NCCMP Lawyers & Administrators Meeting

Multiemployer Pension Provisions of the American Recovery Plan Act (“ARPA”):

What We Know and What We Don’t Know

Paul A. Green
Mooney, Green, Saindon, Murphy & Welch, P.C.

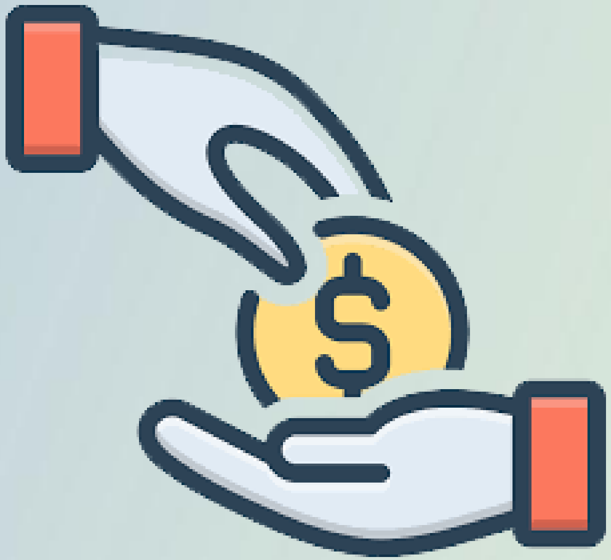
Jason L. Russell
The Segal Group

April 7, 2021

Presentation Topics

- Special Financial Assistance (SFA).
- Temporary Funding Relief.
- Additional Materials and Commentary.

Special Financial Assistance



The Holy Grail

- Excerpt from floor statement made by Senate Majority Leader Schumer on March 5, 2021:

  "I will be watching how the administration implements this new program very closely to ensure plans receiving financial assistance under the new program are not placed in a worse long-term funding position than they are today or are projected to be into the future. This new program is intended to be a long-term solution for these ailing plans, a solution that protects retiree benefits as well as the health of the plans themselves."

Cong Rec (Daily Ed.), March 5, 2021, S1270.

Special Financial Assistance ("SFA")

- SFA is a one-time lump sum payment
  - Not a loan like existing PBGC guarantee program or prior proposals.
  - Not a partition like other legislative proposals.
- SFA sufficient for pay benefits through the 2051 plan year.
  - Open to interpretation.
- Unlimited appropriation
  - Although scored at $86 billion by CBO

Onus on PBGC

- PBGC guidance or regulations:
  - Due by July 9, 2021 (whew!).
  - Must limit the materials required to apply.
  - Set dates for transfers of SFA in its guidance.
  - Provide an alternative application for plans that have already applied for partition.
- PBGC must act on applications within 120 days of submission, or they are automatically approved.

Eligibility – 4 Categories

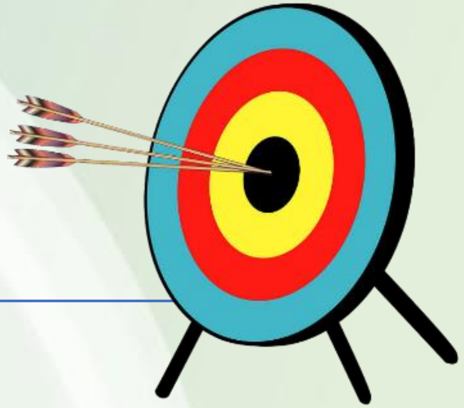
- Plans in critical and declining status in 2020 through 2022.
- Plans that have implemented MPRA suspensions.
- Plans in critical status in 2020 through 2022, and:
  - Inactive to active participant ratios of greater than 3:2; *and*
  - Less than 40% funded based on “current liability” and market value of assets.
- Plans that became insolvent after December 16, 2014 and have not been terminated.

