11, 2021, is to circumvent this condition, any allocation made pursuant to such reciprocity agreement will not be considered as made in good faith.) The prohibition also does not apply to a good faith allocation of contributions where the contributions to a plan that receives SFA required for each base unit are not reduced (except if the reduction is approved by PBGC). It also does not apply to a good faith allocation of the costs of securing shared space, goods, or services, where such allocation does not constitute a prohibited transaction under ERISA or is otherwise exempt from the prohibited transaction provisions pursuant to section 408(b)(2), 408(c)(2), or 408(a) of ERISA, or of the actual cost of services provided to the plan by an unrelated third party.

This condition is to ensure that plans do not inappropriately reallocate contributions away from the plan to other benefit programs or inappropriately reallocate expenses from other benefit programs to the plan.

In addition, during the SFA coverage period, a plan receiving SFA must not engage in a transfer of assets or liabilities (including a spinoff) or merger except with PBGC's approval. PBGC will approve a proposed transfer or merger if: (1) the transaction complies with section 4231(a)-(d), (2) the transfer or merger, or the larger transaction of which the transfer or merger is a part, does not unreasonably increase PBGC's risk of loss respecting any plan involved in the transaction and (3) the transfer or merger is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans involved in the transaction.



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This condition is to ensure that plans that receive taxpayer-funded assistance do not subsequently engage in transactions that may allocate contributions away from the plan in a manner that is projected to accelerate insolvency.

*Conditions related to withdrawal liability*

Under the interim final rule, a plan must use the interest assumptions under § 4281.13(a) to determine withdrawal liability beginning for withdrawals after the plan year in which the plan receives SFA. This condition continues to apply until the later of 10 years after the end of the plan year in which the plan receives payment of SFA or the last day of the plan year in which the segregated SFA asset account is fully depleted.

The interim final rule also provides that, during the SFA coverage period, plans that receive SFA cannot enter into a negotiated settlement agreement with a withdrawing employer that is in excess of \$50 million without first obtaining approval from PBGC. It is important to ensure that any negotiated settlements of material size are not projected to be harmful to participants in the plan or harmful to PBGC's multiemployer insurance program.

The interim final rule would prevent the payment of SFA from resulting in decreases in withdrawal liability assessments and thereby reduce the incentive for employers to withdraw from these plans. The purpose of SFA is to help plans pay for benefits and plan expenses and not to indirectly subsidize employers to exit these plans.

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#### (4) Estimated Impact of Regulatory Action

The following table summarizes the estimated transfers and costs expected as a result of implementation of the SFA program.

	PV Amount (3% Rate)	PV Amount (7% Rate)	2021	2022	2023	2024	2025	2026	2027-2051 (Total) <sup>22</sup>
<b>Annual Transfer Amounts</b>									
SFA payments to plans ( <i>total nominal value of \$94.2 billion</i> )	\$86.35 billion	\$77.33 billion	\$1.46 billion	\$43.68 billion	\$23.03 billion	\$13.32 billion	\$8.89 billion	\$3.33 billion	\$0.47 billion
Financial assistance loan repayment to PBGC ( <i>total nominal value of \$200 million</i> )	(\$194.17) million	(\$186.92) million	(\$200.00) million	\$0	\$0	\$0	\$0	\$0	\$0
<b>Total transfer amounts (<i>total nominal value of \$94.0 billion</i>)</b>	<b>\$86.16 billion</b>	<b>\$77.14 billion</b>	<b>\$1.26 billion</b>	<b>\$43.68 billion</b>	<b>\$23.03 billion</b>	<b>\$13.32 billion</b>	<b>\$8.89 billion</b>	<b>\$3.33 billion</b>	<b>\$0.47 billion</b>
<b>Annual Cost Amounts</b>									
PBGC administrative expenses ( <i>total nominal value of \$150 million</i> )	\$129.57 million	\$108.41 million	\$20.50 million	\$17.50 million	\$15.75 million	\$15.00 million	\$14.75 million	\$14.00 million	\$52.50 million
SFA applications	\$8,091,600	\$7,232,400	\$1,199,300	\$2,121,800	\$2,183,300	\$1,998,800	\$1,260,800	\$78,800	\$0
Benefit reinstatement participant notices	\$69,900	\$66,000	\$34,400	\$38,700	\$0	\$0	\$0	\$0	\$0
Annual compliance filings	\$12,495,000	\$7,231,200	\$0	\$99,500	\$275,400	\$456,500	\$622,200	\$726,800	\$18,168,750
Condition exemption filings	\$354,000	\$209,900	\$0	\$0	\$19,600	\$19,600	\$19,600	\$19,600	\$489,250
<b>Total cost amounts</b>	<b>\$150.58 million</b>	<b>\$123.15 million</b>	<b>\$21.73 million</b>	<b>\$19.76 million</b>	<b>\$18.23 million</b>	<b>\$17.47 million</b>	<b>\$16.65 million</b>	<b>\$14.83 million</b>	<b>\$71.16 million</b>

<sup>22</sup> SFA payments to plans are expected to be \$474 million in 2027 and \$0 thereafter. PBGC administrative expenses are expected to be \$14 million per year from 2027 through 2029 and \$10.5 million in 2030. Additional PBGC expenses are expected to be incurred from 2031 through 2051, but would not be funded through general appropriations. Annual compliance filings are expected to be \$726,800 per year from 2027 through 2051. Condition exemption filings are expected to be \$19,600 per year from 2027 through 2051.

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### Filing and issuance requirements

As discussed in this interim final rule, to request SFA for a multiemployer plan, a plan sponsor must, under section 4262 of ERISA and part 4262, file an application with PBGC. The applications for SFA must include information about the plan, plan documentation, and actuarial information. The information is necessary for PBGC to verify a plan's eligibility for SFA, amount of requested SFA, and if applicable, inclusion in a priority group. In addition, under part 4262, a plan that has received SFA is required to file a compliance notice with PBGC once every year until 2051. As discussed further in the *Paperwork Reduction Act* section, the estimated average cost (dollar equivalent of the in-house hour burden + contractor costs) to prepare the one-time application to PBGC is \$30,750, and the estimated average cost to prepare the annual statement of compliance is \$2,550. PBGC estimates that over the next 3 years (2021-2023) it will receive annually an average of 60 applications for SFA at an aggregate average annual cost of \$1,845,000 and 49 annual statements of compliance at an aggregate average annual cost of \$124,950.

In addition, certain plan sponsors that receive SFA are subject to participant disclosure and reporting requirements. A plan sponsor of a plan with benefits that were suspended under sections 305(e)(9) or 4245(a) of ERISA must issue a notice of reinstatement to participants and beneficiaries whose benefits were previously suspended and then reinstated. PBGC estimates that over the next 3 years (2021-2023) an average of 11.33 plans annually (34 total plans) will issue the notice of reinstatement to an average of 3,050 participants and beneficiaries at an aggregate average annual cost of \$24,367.

A plan sponsor that receives SFA also is required to administer the plan in accordance with conditions prescribed by PBGC in § 4262.16. A plan sponsor may request approval from PBGC for an exception under certain circumstances for conditions relating to reductions in

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contributions, transfers or mergers, and settlement of withdrawal liability. PBGC expects these determination requests to be infrequent. PBGC estimates that it will receive an average of 2.2 requests per year beginning in 2023 at a cost of \$19,570 per year (averaged over 2021-2023 = \$6,523).

Over the next 3 years (2021-2023), the total average annual cost for the information collection is \$2,000,840 (\$1,845,000 + \$124,950 + \$24,367 + \$6,523).

#### Conditions for plans that receive SFA

The following table provides estimated financial impacts under a benchmark scenario analysis for each of the 6 areas for conditions listed under section 4262(m)(1) of ERISA. The estimated results were produced by ME-PIMS, PBGC's stochastic modeling tool used to project the future solvency and potential financial assistance under section 4261 for each plan in the U.S. multiemployer pension plan system.<sup>23</sup> The level of complexity and the lack of availability of complete plan-level data needed to program the specifications under the range of alternative regulatory actions under section 4262(m) are barriers to producing precise financial estimates for each potential action. Instead, PBGC conducted a single benchmark scenario for each regulatory condition that illustrates the order-of-magnitude financial impact.

The baseline assumptions represent PBGC's best-estimate assumptions for determining the aggregate amounts of SFA under section 4262 of ERISA and financial assistance under section 4261 based on employer and plan behavior that remains consistent before and following the distribution of SFA. The benchmark scenario assumptions represent a single scenario that was used to estimate each alternative regulatory action that was considered.

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<sup>23</sup> The following webpage on PBGC's website provides more detailed information about PBGC's Multiemployer Program Pension Insurance Modeling System (ME-PIMS): <https://www.pbgc.gov/about/projections-report/pension-insurance-modeling-system>

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<b>Regulatory Condition</b>	<b>Baseline Assumption</b>	<b>Benchmark Scenario Assumption</b>	<b>Estimated Benchmark Impact*</b>	<b>Comments</b>
<b>Future Benefit Accruals</b>	No assumed accrual increases	An immediate 10% increase in future accruals followed by annual increases based on assumed wage index increases (no corresponding contribution rate increases)	\$5 billion to \$8 billion in section 4261 Financial Assistance ( <i>estimated through 2070</i> )	Plans are already constrained on increasing accrual levels based on rehabilitation plan requirements. The estimated impact is primarily due to accelerated plan insolvencies. Most increases to benefit accrual rates would not be covered under PBGC guaranteed benefit limits.
<b>Retroactive Benefit Accruals</b>	No assumed accrual increases	A one-time 10% increase in retroactive accrued benefits for all active participants increases (no corresponding contribution rate increases)	\$7 billion to \$10 billion in section 4261 Financial Assistance ( <i>estimated through 2070</i> )	Plans are already constrained on increasing benefit levels based on rehabilitation plan requirements. The estimated impact is primarily due to accelerated plan insolvencies. Most increases to accrued benefits would not be covered under PBGC guaranteed benefit limits.
<b>Allocation of Plan Assets</b>	Baseline stochastic returns under ME-PIMS model, without restrictions on asset allocation	All plans that receive SFA utilize an LDI strategy to match assets to benefit payments	\$5 billion to \$15 billion in section 4261 Financial Assistance ( <i>estimated through 2070</i> )	Plans required to invest all available plan assets in high quality fixed income securities are expected to attain lower investment returns, which accelerates plan insolvencies.
<b>Reduction in Contribution Rates</b>	Level contribution rates (no assumed decreases)	A one-time 20% decrease in the per-capita contribution rate increases (no corresponding reduction in future accruals)	\$20 billion to \$40 billion in section 4261 Financial Assistance ( <i>estimated through 2070</i> )	The estimated impact includes the acceleration of projected plan insolvencies resulting from reduced contribution levels, as well as lower contribution and withdrawal liability income following insolvency used to partially offset benefit payments.

