

[Podcast]: Special Financial Assistance for Multiemployer Pension Plans (Part 2)

Employee Benefits & Executive Compensation Blog on August 20, 2021

This episode of The Proskauer Benefits Brief is the second of our three-part series analyzing the Pension Benefit Guaranty Corporation (PBGC) guidance on the new special financial assistance program for troubled multiemployer pension plans that was created by the American Rescue Plan Act (ARPA). Tune in as [Rob Projansky](#) and [Justin Alex](#) dig into more details on the guidance and the program.

ROB PROJANSKY: Hello and welcome to Proskauer Benefits Brief, Legal Insights on Employee Benefits and Executive Compensation. I'm Rob Projansky and on today's episode I'm joined by Justin Alex. This is the second installment of a three-part series on the new special Financial Assistance Program created by the American Rescue Plan Act of 2021, for troubled multiemployer pension plans, and we'll be discussing, in particular, the interim guidance issued by the Pension Benefit Guaranty Corporation in July 2021 regarding the program. In the first installment, we covered really the basic contours of the program. In today's podcast, we want to give a little bit more detail on the application process and how the amount of special financial assistance is calculated. So let's turn to you, Justin. Can you talk a little a bit about applications, how they work, the timing, the priority groups and so forth?

JUSTIN ALEX: First to set the stage, the Special Assistance Program is available to plans that fall into one of four categories:

First, plans that are in critical and declining status in 2020, 2021 or 2022.

Second, plans that are in critical status during any of those plan years, and that also meet additional funding and demographic criteria.

Third, plans that has suspended benefits under the Multiemployer Pension Reform Act as of March 11, 2021, which is the date on which this new law was enacted.

And, finally insolvent plans that became insolvent after December 16, 2014 and that had not terminated as of March 11, 2021.

Now, we touched on this in the first episode but because the eligibility criteria is intended to be objective, the PBGC doesn't have discretion to deny assistance to a plan that falls into one of these four categories. If a plan falls into one of those categories, it will receive assistance. The only variable is the specific amount of assistance and the assumptions that go into that. And we'll turn to that a little later. For purposes of submitting applications, the PBGC's interim rule and its special website for this program has detailed information and templates. We won't get into that level of detail here, but it is worth noting that the PBGC has established an order of priority for applications to make sure it does not get overwhelmed. Currently, the only plans eligible to apply are plans that are already insolvent, or those that are projected to become insolvent before March 11, 2022. Additional groups of priority plans will be able to apply over the course of the next 18 months or so, and all eligible plans will be able to apply by March 2023. So, it could be a couple of years before some eligible plans actually get their funds. Once a plan submits an application, the PBGC has 120 days to review it and then the PBGC will pay out assistance to plans within 60 to 90 days after their applications are approved.

ROB PROJANSKY: So Justin, practically speaking, does it really matter if you end up with a lower priority group, so you have to wait up to 2 years to apply? Is there any real difference from the plan's perspective?

JUSTIN ALEX: From a financial perspective, not really, because at the end of the day, the PBGC is going to give the plan enough money so that it can make it through the plan year ending in 2051. Now obviously getting the money sooner means plans have more certainty earlier about what they'll get, on the other side of it plans that have to wait for some period of time, will have two more years of experience in terms of what their plan assets are doing that period, and I suppose they will get more insight into any speed bumps in the application process as they see how the process plays out for the plans that apply early. Since I touched on the amount of money the government is giving to eligible plans, maybe it makes sense for you to turn to the calculation of the amount of liability, which has caused quite a bit of stir.

ROB PROJANSKY: Under the statute, the PBGC was directed to provide eligible plans with and, I'm going to quote this because I think it's important, "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." One of the most eagerly anticipated aspects of the PBGC's guidance was how PBGC was going to interpret that language and therefore calculate the amount of the SFA or Special Financial Assistance, which I call the SFA. So, the PBGC ultimately took a narrow interpretation of the statutory language and they basically determine the amount of the SFA is calculated after taking into account all of the plan's existing and projected obligations, and all of its existing and projected resources. And that includes, for example, the present value of future contributions, present value of future withdrawal liability payments, and really any other payments expected to be made to the plan through that plan year ending in 2051.

So essentially, what you are doing to make this calculation is you are taking the present value of all the benefits and expenses that the plan is going to have through that 2051 plan year and you compare that to all the assets you have and all the assets you are expected to have, and then the SFA is basically the delta between those two amounts. So, in this projection assets are used up by the end of 2051, and the plan is insolvent. A number of interested parties has suggested alternative methodologies to the one that PBGC chose, and the reason was that they view that as more consistent with the legislative intent to provide a permanent solution to issues faced by these troubled plans. So for example, many of us thought that it made sense to exclude the assets of the plan to the extent they were needed to pay benefits after 2051. If you look at the language of the statute, it really boils down to what's required for the plan to pay all benefits means, does it mean required after exhaustion of all of the other assets or does it mean something else? The PBGC thought it meant the former and said that these other proposed methodologies that had been brought forth weren't consistent with the statutory language and were really just ends driven. There can be a debate about that in the future, but that is the PBGC's take on it.