Funding Target – Statutory Language

- From section 4262(j):

  “[S]uch 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… ”

Funding Target – Interpretations



	Interpretation	Commentary
1	Pay present value of all benefits through 2051, regardless of plan's solvency needs	• Expensive! • May result in anomalies
2	Pay only enough for plan to remain solvent through 2051	• Sets up new solvency crisis in late 2040s • Disincentives for ongoing participation
3	Reserve plan assets for benefits after 2051; remaining plan assets plus SFA pays benefits through 2051	• Avoids new solvency crisis • Brings stability to the system • Limits program costs

Interest Rate – Overview

For determining amount of SFA, not eligibility

- “Interest rate” is the rate used in the most recent zone certification completed before 2021
- Interest rate limit – not higher than:
  - Third-segment corporate bond rate (20+ year duration),
  - Plus 200 basis points,
  - For month in which application is filed or past 3 months
- Interest rate limit is currently about 5.6%
  - Projected to decline to about 5.2% by end of 2021

Interest Rate – Potential Disconnect

For determining amount of SFA, not eligibility

- “Interest rate” is limited to about 5.5%.
- SFA must be segregated, invested in investment grade bonds
  - Or other investments permitted by PBGC.
  - Current corporate bond yields: ~2% (intermediate), ~3% (long-duration).
- Potential disconnect:
  - What if determine SFA amount at 5.5% interest rate, and then plans have to invest SFA entirely in bonds?
  - Sets plans up to fall short of funding target.

Interest Rate – “Bifurcated” Approach

For determining amount of SFA, not eligibility

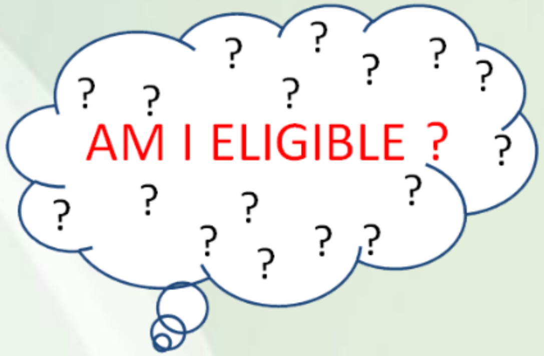
- Only sensible interpretation:
  - “Interest rate” applies only to existing plan assets
  - Separate assumption based on bond yields applies to segregated SFA
- Rationale:
  - Zone certifications prior to 2021 were based on then-current law and didn’t have an assumption related to SFA
  - Congressional intent appears to favor conservative investments
  - Single interest rate = plans fail to meet funding targets

Assumptions other than Interest Rate

- Baseline = assumptions used in pre-2021 zone certification . . .
  - Unless clearly erroneous .
- Changes to assumptions.
  - Plan may change pre-2021 assumptions if they are unreasonable.
  - PBGC, in consultation with Treasury, must accept those changes unless they are unreasonable.
- Impact of pandemic on industry activity, retirement, etc.?
- PBGC and Treasury need to show flexibility and expedience.

With limited exceptions, same rules apply to both eligibility and amount of SFA.

Eligibility Questions



- Two zone status certifications?
  - One for actual zone certification, one for SFA purposes?
- Changes in rehabilitation plan?
  - For example, reduced contribution rate increases?
- For plans in critical (but not declining) status:
  - Measurement date – meet all tests in same year?
  - Current liability interest rate – within range.
  - Definition of active and inactive participants .

Temporary Priority Consideration

- Subject to PBGC guidance (not mandated by statute).
- For up to 2 years, PBGC may restrict applications from certain plans.
- Priority plans:
  1. Insolvent or projected to be insolvent in 5 years.
  2. Represent at over $1 billion in liability to PBGC without SFA.
  3. Have implemented MPRA suspensions.
  4. Other similar categories, as determined by PBGC.
- PBGC guidance:
  - May clarify methodology for $1 billion threshold (test #2).
  - Could offer simplified approach (test #4).

Withdrawal Liability – Overview

- No provision in the Act to adjust withdrawal liability for SFA.
- Prior bills would have disregarded SFA for 15 years.
  - Eliminated for parliamentary reasons (“Byrd Rule”).
  - Affects both assets and liabilities (benefits paid from SFA).
- PBGC may regulate withdrawal liability.
  - PBGC may impose conditions on plans receiving SFA.
  - PBGC has general regulatory authority over withdrawal liability actuarial assumptions.

Withdrawal Liability – Alternatives

- PBGC regulation on recognition of SFA proceeds:
  - Defer through 2051 (consistent with UMWA Plan relief).
  - Defer for 15 years (consistent with prior bills).
  - Phased in through 2051.
  - Permit immediate recognition.
- PBGC regulation on actuarial assumptions.
- Plan actuary's best estimate actuarial assumptions.