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<b>Regulatory Condition</b>	<b>Baseline Assumption</b>	<b>Benchmark Scenario Assumption</b>	<b>Estimated Benchmark Impact*</b>	<b>Comments</b>
<b>Allocation of Contributions and Other Practices</b>	No assumed reallocation of contributions to other plans. CBUs projected with annual 1.3% decline	A one-time immediate decline to CBUs of 20%, followed by annual 1.3% declines (includes corresponding reduction in future accruals)	\$10 billion to \$25 billion in section 4261 Financial Assistance ( <i>estimated through 2070</i> )	Reallocation of contributions to other plans could take the form of plan transactions such as spinoffs or liability transfers, which are not explicitly modeled.
<b>Withdrawal Liability</b>	No assumed future employer withdrawals explicitly factored into modeling	Employers representing 35% of active members withdraw immediately after receiving SFA	\$15 billion to \$20 billion in section 4262 SFA	Plans are assumed to project the increased level of employer withdrawals as part of assumption setting for SFA determination purposes.

\* The estimated impacts that increase the \$94 billion of SFA amounts under section 4262 of ERISA occur from 2021 through 2027. The estimated impacts for all “Section 4261 Financial Assistance” represent the aggregate nominal amount of this assistance provided through 2070. “Section 4261 Financial Assistance” is the multiemployer insurance program financial assistance PBGC provides in periodic payments upon plan insolvency under section 4261 of ERISA, which is limited to PBGC guarantee amounts.

## **(5) Regulatory Alternatives Considered**

### Conditions related to future benefit accruals

PBGC first considered the implications of foregoing any regulatory authority provided under section 4262(m) of ERISA to impose reasonable conditions related to future benefit accruals. The primary factor in support of the option to not regulate is that additional constraints on benefit improvements may be unnecessary and may be considered onerous. Plans that receive SFA will be deemed to be in critical status through the plan year ending in 2051 and will be subject to the terms of their applicable rehabilitation plan. A rehabilitation plan generally restricts a plan from increasing benefits unless the plan is able to provide additional contribution income that is not already contemplated with the rehabilitation plan.

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Although this may be applicable for many plans, there may be additional benefits to imposing a secondary restriction on benefit increases as permitted under section 4262(m) of ERISA. A secondary condition may eliminate some existing flexibility but could prevent plans from adopting benefit improvements that prove ultimately to be unaffordable for the plan. If a plan that receives SFA were able to subsequently implement significant increases to the future accrual rate, it would likely accelerate the plan's insolvency date which would jeopardize participant benefits and impose financial strain on PBGC's multiemployer insurance program.

PBGC estimates that a one-time 10 percent increase in the future accrual rate accompanied by annual increases based on the national average wage index, for all active participants, could increase the aggregate nominal amount of future financial assistance under section 4261 of ERISA by approximately \$5 billion to \$8 billion. Absent regulatory action, it is unknown the extent to which employers can and would increase future accrual rates. PBGC would generally expect the financial impact to be less than this estimated range due to the existing rehabilitation plan constraints, but the true impact is unknown and subject to a great deal of uncertainty.

Another regulatory alternative was considered under which PBGC would limit levels of future increases based on wage indexation. This alternative would allow plans with limited flexibility to adopt increases but would prevent significant improvements that may prove unaffordable. PBGC considered that certain eligible plans may have recently imposed substantial reductions in the accrual level to forestall insolvency, such that the current level of accruals are not sufficient to retain active members. Although this alternative would have helped to limit the financial impact below the \$5 billion to \$8 billion range modeled in the sensitivity scenario, it was determined to be too restrictive.

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Yet another regulatory alternative was considered under which PBGC would strictly prohibit any increases in future benefit accruals until 2051. Under this approach, the value of plan accrual rates could erode significantly due to inflation. As the benefits lose value, it would likely become increasingly difficult for plans to retain their active members. Plans could suffer irreparable harm to the contribution base as a result, which would likely guarantee that plans would go insolvent. As a result, PBGC determined that this regulatory alternative would harm plan participants and the multiemployer insurance program.

#### Conditions related to retroactive benefit improvements

PBGC first considered the implication of foregoing any regulatory authority provided under section 4262(m) of ERISA to impose reasonable conditions related to retroactive benefit improvements. The primary support for not regulating is that additional constraints on benefit improvements may be unnecessary and may be considered onerous. Plans that receive SFA are deemed to be in critical status through the plan year ending in 2051 and will be subject to the terms of their applicable rehabilitation plan. A rehabilitation plan generally restricts a plan from increasing benefits unless the plan is able to provide additional contribution income that is not already contemplated with the rehabilitation plan.

However, as with the advantages of a condition on future benefit accruals discussed earlier, a secondary condition on retroactive benefit increases could prevent plans from adopting benefit improvements that ultimately prove to be unaffordable for the plan. PBGC estimates that a one-time 10 percent increase in retroactive accrued benefits for all active participants could increase the aggregate nominal amount of future financial assistance under section 4261 by approximately \$7 billion to \$10 billion. Absent regulatory action, the extent to which employers can and would increase retroactive benefits is unknown. PBGC would generally expect the



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financial impact to be less than this estimated range due to existing rehabilitation plan constraints, but the true impact is unknown and subject to a great deal of uncertainty.

Another regulatory alternative considered would allow for retroactive benefit improvements, subject to rehabilitation plan constraints, but only up to a specified limit. The alternative would provide plans with limited flexibility to increase benefits, but also prevent excessive improvements that would impair a plan's financial position. Yet another alternative would be to limit the amount of retroactive benefit increases to a restoration of accrued benefits to levels available before reductions applied pursuant to rehabilitation plan requirements in recent years. The benefit of this approach would be to improve potentially the retirement security of active plan participants, who have experienced the disproportionate impact of benefit reductions. However, increases to future accrual rates more effectively bolster the future engagement of active participants than retroactive benefit improvements. By prohibiting all retroactive benefit improvements, plans will remain on a more favorable financial path and any surplus income would be better utilized by improving future accruals to help attract and retain active members.

#### Conditions related to allocation of plan assets

PBGC first considered the implications of foregoing any regulatory authority provided under section 4262(m) of ERISA to impose reasonable conditions related to asset allocation. There were two primary factors in support of this approach. First, section 4262(l) already restricts the investment of SFA to investment-grade bonds and other investments as permitted by PBGC. This condition alone serves as a significant constraint on a plan's ability to pursue higher returns in risk-seeking assets, particularly for plans that had previously been insolvent or close to insolvency and received an amount of SFA that is large in proportion to the amount of existing plan assets. Second, imposing conditions that severely restrict the level of return-seeking assets

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may impair a plan's ability to achieve greater investment returns and forestall insolvency.

Although a higher proportion of return-seeking assets exposes plans to greater losses in the event of adverse market conditions, the long-term investment horizon affords plans the risk capacity to recoup these losses.

The primary risk to foregoing any regulatory action to impose conditions on asset allocation is the potential for a scenario under which plans that receive SFA invest heavily in highly risky, speculative assets and the market experiences a severe, prolonged downturn. Plans may choose to pay all benefits and administrative expenses from the SFA account before exhausting any existing plan assets. Following the depletion of SFA, plans would then experience no constraints on their asset allocation and could seek to invest in highly risky assets. Although the long-term investment horizon does afford plans with time to recoup losses, a severe and prolonged downturn could cause irreparable harm to the plan's financial position. PBGC is unable to measure a precise financial impact for foregoing any regulatory condition with respect to asset allocation. However, under most economic scenarios, PBGC expects a more favorable outcome both to plan solvencies and future PBGC program outlays by imposing less restrictive conditions related to asset allocation, such as the condition in the interim final rule.

A separate regulatory alternative was considered under which PBGC would require all plan assets to be invested in accordance with the restrictions for SFA under section 4262(l) of ERISA (i.e., investment-grade bonds or other investments as permitted by PBGC). This condition would effectively require plans to pursue a liability-driven investment strategy under which fixed income assets are matched to expected benefit payments to immunize the portfolio from risk. This condition would be highly restrictive on a plan's ability to select plan assets. It would mitigate year-to-year volatility in plan funded status and would severely restrict a plan's attainable investment returns and thus potentially accelerate the insolvency of the plan. Because

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available fixed income yields are expected to be lower than the interest rate limit defined under section 4262(e)(3), plans would generally become insolvent before the 2051 plan year. Based on modeling using ME-PIMS, PBGC estimates that this regulatory alternative could increase future financial assistance payments under section 4261 by \$5 billion to \$15 billion over the next four decades. Due to the increased financial impact of this option and the adverse impact to plan participants resulting from accelerated plan insolvencies, PBGC did not choose to pursue this alternative.

#### Conditions related to reductions in employer contribution rates

PBGC first considered the implications of foregoing any regulatory authority provided under section 4262(m) of ERISA to impose reasonable conditions related to reductions in employer contribution rates. The primary benefit of this option is that it could provide plans with flexibility to reduce contribution rates if it is expected to attract or retain employers in the plan. Any mechanism that allows plans to bolster their active membership could help to improve their funded status through increased contribution levels. A plan's authority to allow for reduced contribution rates during the collective bargaining process is already constrained by the terms of their rehabilitation plan, which is mandated for plans certified in critical status. However, if plans are able to allow for reductions in employer contribution rates, the contribution income into the plan may decrease if the reduced rates do not effectively increase plan participation. Plans may view SFA as a windfall that will allow for contribution rate relief that benefits employers at the expense of the plan's financial health. Although the financial impact is likely to be significantly less than the \$23 billion to \$36 billion range estimated under the ME-PIMS benchmark scenario for a 20 percent universal reduction in assumed contribution rates (primarily due to the aforementioned rehabilitation plan constraints), PBGC expects there to be a material (albeit unknown) impact.

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A separate regulatory alternative was considered under which PBGC would strictly prohibit plans from accepting any collective bargaining agreement under which there was a reduction in the contribution rate. This alternative is similar to the provision in the interim final rule but does not allow for any exceptions to the prohibition. PBGC recognizes that employers that are on the brink of insolvency may be able to avoid bankruptcy by reducing the contribution rate to the pension plan. Although this exception reduces short term contribution income to the plan, it may increase long-term contribution levels by enabling the contributing employer to stay solvent and have the resources available to contribute to the plan.

*Conditions related to the allocation of contributions and other practices*

PBGC considered the implications of foregoing any regulatory action under section 4262(m) of ERISA to impose reasonable conditions related to the allocation of contributions and other practices. The primary benefit of this option is that the bargaining parties would retain full discretion over how to allocate contributions to benefit programs that align with their desired preferences. Regulatory action by PBGC could be considered onerous.