JUSTIN ALEX: So Rob, a lot of people are asking this question. In light of that, does this mean that plans get the special financial assistance are actually going to run out of money before they get to 2052?

ROB PROJANSKY: Yeah, Justin, that is a great question, and a lot of our clients have been asking it. And I think the answer is not exactly. And I think that's because of the interplay of two things, the assumptions used to calculate the relief and the investment restrictions on the special financial assistance. So let's talk about those two things in a little bit of detail. So for most assumptions that you are using to calculate the amount of the SFA, the statute says that the plan has to use the actuarial assumptions that it used in its zone certification right before 2021 unless those assumptions have become unreasonable and for many plans, those assumptions have become unreasonable. If you think about it, those assumptions were made for a lot of plans right at the beginning of the pandemic, before we had clear visibility in what was going to happen. So what the PBGC said, yes, you can change assumptions, if you think that the ones you have are unreasonable, but it's going to require extensive data that support those assumption changes. And it's going to look very carefully and scrutinize them pretty heavily. PBGC issued some guidelines for certain changes in the assumptions, but this definitely adds a little bit of uncertainty. But the bigger problem revolves around a special rule for the interest rate or investment return assumption. One of the biggest drivers of the amount of the SFA that a plan is going to get is that interest rate that's used to value the plans benefit liabilities and its future assets. So here, the interim final rule starts by saying that the rate you use is the rate you use for your funding standard account projections in that pre-2021 zone status certification. Alright, so nothing different there from the other assumptions. But here is what is different, then they say that that rate is capped at 200 basis points, plus the third segment interest rate in the last four months prior to the filing of the application. Without getting to all the details about the third segment rate, it suffices to say that under current rates cap, they your interest rate at about 5.5%. Normally, you would say that's great, if I can use a lower interest rate, I get more money, right? They are giving me money, assuming I can earn 5.5% when actually, normally I think I might earn 7%, or 7.5%. And if I already use a lower rate than that, I can use my lower rate. So if I'm below 5.5%, I can even go below 5.5%. So that's great, right?

JUSTIN ALEX: So here's the wrinkle Rob, any Special Financial Assistance that a plan receives has to be segregated from the plan's other assets, and can only be invested in investment-grade bonds or other investments approved by the PBGC. That creates a potential issue for plans with investment return assumptions that exceed corporate bond rates. For example, let's say you have a plan with a 7.5% investment return assumption, which isn't unusual at all in the multiemployer world. The interest rate cap that you described would apply to that plan. So it would get assistance based on evaluation of its liabilities using a roughly 5.5% interest rate today, but could only invest the money against bonds that are currently yielding much less than that. So the calculation of the amount of assistance assumes you will earn a few percentage points more than you actually can based on what you can invest special financial assistance assets in. So really, the viability of a plan through 2051 is going to depend on the investment performance of the plan's other assets and whether that investment performance can make up the difference. That's really unique to each plan. Will it have enough assets now or in the future that are not subject to these investment restrictions, and how will those assets be invested. Now the PBGC's interim guidance slightly broadens the investments available to plans with respect to their special financial assistance by including things like ETFs, mutual funds and other commingled vehicles that invest in investment-grade bonds as well as certain derivative products, but the fixed income element is still there. Interestingly, however, the PBGC has specifically requested comments on this aspect of its guidance and the PBGC's questions indicate that allowing plans to invest their special financial assistance in equities or other investments might be an option. So we'll see how that unfolds. To the extent that PBGC allows for investments that could provide some additional return, that might make the difference for many plans. On the plus side though the PBGC's guidance makes clear that plans can use special financial assistance money to pay benefits and admin expenses before using other plan assets, which would allow plans to preserve their existing assets and any other amounts like future contributions and withdrawal liability payments that are not subject to the restrictions on special financial assistance.

That's all for today. But, there is still plenty more to discuss. In our final installment next week, we'll cover the other special rules that apply to plans to receive the assistance and additional details, including how the program impacts withdrawal liability for employers who contribute to these plans. Now that you're on the edge your seat, thanks to that cliffhanger, thank you for joining us today on the Proskauer Benefits Brief. Stay tuned for our final installment of our ARPA discussion, and for more legal insights on employee benefits and executive compensation.

[View Original](#)

[Related Professionals](#)

- **Robert M. Projansky**
Partner
- **Justin S. Alex**
Partner