Consider impact of 20-year cap.

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS • NCCMP

Additional Post-Assistance Issues

- Benefit improvements
  - Note: plan will remain in critical status through 2051.
  - PBGC need not impose further restrictions.
- Contribution rate freezes, reductions, diversions.
- New groups and new employers.
- Allocation of expenses.
- Investments and asset allocation.
- Mergers and partitions.

See detailed commentary at end of presentation.

Where PBGC Dare Not Tread

The law precludes the PBGC from regulating:

- Prospective benefit reductions.
- Selection of Trustees and the terms of their service.
- Selection of professionals and service providers and the terms of their retention.
- Plan funding rules (presumably on matters like interest rate and other assumptions, etc.).

Temporary Funding Relief

Zone Status Freeze

- Plans may elect to “freeze” zone status for one plan year.
  - Either of plan years beginning March 1, 2020 – February 28, 2022
- During frozen year, no requirement to update FIPs or RPs.
- Unclear how to measure scheduled progress.
  - What if plan was not making scheduled progress in prior year?
  - Treasury should provide guidance.
- Special rule to avoid potential excise tax liability.

Extension of PPA Periods

- Extension of Funding Improvement or Rehabilitation Period.
  - For plan years beginning in 2020 or 2021, plans may elect to extend their Funding Improvement or Rehabilitation Periods by 5 years.
  - Treasury should clarify that this is in addition to the 3-year extension plans might have taken under the Worker, Retiree, and Employer Recovery Act of 2008.

Expanded Recognition of Pandemic Losses

- Plans receiving SFA are not eligible.
- Similar to Pension Relief Act of 2010.
  - 10-year smoothing in actuarial value of assets.
  - Funding standard account amortizations through 2050.
- Include non-investment losses related to pandemic.
  - Guidance needed.
- Restrictions on benefit improvements apply.

See detailed commentary at end of presentation.

Additional Commentary

Amount of Assistance – Funding Target

- SFA is “such 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 . . . .”
- Literally means the present value of all benefits payable through the end of the 2051 plan year.
  - Expensive!
  - May result in anomalies.

Funding Target – The Wrong Approach

- Designed to Fail – Provide the minimum amount necessary so that the plan is projected to exhaust its assets at the end of the 2051 Plan Year.
  - Produces an absurd result in that it suggests that Congress intended to bankrupt every plan that accepts assistance by 2051.
  - Creates huge disincentives for employers *and* employees to stay in plans.
    - Employers know that their withdrawal liability and/or contributions will only increase if they remain.
    - Employees know they are throwing their wages away and will likely not get their bargained benefits when they retire.
    - The result is that employers will withdraw as soon as they can.

Funding Target – Better Approach

- Reserve current assets and future contributions required for projected benefits after 2051, and provide enough money, when combined with the remaining, unreserved assets to pay all benefits through the 2051 plan year.
  - Designed to achieve Congress' goal of ensuring a long-term solution by providing employers and employees with reasons to remain in the plans.
  - Makes it possible for plans to attract new employers and bargaining units.
  - Limits the program's expense and avoids potentially anomalous results.

Changes to Rehabilitation Plan

- PPA requires plans to review and, as necessary, modify their rehabilitation plans (“RPs”) annually, and these changes may affect a plan’s zone status.
- In particular, such RPs may project out unsustainable contribution rates and unreasonable industry and employment assumptions.
- Plans need the flexibility to change these substantive terms to match the current reality.
- Although PBGC has an interest in policing the SFA program, it must not do so at the expense of the plans’ long-term interests.
- To accommodate both sets of interests, a system of notice and, if necessary, consultation may be appropriate.

Eligibility for Critical (not Declining) Plans

CRITICAL

General

- The language for when and how the three tests must be met is unclear
  - Congress presumably intended that all three conditions must be met in the same year.
  - The language *is* clear that a plan that meets the three tests in any of the three years qualifies.
    - This necessarily means that plans can use data from any of the 2020, 2021, or 2022 plan years to qualify.

Eligibility for Critical (not Declining) Plans

Modified funded percentage

- Ratio of the market value of assets over the plan’s current liability.
- Current liability is used to determine full funding limitations.
- The discount rate used to determine current liability is selected by a plan’s actuary from a range determined by the IRS, which is typically much lower than a plan’s discount rate for minimum contribution purposes.
- The discount rate cannot be subject to the statutory requirement that it be the one used in the latest pre-1-Jan-2021 zone certification, since current liability isn’t a component of zone certifications.
- This means that a plan’s actuary should continue to be able to select the discount rate within the permitted range.