However, PBGC recognizes that absent any regulations the bargaining parties could take actions that allocate contributions away from the pension plan and allow it to fail and become covered under PBGC's insurance program. PBGC used ME-PIMS to estimate the financial impact of a 25 percent one-time reduction in CBUs for all plans that receive SFA. This would reflect the efforts that may be made by some plans to shift hours away from the plan to increase contribution allocations to other programs. The 25 percent reduction percentage was set as an average to reflect that some bargaining parties may not allocate any contributions away from the plan whereas other bargaining parties may allocate a substantive portion of contributions away from the plan. Under this benchmark scenario, financial assistance under section 4261 of ERISA would increase by approximately \$10 billion to \$25 billion over the following decades.

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However, the extent to which bargaining parties would engage in these types of strategies is highly uncertain.

#### Conditions related to withdrawal liability

PBGC first considered the implications of foregoing any regulatory authority provided under section 4262(m) of ERISA to impose reasonable conditions related to withdrawal liability. Absent any conditions, plans may anticipate a potential surge of employer withdrawal upon receipt of the SFA. Plans would account for this anticipated outcome by requesting a greater amount of SFA in their applications to PBGC (plans would do so by setting the actuarial assumptions accordingly). The extent to which the aggregate amount of SFA provided under section 4262 is impacted is unknown, but PBGC estimates that it could range from 10% to 30%. The greater the amount of SFA that is provided to plans, the greater the reduction in the employers' unfunded vested benefit obligations and therefore the greater the incentive for employers to withdraw from the plans. This outcome could materially increase the amounts of SFA provided under section 4262.

A separate regulatory alternative was considered under which PBGC would mandate that, during the SFA coverage period, SFA assets are disregarded in the determination of unfunded vested benefits for the assessment of withdrawal liability. This alternative would prevent a decrease in the value of employer unfunded benefit obligations due to receipt of SFA and thereby block an incentive from arising that may cause employers to withdraw from these plans. This would mitigate against a change in plan assumptions for increased employer withdrawals within the application for SFA that would in turn increase the aggregate transfers of SFA across all plans under section 4262. This alternative was determined to be more administratively complex and therefore less desirable.

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### *Regulatory Flexibility Act*

Because PBGC is not publishing a general notice of proposed rulemaking under 5 U.S.C. 553(b), the regulatory flexibility analysis requirements of the Regulatory Flexibility Act do not apply. See 5 U.S.C. 601(2).

### *Paperwork Reduction Act*

This interim final rule contains a collection of information that PBGC has submitted to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act. OMB's decision regarding this information collection request will be available at <http://www.Reginfo.gov>. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC estimates that over the next 3 years an annual average of 60 plan sponsors will file applications for SFA (39 in 2021, 69 in 2022, and 71 in 2023). PBGC needs the information in the application to review a plan's eligibility for SFA, priority group status, and amount of requested SFA, and to make payment of SFA. PBGC estimates that each application requires \$30,000 in contractor cost and 10 hours of in-house fund time. Thus, the application imposes estimated annual burdens of \$1,800,000 (60 x \$30,000) and 600 (60 x 10) hours.

PBGC estimates that over the next 3 years an annual average of 49 plan sponsors will file Annual Statements of Compliance (0 in 2021, 39 in 2022, and 108 in 2023). PBGC needs the information in this statement to ensure that a plan is compliant with the conditions imposed upon its receiving SFA. PBGC estimates that each Annual Statement of Compliance requires \$2,400 in contractor cost and 2 hours of in-house fund time. The Annual Statement of Compliance imposes estimated annual burdens of \$117,600 (49 x \$2,400) and 98 (49 x 2) hours.

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Over the next 3 years an average of 11.33 plans per year (16 plans in 2021, 18 plans in 2022, and 0 in 2023) will be required to send notices to participants with suspended benefits. This notice is intended to ensure participants understand the calculation and dates of their reinstated benefits and, if applicable, make-up payments. PBGC estimates that the burden for each plan to prepare required notices is \$2,000 in contractor cost and 2 hours of in-house fund time. Thus, these notices impose estimated annual burdens of \$22,667 (11.33 x \$2,000) and 22.66 (11.33 x 2) hours. PBGC is considering issuing a model notice and hereby solicits public comment on whether a model notice would be helpful.

Also, PBGC estimates that beginning in 2023, PBGC will receive an average of 2.2 requests per year (averaged over 2021-2023 = 0.73 per year) for determinations concerning a transfer of assets or liabilities (including a spinoff) or merger (1 per year); a withdrawal liability settlement greater than \$50 million (1 per year); or a contribution decrease (.2 (1 every 5 years)) (0 plans in 2021, 0 plans in 2022, and 2.2 plans in 2023). PBGC needs the information requested to make a determination on the proposed transaction, withdrawal liability settlement, or contribution decrease. PBGC estimates an average annual hour burden (employer and fund office hours) and average annual cost burden (contractor costs) per request of:

- 1.6 hours (8 hours x .2) and \$5,000 (\$25,000 x .2) for a proposed contribution change;
- 4 hours and \$12,000 for a proposed transfer or merger; and
- 2 hours and \$2,000 for a proposed settlement of withdrawal liability.

PBGC estimates that, beginning in 2023, for 2.2 determination requests, the aggregated average annual hour burden will be 7.6 hours (1.6+4+2 employer and fund office hours) and the aggregated average annual cost burden will be \$19,000 (\$5,000 + \$12,000 + \$2,000 in contractor

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costs). For 2021-2023, PBGC estimates an average annual hour burden of 2.53 hours (7.6/3) and average annual cost burden of \$6,333 (\$19,000/3).

The estimated aggregate average annual hour burden for 2021-2023 for the information collection in part 4262 is 723.20 hours (600 + 98 + 22.67 + 2.53), which means a cost equivalent of \$54,240 assuming a blended hourly rate of \$75 for employer and fund office administrative, clerical, and supervisory time. The estimated aggregate average annual cost burden for 2021-2023 for the information collection in part 4262 is \$1,946,600 (\$1,800,000 + \$117,600 + \$22,667 + \$6,333), which means approximately 4,867 contract hours assuming an average hourly rate of \$400 for work done by outside actuaries and attorneys. The actual hour burden and cost burden per plan will vary depending on plan size and other factors.

The estimated average annual burden figures for 2021-2023 are shown in the following chart.

<b>Average # of Respondents p/year</b>	<b>Hour Burden</b>	<b>Hour Burden – Equivalent Cost</b>	<b>Cost Burden</b>
Applications for SFA: 60	600 hours	\$45,000	\$1,800,000
Annual compliance statements: 49	98 hours	\$ 7,350	\$ 117,600
Notice of reinstatement: 11.33	22.67 hours	\$ 1,700	\$ 22,667
Requests for determination: 1 (0.73)	2.53 hours	\$ 190	\$ 6,333
<b>Totals:</b>	<b>723.20 hours</b>	<b>\$54,240</b>	<b>\$1,946,600</b>

Plan sponsors of multiemployer plans applying for SFA are required to file an application with PBGC with the required information under part 4262. For payment of SFA, they are required to include with an application for SFA, common form SF 3881, ACH Vendor/Miscellaneous Payment Enrollment, OMB control no. 1530-0069.

Written comments and recommendations for the information requirements under this interim final rule should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation



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through [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function. To be assured of consideration, comments must be submitted by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

PBGC is soliciting public comments to—

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

### **List of Subjects**

#### *29 CFR Part 4000*

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

#### *29 CFR Part 4262*

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

For the reasons given above, PBGC is amending 29 CFR chapter XL as follows:

### **PART 4000 — FILING, ISSUANCE, COMPUTATION OF TIME, AND RECORD RETENTION**

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1. The authority citation for part 4000 continues to read as follows:

**Authority:** 29 U.S.C. 1083(k), 1302(b)(3).

**§ 4000.3 [Amended]**

2. In § 4000.3, amend paragraph (b)(4) by adding “4262,” after “4245,”.

3. Add part 4262 to read as follows:

**PART 4262—SPECIAL FINANCIAL ASSISTANCE BY PBGC**

Sec.

4262.1 Purpose.

4262.2 Definitions.

4262.3 Eligibility for special financial assistance.

4262.4 Amount of special financial assistance.

4262.5 PBGC review of plan assumptions.

4262.6 Information to be filed.

4262.7 Plan information.

4262.8 Actuarial and financial information.

4262.9 Application for a plan with a partition.

4262.10 Processing applications.

4262.11 PBGC action on applications.

4262.12 Payment of special financial assistance.

4262.13 Restrictions on special financial assistance.

4262.14 Permissible investments of special financial assistance.

4262.15 Reinstatement of benefits previously suspended.

4262.16 Conditions for special financial assistance.

4262.17 Other provisions.

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**Authority:** 29 U.S.C. 1302(b)(3), 1432.

### **§ 4262.1 Purpose.**

The purpose of this part is to prescribe rules governing applications for special financial assistance under section 4262 of ERISA and related requirements.

### **§ 4262.2 Definitions.**

The following terms are defined in § 4001.2 of this chapter: Code, ERISA, fair market value, IRS, multiemployer plan, PBGC, plan, and plan sponsor. In addition, for purposes of this part:

*Form 5500* means the Annual Return/Report of Employee Benefit Plan required to be filed for employee benefit plans under sections 104 and 4065 of ERISA and sections 6057(b) and 6058(a) of the Code.

*Merger* means merger as defined in § 4231.2 of this chapter.

*SFA coverage period* means the period beginning on the plan's SFA measurement date and ending on the last day of the last plan year ending in 2051.

*SFA measurement date* means the last day of the calendar quarter immediately preceding the date the plan's application was filed.

*Special financial assistance* or *SFA* means special financial assistance from PBGC under section 4262 of ERISA.

*Transfer and transfer of assets or liabilities* means transfer and transfer of assets or liabilities as defined in § 4231.2 of this chapter.

### **§ 4262.3 Eligibility for special financial assistance.**

(a) *In general.* Subject to all the provisions of this section, a multiemployer plan is eligible for special financial assistance in any of the following cases:

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(1) *Critical and declining status plans.* The plan is in critical and declining status within the meaning of section 305(b)(6) of ERISA for the specified year; or

(2) *Plans with a suspension of benefits.* A suspension of benefits has been approved with respect to the plan under section 305(e)(9) of ERISA as of March 11, 2021; or

(3) *Critical status plans.* The plan:

(i) Is certified to be in critical status within the meaning of section 305(b)(2) of ERISA for a specified year; and

(ii) The percentage calculated under paragraph (c)(2) of this section was less than 40 percent; and

(iii) The ratio of the total number of active participants at the end of the plan year required to be entered on the Form 5500 that was required to be filed for a specified year to the sum of inactive participants (retired or separated participants receiving benefits, other retired or separated participants entitled to future benefits, and deceased participants whose beneficiaries are receiving or are entitled to receive benefits) required to be entered on such Form 5500 was less than 2 to 3.

(4) *Insolvent plans.* The plan became insolvent for purposes of section 418E of the Code after December 16, 2014, has remained insolvent, and has not terminated under section 4041A of ERISA as of March 11, 2021.

(b) *Specified year.* For purposes of this section, the term *specified year* means a plan year specified by the plan sponsor beginning in 2020, 2021, or 2022. The specified years for paragraphs (a)(3)(i), (ii), and (iii) of this section need not be the same.

(c) *Additional rules for critical status plans--(1) Elected status.* Election of critical status under section 305(b)(4) of ERISA does not satisfy the requirement for the certification of critical status by the plan's actuary under paragraph (a)(3)(i) of this section.

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(2) *Percentage.* The percentage calculated as —

(i) The current value of net assets as of the first day of the plan year that was required to be entered on the Form 5500 Schedule MB that was required to be filed for a specified year; plus

(ii) The current value of withdrawal liability due to be received by the plan on an accrual basis, reflecting a reasonable allowance for amounts considered uncollectible, as of the first day of the plan year for the specified year in paragraph (c)(2)(i) of this section (if not already included in the current value of net assets in paragraph (c)(2)(i) of this section); divided by

(iii) The current liability attributable to all benefits as of the first day of the plan year required to be entered on the Form 5500 Schedule MB specified in paragraph (c)(2)(i) of this section.

(d) *Actuarial assumptions.* Determinations of eligibility under paragraph (a)(1) or (3) of this section must be made in accordance with the provisions in this paragraph (d).

(1) *Certifications completed before January 1, 2021.* For certifications of plan status completed before January 1, 2021, PBGC will accept assumptions incorporated in the determination of whether a plan is in critical status or critical and declining status as described in section 305(b) of ERISA unless such assumptions are clearly erroneous.

(2) *Certifications completed after December 31, 2020.* For certifications of plan status completed after December 31, 2020, the determination of whether a plan is in critical status or critical and declining status for purposes of eligibility for special financial assistance must be made using the assumptions that the plan used in its most recently completed certification of plan status before January 1, 2021, unless such assumptions (excluding the plan's interest rate assumption) are unreasonable.

(3) *Changes in assumptions.* If a plan determines that use of the assumptions under paragraph (d)(2) of this section is unreasonable, the plan's application may include a proposed

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change in the assumptions (excluding the plan's interest rate assumption), as described in § 4262.5.

#### **§ 4262.4 Amount of special financial assistance.**

(a) *In general.* Subject to paragraph (f) of this section, the amount of special financial assistance for a plan is the amount (if any), subject to adjustment for the date of payment as described in § 4262.12, by which —

(1) The value, as of the plan's SFA measurement date, of all SFA-eligible plan obligations; exceeds

(2) The value, as of the plan's SFA measurement date, of all SFA-eligible plan resources.

(b) *SFA-eligible plan obligations.* The value of SFA-eligible plan obligations as of the plan's SFA measurement date, is the sum of —

(1) The present value of benefits expected to be paid by the plan during the SFA coverage period including any reinstatement of benefits attributable to the elimination of reductions in a participant's or beneficiary's benefit due to a suspension of benefits under sections 305(e)(9) or 4245(a) of ERISA as required under § 4262.15 and any restoration of benefits under 26 CFR 1.432(e)(9)-1(e)(3), and assuming such reinstatements are paid beginning as of the SFA measurement date; and

(2) The present value of administrative expenses expected to be paid by the plan using plan assets during the SFA coverage period, excluding the amount owed to PBGC under section 4261 of ERISA (which is added to the amount of special financial assistance in § 4262.12 determined as of the date special financial assistance is paid).

(c) *SFA-eligible plan resources.* The value of SFA-eligible plan resources as of the plan's SFA measurement date, is the sum of —

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(1) The fair market value of plan assets on the SFA measurement date; and

(2) The present value of future contributions, withdrawal liability payments, and other payments expected to be made to the plan (excluding the amount of financial assistance under section 4261 of ERISA and special financial assistance to be received by the plan) during the SFA coverage period.

(d) *Deterministic basis.* The projections in paragraphs (b)(1) and (2) and (c)(2) of this section must be performed on a deterministic basis using a single set of assumptions as described in paragraph (e) of this section. The projections must be based on participant census data as of the first day of the plan year in which the plan's initial application for special financial assistance is filed, or, if the date on which the plan's initial application for special financial assistance is filed is less than 270 days after the beginning of the current plan year and the actuarial valuation for the current plan year is not complete, the projections may instead be based on the participant census data as of the first day of the plan year preceding the year in which the plan's initial application for special financial assistance is filed.

(e) *Actuarial assumptions.* The amount of special financial assistance must be determined in accordance with generally accepted actuarial principles and practices and the provisions in this paragraph (e).

(1) The assumed interest rate is the lesser of the rate in paragraph (e)(1)(i) or (ii) of this section.

(i) The interest rate in this paragraph (e)(1)(i) is the interest rate used for funding standard account purposes as projected in the plan's most recently completed certification of plan status before January 1, 2021.

(ii) The interest rate in this paragraph (e)(1)(ii) is the interest rate that is 200 basis points higher than the rate specified in section 303(h)(2)(C)(iii) of ERISA (disregarding modifications

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made under clause (iv) of such section) for the month in which the plan's application for special financial assistance is filed or one of the 3 preceding months, as selected by the plan.

(2) The assumptions other than the interest rate are those used for the plan's most recently completed certification of plan status before January 1, 2021, unless such assumptions are unreasonable.

(3) If a plan determines that use of the assumptions under paragraph (e)(2) of this section is unreasonable, the plan's application may include a proposed change in the assumptions (excluding the plan's interest rate assumption under paragraph (e)(1) of this section), as described in § 4262.5.

(f) *Certain events--(1) General rules.* (i) The special financial assistance of a plan that experiences one or more of the events described in paragraphs (f)(2), (3), and (4) of this section during the period beginning on July 9, 2021, and ending on the SFA measurement date is limited to the amount of special financial assistance that would have applied to the plan on the SFA measurement date if the events had not occurred, as determined in a reasonable manner.

(ii) The special financial assistance of a plan that experiences a merger event during the period described in paragraph (f)(1)(i) of this section is limited to the sum of the amounts of special financial assistance that would have applied to the plans involved in the merger on the SFA measurement date if the merger had not occurred, as determined in a reasonable manner. If any of the plans involved in the merger also experiences one or more of the events described in paragraph (f)(2), (3), or (4) of this section during the period described in paragraph (f)(1)(i) of this section, the amount of special financial assistance for that plan on the SFA measurement date, determined as if the merger had not occurred, must be determined in accordance with paragraph (f)(1)(i) of this section.



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(2) *Transfers.* The event described in this paragraph (f)(2) is a transfer of assets or liabilities (including a spinoff).

(3) *Benefit increases.* The event described in this paragraph (f)(3) is the execution of a plan amendment increasing accrued or projected benefits under a plan, other than a restoration of suspended benefits that satisfies the requirements of 26 CFR 1.432(e)(9)-1(e)(3).

(4) *Contribution reductions.* The event described in this paragraph (f)(4) is the execution of a document reducing a plan's contribution rate (including any reduction in benefit accruals adopted simultaneously or arising from a pre-existing linkage between benefit accruals and contributions), but only if the plan does not demonstrate (in accordance with the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov)) that the risk of loss to participants and beneficiaries is reduced (disregarding special financial assistance) by execution of the document. The document referred to in this paragraph (f)(4) is either —

(i) A collective bargaining agreement not rejected by the plan; or

(ii) A document reallocating contribution rates.

(5) *Effect of pre-event ineligibility.* In determining the amount of special financial assistance that would have applied to a plan if an event described in this paragraph (f) had not occurred, if the plan would have been ineligible for special financial assistance under § 4262.3 in the absence of the event, then the amount of special financial assistance is deemed to be \$0 (zero).

(6) *Examples.* The following examples illustrate the provisions of paragraph (f) of this section.

(i) *Example 1.* Plan A applies for special financial assistance. If the limitation in paragraph (f)(1)(i) of this section did not apply, Plan A would be entitled to special financial assistance in the amount of \$20X. Before the SFA measurement date, but on or after July 9,

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2021, Plan A transferred a portion of its assets and liabilities to Plan B. If the transfer had not occurred, Plan A would, as of the SFA measurement date, be entitled to special financial assistance in the amount of \$40X. Although an event described in paragraph (f)(2) of this section occurred with respect to Plan A, Plan A's special financial assistance is unaffected by the limitation in paragraph (f)(1)(i) of this section and is \$20X. Plan B also applies for special financial assistance. If the limitation in paragraph (f)(1)(i) of this section did not apply, Plan B would be entitled to special financial assistance in the amount of \$30X. If the transfer from Plan A had not occurred, Plan B would, as of the SFA measurement date, be ineligible for special financial assistance. As a result of the event described in paragraph (f)(2) of this section, the limitation in paragraph (f)(1)(i) of this section reduces Plan B's special financial assistance from \$30X to \$0.

(ii) *Example 2.* Plan C applies for special financial assistance. If the limitation in paragraph (f)(1)(ii) of this section did not apply, Plan C would be entitled to special financial assistance in the amount of \$40X. Before the SFA measurement date, but on or after July 9, 2021, Plans A and B were merged into existing Plan C. If the mergers had not occurred, Plan A would not be eligible for special financial assistance, and Plan B and Plan C would be entitled, respectively, to \$10X and \$5X of special financial assistance as of the SFA measurement date. As a result of the merger event described in paragraph (f)(1)(ii) of this section, the limitation in paragraph (f)(1)(ii) of this section reduces Plan C's special financial assistance from \$40X to \$15X.

(iii) *Example 3.* Plan A applies for special financial assistance. If the limitation in paragraph (f)(1)(i) of this section did not apply, Plan A would be entitled to special financial assistance in the amount of \$10X. Before the SFA measurement date, but on or after July 9, 2021, projected benefits under Plan A were increased. If the increase had not occurred, Plan A

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would, as of the SFA measurement date, be ineligible for special financial assistance. As a result of the event described in paragraph (f)(3) of this section, applying the limitation in paragraph (f)(1)(i) of this section and in accordance with paragraph (f)(5) of this section, Plan A is treated as being entitled to special financial assistance of \$0.

(iv) *Example 4.* Plan A applies for special financial assistance. If the limitation in paragraph (f)(1)(i) of this section did not apply, Plan A would be entitled to special financial assistance in the amount of \$10X. Before the SFA measurement date, but on or after July 9, 2021, Plan A's contribution rate was reduced. Plan A's benefit formula states that the monthly benefit accrual for a participant for a plan year is 2.0% of the contributions paid on behalf of the participant for that plan year. Since there is a pre-existing linkage between benefit accruals and contributions, the event described in paragraph (f)(4) of this section includes both the reduction in benefit accruals and the reduction in the contribution rate. If the contribution rate reduction and the reduction in benefit accruals had not occurred, Plan A would, as of the SFA measurement date, be entitled to special financial assistance of \$8X. Plan A does not provide a demonstration that the risk of loss to participants and beneficiaries is reduced (disregarding special financial assistance) due to the reduction in contribution rate and the reduction in benefit accruals. As a result of the events described in paragraph (f)(4) of this section, the limitation in paragraph (f)(1)(i) of this section reduces Plan A's special financial assistance from \$10X to \$8X.

#### **§ 4262.5 PBGC review of plan assumptions.**

(a) *In general.* (1) As set forth in § 4262.3(d)(1), PBGC will accept the assumptions used by a plan to determine eligibility for special financial assistance under § 4262.3(d)(1) unless PBGC determines that such assumptions are clearly erroneous.

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(2) PBGC will accept the assumptions used by a plan to determine eligibility for special financial assistance under § 4262.3(d)(2) or to determine the amount of special financial assistance under § 4262.4(e)(2) unless PBGC determines that an assumption is unreasonable.

(3) PBGC will accept a plan's changes in assumptions under paragraph (c) of this section except to the extent that PBGC determines that an assumption is individually unreasonable, or the proposed changed assumptions are unreasonable in the aggregate.

(b) *Reasonableness of assumptions.* (1) Each of the actuarial assumptions and methods used for the actuarial projections (excluding the interest rate assumption) must be reasonable in accordance with generally accepted actuarial principles and practices, taking into account the experience of the plan and reasonable expectations. The actuary's selection of assumptions about future covered employment and contribution levels (including contribution base units and contribution rates) may be based on information provided by the plan sponsor, which must act in good faith in providing the information.

(2) If a plan has a change in assumptions under paragraph (c) of this section, each of the actuarial assumptions and methods (other than the interest rate) must be reasonable and the combination of those actuarial assumptions and methods (excluding the interest rate) must also be reasonable.

(c) *Changes in assumptions.* If a plan determines that use of an assumption described in § 4262.3(d)(2) or § 4262.4(e)(2) is unreasonable, the plan's application may include a proposed change in the assumptions (excluding the plan's interest rate assumption).

(1) The application for special financial assistance must —

- (i) Describe why the original assumption is no longer reasonable;
- (ii) Propose to use a different assumption (the changed assumption); and
- (iii) Demonstrate that the changed assumption is reasonable.

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(2) PBGC will provide guidelines for changed assumptions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

#### **§ 4262.6 Information to be filed.**

(a) *In general.* An application for special financial assistance must include the information specified in this section and §§ 4262.7 (plan information) and 4262.8 (actuarial and financial information); a copy of the executed plan amendment required under paragraph (e)(1) of this section; a copy of the proposed plan amendment required under paragraph (e)(2) of this section; a completed checklist; and other information as described in the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov). If any of the information required for an application for special financial assistance under this part is not accurately completed or not filed with the application, the application will not be considered complete.

(b) *Required trustee signature.* An application for special financial assistance must —

(1) Be signed and dated by an authorized trustee, who is a current member of the board of trustees and who is authorized to sign on behalf of the board of trustees, or by another authorized representative of the plan sponsor; and

(2) Include the following statements signed by an authorized trustee who is a current member of the board of trustees: "Under penalties of perjury under the laws of the United States of America, I declare that I have examined this application, including accompanying documents, and, to the best of my knowledge and belief, the application contains all the relevant facts relating to the application, and such facts are true, correct, and complete."

(c) *Actuarial calculations.* All calculations that are required in an application for special financial assistance under this part must include a certification by the plan's enrolled actuary.

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(d) *Clarifying information.* PBGC may require a plan sponsor to file additional information to clarify or verify information provided in the plan’s application. The plan sponsor must promptly file any such information with PBGC upon request.

(e) *Duty to amend and supplement application.* The plan sponsor of a plan applying for special financial assistance must —

(1) Amend the plan to include the following special financial assistance provision effective through the end of the last plan year ending in 2051: “Beginning with the SFA measurement date selected by the plan in the plan’s application for special financial assistance, the plan shall be administered in accordance with the restrictions and conditions specified in section 4262 of ERISA and 29 CFR part 4262. This amendment is contingent upon approval by PBGC of the plan’s application for special financial assistance.”

(2) Amend the plan to reinstate benefits, as described in § 4262.15(a)(1), and make payments of previously suspended benefits, described in § 4262.15(a)(2), in accordance with guidance issued by the Secretary of the Treasury under section 432(k)(2) of the Code.

(3) During any time in which an application is pending approval by PBGC, the plan sponsor must promptly notify PBGC in writing as soon as the plan sponsor becomes aware that any material fact or representation contained in or relating to the application, or in any supporting documents, is no longer accurate, or that any material fact or representation was omitted from the application or supporting documents.

(f) *Disclosure of information.* Unless confidential under the Privacy Act, all information that is filed with PBGC for an application for special financial assistance under this part may be made publicly available, at PBGC’s sole discretion, on PBGC’s website at [www.pbgc.gov](http://www.pbgc.gov) or otherwise publicly disclosed. Except to the extent required by the Privacy Act, PBGC provides

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no assurance of confidentiality in any information or documentation included in an application for special financial assistance.

#### **§ 4262.7 Plan information.**

(a) *Basic information.* An application for special financial assistance must include all of the following information with respect to the plan and amount of special financial assistance requested:

(1) Name of the plan, Employer Identification Number (EIN), and three-digit Plan Number (PN).

(2) Name of the individual filing the application and role of the individual with respect to the plan.

(3) Name, address, email, and telephone number of the plan sponsor and the plan sponsor's authorized representatives, if any.

(4) The total amount of special financial assistance requested.

(b) *Eligibility.* An application must identify the eligibility requirements in § 4262.3 that the plan satisfies to be eligible for special financial assistance. An application for a plan that is eligible under section 4262(b)(1)(C) of ERISA must include a demonstration to support that the plan meets the eligibility requirements.

(c) *Priority group identification.* An application must identify any priority group under § 4262.10(d)(2) that the plan is in. An application must include a demonstration to support the plan's inclusion in a priority group, unless the plan is insolvent under section 4245(a) of ERISA, has implemented a suspension of benefits under section 305(e)(9) of ERISA as of March 11, 2021, is in critical and declining status (as defined in section 305(b)(6) of ERISA) and had 350,000 or more participants, or is listed on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) as a plan in priority group 6, as defined under § 4262.10(d)(2)(vi).

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(d) *Plans with a suspension of benefits.* If a plan previously suspended benefits under sections 305(e)(9) or 4245(a) of ERISA, its application must include a description of how the plan will reinstate the benefits that were previously suspended and a proposed schedule showing aggregate amount and timing of payments (in accordance with § 4262.15) to participants and beneficiaries under the plan. The proposed schedule should be prepared assuming the effective date for reinstatement is the SFA measurement date and that payments for previously suspended benefits described in § 4262.15(a)(2) are paid or commence on the SFA measurement date. If the plan restored benefits under 26 CFR 1.432(e)(9)-1(e)(3) before the SFA measurement date, the proposed schedule should reflect the amount and timing of payments of restored benefits and the effect of the restoration on the benefits remaining to be reinstated.

(e) *Plan documentation.* An application must include all of the following plan documentation:

(1) Most recent plan document or restatement of the plan document and all subsequent amendments adopted (if any), including a copy of the executed plan amendment required under § 4262.6(e)(1).

(2) A copy of the proposed plan amendment required under § 4262.6(e)(2) and certification by the plan sponsor that the plan amendment will be timely adopted.

(3) Most recent trust agreement or restatement of the trust agreement and all subsequent adopted amendments (if any).

(4) Most recent IRS determination letter.

(5) Actuarial valuation report completed for the 2018 plan year and each subsequent actuarial valuation report completed before the date the plan's application was filed.

(6) Most recent rehabilitation plan (or funding improvement plan, if applicable), including all subsequent amendments and updates, and the percentage of total contributions



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received under each schedule of the rehabilitation plan for the most recent plan year available. If the most recent rehabilitation plan does not include historical documentation of rehabilitation plan changes (if any) that occurred in calendar year 2020 and later, these details must be provided in a supplemental document.

(7) Most recent Form 5500 and all schedules and attachments (including the audited financial statement).

(8) Plan actuary's certification of plan status required under section 305(b)(3) of ERISA completed for the 2018 plan year and each subsequent annual certification completed before the date the plan's application was filed, with documentation supporting each certification, which must include the projections and information required in the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

(9) Most recent statement for each of the plan's cash and investment accounts.

(10) Most recent plan financial statement (audited, or unaudited if audited is not available).

(11) Bank account and other information necessary for electronic payment of funds.

(12) All written policies and procedures governing withdrawal liability determination, assessment, collection, settlement, and payment.

#### **§ 4262.8 Actuarial and financial information.**

(a) *Required information.* An application for special financial assistance must include all of the following actuarial and financial information:

(1) 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".

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(2) For a plan that has 10,000 or more participants as required to be entered on line 6f of the plan's most recently filed Form 5500, a listing of the 15 largest contributing employers and the contribution amounts for each for the most recently completed plan year.

(3) Historical plan financial information for each of the most recent 10 plan years immediately preceding the date the plan's application was filed that separately 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.

(4) Information used to determine the amount of the requested special financial assistance, based on a deterministic projection, including all of the following information —

(i) Interest rate required under § 4262.4(e)(1), including supporting details on how it was determined.

(ii) Fair market value of plan assets determined as of the SFA measurement date; a certification from the plan sponsor with respect to the accuracy of this amount, including information that substantiates the asset value and any projections to the SFA measurement date (including details and supporting rationale); and a reconciliation of the fair market value of plan assets from the date of the most recent plan financial statement to the SFA measurement date showing contributions, withdrawal liability payments, benefit payments, administrative expenses, and investment income.

(iii) Special financial assistance determined as a lump sum as of the SFA measurement date.

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(iv) For each plan year in the SFA coverage period: the projected amount of contributions, projected withdrawal liability payments, and other payments expected to be made to the plan.

(v) For each plan year in the SFA coverage period: benefit payments described in § 4262.4(b)(1) attributable to the reinstatement of benefits under § 4262.15 that were previously suspended through the SFA measurement date and any benefits restored under 26 CFR 1.432(e)(9)-1(e)(3).

(vi) For each plan year in the SFA coverage period: benefit payments described in § 4262.4(b)(1) (excluding the payments in paragraph (a)(4)(v) of this section), separately for current retirees and beneficiaries in pay status, terminated participants not yet in pay status, current active participants, and new entrants.

(vii) For each plan year in the SFA coverage period: administrative expenses expected to be paid using plan assets, excluding the amount owed PBGC under section 4261 of ERISA.

(viii) For each plan year in the SFA coverage period: the projected investment income based on the interest rate required under § 4262.4(e)(1) and the projected fair market value of plan assets at the end of each plan year.

(ix) The present value as of the SFA measurement date of each of the items provided under paragraph (a)(4)(iv) through (viii) of this section.

(5) Projected contributions and withdrawal liability payments used to calculate the requested special financial assistance amount in § 4262.4, including total contributions, contribution base units, average contribution rate(s), reciprocal contributions (if applicable), additional contributions from the rehabilitation plan, and any other contributions, and number of active participants at the beginning of each plan year. For withdrawal liability, separate projections for withdrawn employers and for future assumed withdrawals.

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(6) A description of the development of the assumed future contributions and future withdrawal liability payments in paragraph (a)(5) of this section.

(7) For a plan that has 350,000 or more participants reported on line 6f of its most recently filed Form 5500, the participant census data utilized by the plan actuary in developing the cash flow projections included in the application.

(b) *Information required for changed assumptions.* An application for a plan that proposes to change any assumption used in the plan's most recently completed certification of plan status before January 1, 2021, must include all of the following information:

(1) A table identifying which assumptions used in demonstrating the plan's eligibility for special financial assistance or in calculating the amount of special financial assistance differ from those assumptions used in the plan's most recently completed certification of plan status before January 1, 2021, and detailed narrative explanations (with supporting rationale and information) as to why any assumption used in the certification is no longer reasonable and why the changed assumption is reasonable.

(2) Deterministic cash flow projection ("Baseline") in accordance with the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) that shows the amount of special financial assistance that would be determined if all underlying assumptions used in the projection were the same as those used in the actuarial certification of plan status last completed before January 1, 2021 (excluding the plan's interest rate, which must be the same as the interest rate required under § 4262.4(e)(1)). For purposes of this paragraph (b)(2), certain changes in assumptions as described in the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) should be reflected in the Baseline projection.

(3) In accordance with the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov), a reconciliation of the change in the requested special financial assistance due to

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each changed assumption from the Baseline to the requested special financial assistance amount in paragraph (a)(4)(iii) of this section, showing, for each assumption change from the Baseline, a deterministic projection calculated in the same manner as the requested amount in § 4262.4.

(c) *Information required for certain events.* An application for a plan with respect to which an event described in § 4262.4(f) occurs on or after July 9, 2021, must include the applicable information related to the event specified in special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

### **§ 4262.9 Application for a plan with a partition.**

(a) *In general.* This section applies to plans partitioned under section 4233 of ERISA. A partitioned plan is in priority group 2 for purposes of § 4262.10(d).

(b) *Filing requirements.* A plan sponsor of a partitioned plan filing an application for special financial assistance must —

(1) File one application for the original plan and successor plan.

(2) Include in the application —

(i) A statement that the plan was partitioned under section 4233 of ERISA;

(ii) A copy of the plan document and other amendments required under paragraph (c)(2)

of this section; and

(iii) The information required in §§ 4262.6 through 4262.8.

(3) If a plan sponsor has already filed with PBGC any of the required information described in paragraph (b)(2)(iii) of this section, the plan sponsor is not required to file that information with its application for special financial assistance. For any such information not filed with the application, the plan sponsor must note on the checklist described under § 4262.6(a) when the information was filed.

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(c) *Rescission of partition order.* Effective when special financial assistance is paid under § 4262.12, and in a manner consistent with the application procedure determined under paragraph (b) of this section —

(1) PBGC will rescind the partition order; and

(2) The plan sponsor must amend the plan to remove any provisions or amendments that were required to be adopted under the partition order.

#### **§ 4262.10 Processing applications.**

(a) *In general.* Any application for special financial assistance for an eligible multiemployer plan must be filed by the plan sponsor in accordance with the provisions of this part and the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

(b) *Method of filing.* An application filed with PBGC under this part must be made electronically in accordance with the rules in subpart A of part 4000 of this chapter. The time period for filing an application under this part must be computed under the rules in subpart D of part 4000 of this chapter.

(c) *Where to file.* (1) An application filed with PBGC under this part must be filed as described in § 4000.4 of this chapter.

(2) Section 432(k)(1)(D) of the Code requires an application in a priority category under paragraph (d)(2) of this section to be submitted to the Secretary of the Treasury. If the requirement in the preceding sentence applies to an application, PBGC will transmit the application to the Department of the Treasury on behalf of the plan.

(d) *When to file.* Any initial application for special financial assistance must be filed by December 31, 2025, and any revised application must be filed by December 31, 2026. Any application other than a plan's initial application is a revised application regardless of whether it differs from the initial application.

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(1) *Processing system.* To accommodate expeditious processing of many special financial assistance applications in a limited time period:

(i) The number of applications accepted for filing will be limited in such manner that, in PBGC's estimation, each application can be processed within 120 days.

(ii) Plans specified in paragraph (d)(2) of this section will be given priority to file an application before plans not specified in paragraph (d)(2) of this section.

(iii) Notices on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) will apprise potential filers of the current priority group(s) for which applications are being accepted and whether PBGC is accepting applications for filing as well as other information about priority groups and filing.

(2) *Priority groups.* Until not later than March 11, 2023, the plan sponsor of an eligible multiemployer plan will be given priority to file an application if the plan is in one of the priority groups in paragraphs (d)(2)(i) through (vii) of this section, listed in order of higher priority group to lower priority group. When applications for plans in a priority group are accepted for filing, PBGC will continue to accept applications for plans in a higher priority group, subject to paragraph (d)(1) of this section.

(i) *Priority group 1.* A plan is in priority group 1 if the plan is insolvent or is projected to become insolvent under section 4245 of ERISA by March 11, 2022. A plan in priority group 1 may file an application beginning on July 9, 2021.

(ii) *Priority group 2.* A plan is in priority group 2 if the plan has implemented a suspension of benefits under section 305(e)(9) of ERISA as of March 11, 2021; or the plan is expected to be insolvent under section 4245 of ERISA within 1 year of the date the plan's application was filed. A plan in priority group 2 may file an application beginning on January 1, 2022, or such earlier date specified on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

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(iii) *Priority group 3.* A plan is in priority group 3 if the plan was in critical and declining status (as defined in section 305(b)(6) of ERISA) and had 350,000 or more participants. A plan in priority group 3 may file an application beginning on April 1, 2022, or such earlier date specified on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

(iv) *Priority group 4.* A plan is in priority group 4 if the plan is projected to become insolvent under section 4245 of ERISA by March 11, 2023. A plan in priority group 4 may file an application beginning on July 1, 2022, or such earlier date specified on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

(v) *Priority group 5.* A plan is in priority group 5 if the plan is projected to become insolvent under section 4245 of ERISA by March 11, 2026. The date a plan in priority group 5 may file an application will be specified on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) at least 21 days in advance of such date, and such date will be no later than February 11, 2023.

(vi) *Priority group 6.* A plan is in priority group 6 if the plan is projected by PBGC to have a present value of financial assistance payments under section 4261 of ERISA that exceeds \$1,000,000,000 if special financial assistance is not ordered. PBGC will list the plans in priority group 6 on its website at [www.pbgc.gov](http://www.pbgc.gov). The date a plan in priority group 6 may file an application will be specified on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) at least 21 days in advance of such date, and such date will be no later than February 11, 2023.

(vii) *Additional priority groups.* PBGC may add additional priority groups based on other circumstances similar to those described for the groups listed in paragraphs (d)(2)(i) through (vi) of this section. If added, additional priority groups and the date PBGC will begin accepting applications for such additional priority groups will be posted in guidance on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).



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(e) *Filing date.* An application will be considered filed on the date it is submitted to PBGC if it meets the applicable requirements in paragraph (d) of this section and can be accommodated in accordance with the processing system described in paragraph (d)(1) of this section or the emergency filing process described in paragraph (f) of this section. Otherwise, the application will not be considered filed and PBGC will notify the applicant that the application was not properly filed and that the application must be filed in accordance with the processing system and instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

(f) *Emergency filing.* Beginning when PBGC accepts applications in priority group 2 described in paragraph (d)(2)(ii) of this section, and notwithstanding the processing system described in paragraph (d)(1) of this section, an application may be accepted for filing if —

(1) It is an application for a plan that either —

(i) Is insolvent or expected to be insolvent under section 4245 of ERISA within 1 year of the date the plan's application was filed; or

(ii) Has suspended benefits under section 305(e)(9) of ERISA as of March 11, 2021; and

(2) The filer notifies PBGC before submitting the application that the application qualifies as an emergency filing under this paragraph (f) in accordance with instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

(g) *Informal consultation.* Nothing in this section prohibits a plan sponsor from contacting PBGC informally to discuss a potential application for special financial assistance.

#### **§ 4262.11 PBGC action on applications.**

(a) *In general.* Within 120 days after the date an initial or revised application for special financial assistance is properly and timely filed, PBGC will —

(1) Approve the application and notify the plan sponsor of the payment of special financial assistance in accordance with § 4262.12; or

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(2) Deny the application because —

(i) The application is incomplete, and notify the plan sponsor of the missing information; or

(ii) An assumption is unreasonable, a proposed change in assumption is individually unreasonable, or the proposed changed assumptions are unreasonable in the aggregate, and notify the plan sponsor of the reasons for the determination; or

(iii) The plan is not an eligible multiemployer plan, and notify the plan sponsor of the reasons the plan fails to be eligible for special financial assistance; or

(3) Fail to act on the application, in which case the application is deemed approved, and notify the plan sponsor of the payment of special financial assistance in accordance with § 4262.12.

(b) *Incomplete application.* PBGC will consider an application incomplete under paragraph (a)(2)(i) of this section unless the application accurately includes the information required to be filed under this part and the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov), including all additional information that PBGC requires under § 4262.6(d).

(c) *Application base data.* (1) A plan's base data are —

(i) The plan's SFA measurement date as required to be reported in the plan's initial application for special financial assistance;

(ii) The plan's participant census data used in the plan's initial application for special financial assistance; and

(iii) The plan's interest rate required under § 4262.4(e)(1).

(2) A plan's base data are fixed by the filing of the plan's initial application and must be reported on any revised application for the plan.

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(d) *Withdrawn applications.* (1) A plan's application for special financial assistance may be withdrawn at any time before or after PBGC denies the application but not after PBGC has approved the application.

(2) Any withdrawal of a plan's application must be by written notice to PBGC submitted by any person authorized to submit an application for the plan and in accordance with the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

(3) An application submitted for a plan after the withdrawal of an application is a revised application and must comply with the requirements in this part for an initial application except that it must use the base data required in paragraph (c) of this section for the initial application.

(e) *Denied applications.* If PBGC denies a plan's application, and the denied application is not withdrawn, any revised application must not differ from the denied application except to the extent necessary to address the reasons cited by PBGC for the denial.

(f) *Revised applications.* A plan's revised application is processed in the same way as an initial application.

(g) *Final agency action.* PBGC's decision on an application for special financial assistance under this section is a final agency action under § 4003.22(b) of this chapter for purposes of judicial review under the Administrative Procedure Act (5 U.S.C. 701 et seq.).

#### **§ 4262.12 Payment of special financial assistance.**

(a) *Amount of special financial assistance.* (1) The amount of special financial assistance to be paid to or for a plan by PBGC will be the total of —

(i) The amount required as demonstrated by the plan sponsor on the application for such special financial assistance, determined under § 4262.4 as of the SFA measurement date; plus

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(ii) Interest on the amount in paragraph (a)(1)(i) of this section from the SFA measurement date to the date PBGC sends payment (not the bank settlement date) at a rate equal to the interest rate required under § 4262.4(e)(1); plus

(iii) The amount owed to PBGC under section 4261 of ERISA determined as of the date PBGC sends payment of special financial assistance; minus

(iv) Financial assistance payments under section 4261 of ERISA received by the plan between the SFA measurement date and the date PBGC sends payment of special financial assistance, with interest on each such financial assistance payment from the date thereof to the date PBGC sends payment as described in paragraph (a)(1)(ii) of this section calculated at a rate equal to the interest rate required under § 4262.4(e)(1).

(2) The plan must include in its application payment instructions in accordance with the special financial instructions on PBGC's website at *www.pbgc.gov*. Payment will be considered made by PBGC when, in accordance with the payment instructions in the application, PBGC no longer has ownership of the amount being paid. Any adjustment for delay will be borne by PBGC only to the extent that it arises while PBGC has ownership of the funds.

(b) *Repayment of traditional financial assistance.* If a plan has an obligation to repay financial assistance under section 4261 of ERISA, PBGC will —

(1) Issue a written demand for repayment of financial assistance when the application is approved; and

(2) Deduct the amount of financial assistance, including interest, that the plan owes PBGC from the special financial assistance before payment to the plan.

(c) *Date of payment of special financial assistance.* Special financial assistance issued by PBGC will be paid as soon as practicable upon approval of the plan's special financial assistance application but not later than the earlier of —

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(1) Ninety days after a plan's special financial assistance application is approved by PBGC or deemed approved; or

(2) September 30, 2030.

(d) *Manner of payment.* The payment of special financial assistance to a plan will be made by PBGC in a lump sum or substantially so and is not a loan subject to repayment obligations. Notwithstanding the foregoing, the following payment obligations apply:

(1) Special financial assistance is subject to recalculation or adjustment to correct a clerical or arithmetic error. PBGC will, and plans must, make payments as needed to reflect any such recalculation or adjustment in a timely manner.

(2) If PBGC determines that a payment for special financial assistance to a plan exceeded the amount to which the plan was entitled, any excess payment constitutes a debt to the Federal Government. If not paid within 90 calendar days after demand, PBGC may reduce the debt by any action permitted by Federal statute. Except where otherwise provided by statutes or regulations, PBGC will charge interest and other amounts permitted on an overdue debt in accordance with the Federal Claims Collection Standards (31 CFR parts 900 through 999). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

#### **§ 4262.13 Restrictions on special financial assistance.**

(a) *In general.* A plan that receives special financial assistance must be administered in accordance with the restrictions in this section and in § 4262.14.

(b) *Restrictions.* Special financial assistance received, and any earnings thereon —

(1) May be used by the plan only to make benefit payments and pay administrative expenses;

(2) Must be segregated from other plan assets;

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(3) May be used before other plan assets are used to make benefit payments and pay administrative expenses; and

(4) Must be invested in investment-grade bonds or other investments as permitted by PBGC in § 4262.14.

#### **§ 4262.14 Permissible investments of special financial assistance.**

(a) *In general.* A plan that receives special financial assistance may invest amounts attributable to such assistance monies only in fixed income securities denominated in U.S. dollars and in accordance with this section. For purposes of this section, such securities are referred to as permissible investments.

(b) *Other definitions.* For purposes of this section —

(1) *Adequate capacity to meet financial commitments* means that the risk of default by the obligor is low and the full and timely repayment of principal and interest on the security is expected.

(2) *Permissible fund vehicles* mean exchange traded funds, mutual funds, pooled trusts, or other commingled securities whose investible assets are invested solely in fixed income securities denominated in U.S. dollars, with an average credit quality, weighted by market value, that meets the definition of investment grade.

(3) *Investment grade* means publicly traded securities for which the issuer has at least adequate capacity to meet the financial commitments under the security for the projected life of the asset or exposure.

(4) *Leverage* means the right to a return on a capital base that exceeds the investment which was contributed to the entity or instrument achieving a return.

(c) *Holdings.* A plan must hold permissible investments in either —

(1) Individual bonds, securities, or other debt securities; or

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(2) Permissible fund vehicles.

(d) *Quality of permissible investments.* Permissible investments must be considered investment grade by a fiduciary, within the meaning of section 3(21) of ERISA, who is or seeks the advice of an experienced investor (such as an Investment Advisor registered under section 203 of the Investment Advisor's Act of 1940), except that up to 5 percent of the aggregate market value of a plan's assets attributable to special financial assistance may be invested in securities or permissible fund vehicles that were investment grade at the time of purchase but are no longer investment grade.

(e) *Leverage and derivative limitations on permissible fund vehicles or portfolio of individual securities held by the plan.* (1) Permissible investments, whether held through permissible fund vehicles or directly through a portfolio of individual securities may not be supplemented by derivatives or otherwise leveraged in a way that could increase the interest rate risk or credit risk in the fund vehicle or portfolio beyond the risk in a portfolio of physical securities, meeting the definition of permissible investments in paragraph (a) of this section, equal to the market value of the portfolio; and

(2) Any notional derivative exposure, other than exposure gained through a permissible fund vehicle, must be supported by liquid assets that are cash or cash equivalents denominated in U.S. dollars.

#### **§ 4262.15 Reinstatement of benefits previously suspended.**

(a) In accordance with guidance issued by the Secretary of the Treasury under section 432(k) of the Code, a plan with benefits that were suspended under sections 305(e)(9) or 4245(a) of ERISA must:

(1) Reinstatement any benefits that were suspended for participants and beneficiaries effective as of the first month in which the special financial assistance is paid to the plan; and

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(2) Make payments equal to the amounts of benefits previously suspended to any participants or beneficiaries who are in pay status as of the date that the special financial assistance is paid.

(b) A plan must make the payments in paragraph (a)(2) of this section either in:

(1) A single lump sum no later than 3 months after the date that the special financial assistance is paid to the plan; or

(2) Equal monthly installments over a period of 5 years, with the first installment paid no later than 3 months after the date that the special financial assistance is paid to the plan, with no installment payment adjusted for interest.

(c) The plan sponsor of a plan with benefits that were suspended under sections 305(e)(9) or 4245(a) of ERISA must issue a notice of reinstatement to participants and beneficiaries whose benefits were previously suspended and then reinstated in accordance with section 4262(k) of ERISA. The requirements for the notice are in notice of reinstatement instructions available on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

#### **§ 4262.16 Conditions for special financial assistance.**

(a) *In general.* A plan that receives special financial assistance must be administered in accordance with the conditions in this section.

(b) *Benefit increases.* This paragraph (b) applies to benefits and benefit increases described in section 4022A(b)(1) of ERISA without regard to the time the benefit or benefit increase has been in effect. This paragraph (b) does not apply to the reinstatement of benefits that were suspended under sections 305(e)(9) or 4245(a) of ERISA (as provided under § 4262.15) or a restoration of benefits under 26 CFR 1.432(e)(9)-1(e)(3).



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(1) *Retrospective.* A benefit or benefit increase must not be adopted during the SFA coverage period if it is in whole or in part attributable to service accrued or other events occurring before the adoption date of the amendment.

(2) *Prospective.* A benefit or benefit increase must not be adopted during the SFA coverage period unless —

(i) The plan actuary certifies that employer contribution increases projected to be sufficient to pay for the benefit increase have been adopted or agreed to; and

(ii) Those increased contributions were not included in the determination of the special financial assistance.

(c) *Allocation of plan assets.* During the SFA coverage period, plan assets, including special financial assistance, must be invested in permissible investments as described in § 4262.14 sufficient to pay for at least 1 year (or until the date the plan is projected to become insolvent, if earlier) of projected benefit payments and administrative expenses.

(d) *Contribution decreases.* (1) During the SFA coverage period, the contributions to a plan that receives special financial assistance required for each contribution base unit must not be less than, and the definition of the contribution base units used must not be different from, those set forth in collective bargaining agreements or plan documents (including contribution increases to the end of the collective bargaining agreements) in effect on March 11, 2021, unless the plan sponsor determines that the change lessens the risk of loss to plan participants and beneficiaries and, if the contribution reduction affects annual contributions over \$10 million and over 10 percent of all employer contributions, PBGC also determines that the change lessens the risk of loss to plan participants and beneficiaries.

(2) A request for PBGC approval of a proposed contribution change that affects annual contributions over \$10 million and over 10 percent of all employer contributions must be

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submitted by the plan sponsor or its duly authorized representative and must contain all of the following information:

(i) Name, address, email, and telephone number of the plan sponsor and the plan sponsor's authorized representatives, if any.

(ii) The nine-digit employer identification number (EIN) assigned to the plan sponsor by the IRS and the three-digit plan identification number (PN) assigned to the plan by the plan sponsor, and, if different, the EIN and PN last filed with PBGC. If an EIN or PN has not been assigned, that should be indicated.

(iii) Name, address, email, and telephone number of the contributing employer for which the proposed contribution change is being submitted, and the employer's authorized representatives, if any.

(iv) Names and addresses of each controlled group member, along with a chart depicting the structure of the controlled group by entity and its ownership with ownership percentage.

(v) Audited financial statements (income statement, balance sheet, cash flow statement, and notes) for the contributing employer and the consolidated group including the contributing employer, if available, for the most recent 4 years, or, if audited financial statements were not prepared, unaudited financial statements, a statement explaining why audited statements are not available, and tax returns with all schedules for the most recent 4 years available. The financial statement submissions must:

(A) Identify the cash contributions to the multiemployer plan for which the contributing employer is seeking contribution relief;

(B) Identify all outstanding indebtedness, including the name of the lender, the amount of the outstanding loan, scheduled repayments interest rate, collateral, significant covenants, and whether the loan is in default;

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(C) Identify and explain any material changes in financial position since the date of the last financial statement;

(D) To the extent that the contributing employer has undergone or is in the process of undergoing a partial liquidation, estimate the sales, gross profit, and operating profit that would have been reported for each of the 3 years covered by the financial statement for only that portion of the business that is currently expected to continue; and

(E) State the estimated liquidation values for any assets related to discontinued operations or operations that are not expected to continue, along with the sources for the estimates.

(vi) Projected financial statements (income statement, balance sheet, cash flow statement) for the current year and the following 4 years as well as the key assumptions underlying those projections and a justification for the reasonableness for each of those key assumptions. The projections must include:

(A) All business or operating plans prepared by or for management, including all explanatory text and schedules;

(B) All financial submissions, if any, made within the prior 3 years to a financial institution, government agency, or investment banker in support of possible outside financing or sale of the business;

(C) All recent financial analyses done by an outside party with a certification by the employer's chief executive officer that the information on which each analysis is based is accurate and complete; and

(D) Any other relevant information.

(vii) Description of events leading to the current financial distress.

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(viii) Description of financial and operational restructuring actions taken to address financial distress, including cost cutting measures, employee count or compensation reductions, creditor concessions obtained, and any other restructuring efforts undertaken; also, indicate whether any new profit-sharing or other retirement plan has been or will be established or if benefits under such existing plan will be increased.

(e) *Allocating contributions and other practices.* During the SFA coverage period, a decrease in the proportion of income or an increase in the proportion of expenses allocated to a plan that receives special financial assistance pursuant to a written or oral agreement or practice (other than a written agreement in existence on March 11, 2021, to the extent not subsequently amended or modified) under which the income or expenses are divided or to be divided between a plan that receives special financial assistance and one or more other employee benefit plans is prohibited. The prohibition in the preceding sentence does not apply to a good faith allocation of:

- (1) Contributions pursuant to a reciprocity agreement;
- (2) Costs of securing shared space, goods, or services, where such allocation does not constitute a prohibited transaction under ERISA or is exempt from such prohibited transaction provisions pursuant to section 408(b)(2) or 408(c)(2) of ERISA, or pursuant to a specific prohibited transaction exemption issued by the Department of Labor under section 408(a) of ERISA;
- (3) The actual cost of services provided to the plan by an unrelated third party; or
- (4) Contributions where the contributions to a plan that receives special financial assistance required for each base unit are not reduced, except as otherwise permitted by paragraph (d) of this section.

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(f) *Transfer or merger.* During the SFA coverage period, a plan must not engage in a transfer of assets or liabilities (including a spinoff) or merger except with PBGC's approval.

Notwithstanding anything to the contrary in 29 CFR part 4231, the plans involved in the transaction must request approval from PBGC.

(1) PBGC will approve a proposed transfer of assets or liabilities (including a spinoff) or merger if PBGC determines that the transaction complies with section 4231(a)-(d) of ERISA and that the transaction, or the larger transaction of which the transfer or merger is a part, does not unreasonably increase PBGC's risk of loss with respect to any plan involved in the transaction, and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans involved in the transaction.

(2) A request for approval of a proposed transfer of assets or liabilities (including a spinoff) or merger must be submitted by the plan sponsor or its duly authorized representative and must contain the information that must be submitted with a notice of merger or transfer and a request for a compliance determination under subpart A of part 4231 of this chapter and all of the following actuarial and financial information for each of the plans involved in the transaction:

(i) A certification by the enrolled actuary that the plan or any of its component parts received special financial assistance and the most recent value of special financial assistance assets.

(ii) A copy of the actuarial valuation performed for each of the 2 plan years before the most recent actuarial valuation filed in accordance with § 4231.9(f) of this chapter.

(iii) A copy of the plan actuary's most recent certification under section 305(b)(3) of ERISA, including a detailed description of the assumptions used in the certification, and the basis under which they were determined. The description must include information about the

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assumptions used for the projection of future contributions, withdrawal liability payments, and investment returns, and any other assumption that may have a material effect on projections.

(iv) A detailed statement certified by an enrolled actuary that the transaction does not unreasonably increase PBGC's risk of loss with respect to any plan involved in the transaction. The statement must include the basis for the conclusion, supporting data, calculations, assumptions, a description of the methodology, the basis for assumptions used, the projected date of insolvency, and the present value of financial assistance expected to be paid to the plan by PBGC under section 4261 of ERISA as of the date of the transaction individually for each of the plans before and after the transaction. The present value of financial assistance must be based on the guaranteed benefits and administrative expenses presented in the cash flow projections under paragraph (f)(2)(v) of this section, discounted using interest rates published under section 4044 of ERISA.

(v) The statement in paragraph (f)(2)(iv) of this section must include an exhibit showing the annual cash flow projections for each plan before and after the transaction, through the year that each plan pays its last dollar of benefit (but not to exceed 100 years). The cash flow projection should use an open group valuation until the plan reaches insolvency. Annual cash flow projections must reflect the following information:

(A) Fair market value of assets as of the beginning of the year, splitting the assets by special financial assistance and non-special financial assistance amounts.

(B) Contributions and withdrawal liability payments.

(C) Plan level benefit payments organized by participant type (e.g., active, retiree, terminated vested) for the projection period.

(D) Guaranteed benefits payable post insolvency by participant type (e.g., active, retiree, terminated vested).

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(E) Administrative expenses for the projection period.

(F) Assumed investment return separately for special financial assistance and non-special financial assistance amounts.

(G) Fair market value of assets as of the end of the year.

(vi) Any additional information PBGC determines it needs to review a request for approval of a proposed transfer of assets or liabilities (including a spinoff) or merger.

(g) *Withdrawal liability interest assumptions.* A plan must use the interest assumptions under § 4281.13(a) of this chapter to determine withdrawal liability for withdrawals after the plan year in which the plan receives payment of special financial assistance under § 4262.12 and until the later of —

(1) Ten years after the end of the plan year in which the plan receives payment of special financial assistance under § 4262.12; or

(2) The last day of the plan year in which the plan no longer holds any special financial assistance or earnings thereon in a segregated account as required by § 4262.13(b)(2).

(h) *Withdrawal liability settlement.* (1) During the SFA coverage period, a plan must obtain PBGC approval for a proposed settlement of withdrawal liability if the amount of the liability settled is greater than \$50 million calculated as the lesser of —

(i) The allocation of unfunded vested benefits to the employer under section 4211 of ERISA; or

(ii) The present value of withdrawal liability payments assessed for the employer discounted using the interest assumptions under § 4281.13(a) of this chapter.

(2) PBGC will approve a proposed settlement of withdrawal liability if it determines —

(i) Implementation of the settlement is in the best interests of participants and beneficiaries; and

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(ii) The settlement does not create an unreasonable risk of loss to PBGC.

(3) A request for approval of a proposed settlement of withdrawal liability must be submitted by the plan sponsor or its duly authorized representative and must contain all of the following information:

(i) Name, address, email, and telephone number of the plan sponsor and the plan sponsor's authorized representatives, if any.

(ii) The nine-digit employer identification number (EIN) assigned to the plan sponsor by the IRS and the three-digit plan number (PN) assigned to the plan by the plan sponsor, and, if different, the EIN and PN last filed with PBGC. If an EIN or PN has not been assigned, that should be indicated.

(iii) A copy of the proposed settlement agreement.

(iv) A description of the facts leading up to the proposed settlement, including —

(A) The date the employer withdrew from the plan;

(B) The calculation of the withdrawal liability amount, including payment dates and amounts listed in the schedule for liability payments provided to the withdrawn employer in accordance with section 4291(b)(1)(A) of ERISA;

(C) The amount(s) and date(s) of withdrawal liability payments made; and

(D) How the proposed settlement amount was determined (discount rate used, financial condition of the employer, and other factors, as applicable).

(v) Most recent 3 years of audited financial statements and a 5-year cash flow projection for the employer with which the plan proposes to settle.

(vi) A copy of the most recent actuarial valuation report of the plan.

(vii) A statement certifying the trustees have determined that the proposed settlement is in the best interest of the plan and the plan's participants and beneficiaries.



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(viii) Any additional information PBGC determines it needs to review a request for approval of a proposed withdrawal liability settlement.

(i) *Reporting.* In accordance with the statement of compliance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov), a plan sponsor must file with PBGC each plan year, beginning with the plan year after the payment of special financial assistance and through the last day of the last plan year ending in 2051, a statement of compliance with the terms and conditions of the special financial assistance under this part and section 4262 of ERISA. The statement must be —

(1) Filed no later than 90 days after the end of the plan year; and

(2) Signed and dated by a trustee who is a current member of the board of trustees and authorized to sign on behalf of the board of trustees, or by another authorized representative of the plan sponsor.

(j) *Audit.* As authorized under section 4003 of ERISA, PBGC may conduct periodic audits of a plan that has received special financial assistance to review compliance with the terms and conditions of the special financial assistance under this part and section 4262 of ERISA.

(k) *Filing rules.* The filing rules in this paragraph (k) apply to a request for PBGC approval under paragraph (d), (f), or (h) of this section and a statement of compliance under paragraph (i) of this section.

(1) *Method of filing.* A filing described under paragraph (d), (f), (h), or (i) of this section must be made electronically in accordance with the rules in subpart A of part 4000 of this chapter. The time period for filing a request or statement of compliance must be computed under the rules in subpart D of part 4000 of this chapter.

(2) *Where to file.* A filing described under paragraph (d), (f), (h), or (i) of this section must be submitted as described in § 4000.4 of this chapter.

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**§ 4262.17 Other provisions.**

(a) Special financial assistance is not capped by the guarantee under section 4022A of ERISA.

(b) A plan that receives special financial assistance must continue to pay premiums due under section 4007 of ERISA for participants and beneficiaries in the plan.

(c) A plan that receives special financial assistance is deemed to be in critical status within the meaning of section 305(b)(2) of ERISA until the last day of the last plan year ending in 2051.

(d) A plan that receives special financial assistance and subsequently becomes insolvent under section 4245 of ERISA will be subject to the rules and guarantee for insolvent plans in effect when the plan becomes insolvent.

(e) A plan that receives special financial assistance is not eligible to apply for a suspension of benefits under section 305(e)(9) of ERISA.

(f) A plan that receives special financial assistance and meets the eligibility requirements for partition of the plan under section 4233(b) of ERISA may apply for partition.

(g) If any provision in this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding will be one of utter invalidity or unenforceability, in which event the provision will be severable from this part and will not affect the remainder thereof.

Issued in Washington, DC, by:

**Gordon Hartogensis,**

*Director, Pension Benefit Guaranty Corporation.*

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