Eligibility for Critical (not Declining) Plans

Counting Participants

- The methodology for counting participants, as well as distinguishing between active and inactive participants, is not clear.
- PBGC ordinarily applies a 1-year break in service test on its premium reports to determine whether a non-vested participant is no longer a participant
- PBGC doesn't normally need to determine active v. inactive.
- Logically, PBGC should allow plans to use a 1-year break rule to determine both active v. inactive and participant v. non-participant.
- To fully realize Congressional intent, PBGC should also allow plans to use shorter periods for employees out for less than one year due to the pandemic in determining active v. inactive.
- Likely not a huge issue since most troubled plans easily meet the 3/2 test.

Insolvent Plans

For insolvent plans already receiving PBGC assistance:

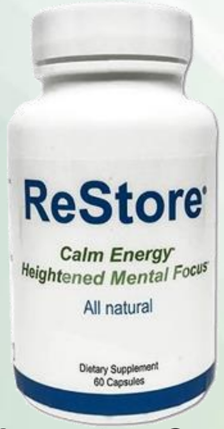
- Traditional financial assistance provided to insolvent plans under the PBGC guarantee program is in the form of loans the plan is required to (but not expected to) repay.
- PBGC must account for these debt obligations by either:
  - Forgiving the financial assistance loans, or
  - Increasing the SFA to cover repayment of the loans.
- The latter alternative has the added benefits that it is clearly permitted by the law *and* it helps to restore the depleted multiemployer guarantee fund.

Interest Rate Assumption

- Special financial assistance must be segregated and invested in investment-grade bonds
- For reference, current fixed income yields (April 4, 2021)

Index	Nominal Yield
T-Bill – 3 Months	0.018%
U.S. Agency – 10-20 Years	0.710%
U.S. Government/Credit	1.550%
U.S. Corporate	1.600%
U.S. Corporate Long Term	3.400%

Benefit Restorations



- Plans are required to retroactively restore benefits that have previously been reduced either as a result of MPRA suspensions or insolvency, and the cost is included in the amount of SFA.
  - Retroactive amounts may be paid in a lump sum or over five years, as determined by the plan.
- Other reductions are not automatically restored, and PBGC is granted regulatory authority over any other restorations or other benefit increases following the approval of SFA.

Benefit Improvements

- Because plans that received SFA remain in critical status through the 2051 plan year, there are already substantial restrictions on benefit improvements, in that plan actuary must certify that:
  - The increases are paid for out of unanticipated employer contributions, and
  - The increases will not delay emergence, presumably, beyond the end of the 2051 plan year.
- Plans with amortization extensions will need to pay $10,000 to get a ruling from the IRS that the increases are *de minimis* and reasonable.
- No additional requirements should be imposed.

Contribution Rate Restrictions

HARD — TIMES

Includes reductions, freezes, and diversions

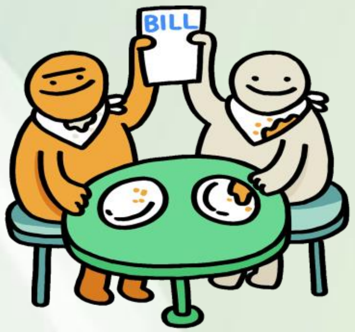
- So-called “Diversions” are just rate reductions and should be treated as such.
- Rate changes are ordinarily determined:
  - By the bargaining parties in their contracts, and/or
  - The Trustees either in the RP or by establishing rate minimums or other requirements.
- Although PBGC has the authority to regulate such changes post-SFA, it needs to use a light touch to avoid imposing unsustainable burdens on employers and their active workforce.

New Employers and Groups

NEW

- The statute is silent as to the permitted treatment of new employers and new groups.
- A key to a plan's long-term health is the ability to attract new employers and new groups.
- Plans should be permitted to use the tools currently at their disposal to attract new employers and groups.
- These may include:
  - Higher benefit levels for the same contribution;
  - Lower required contributions; and
  - Separate withdrawal liability pools, where lawful and approved under existing PBGC regulations. (Note that this would exclude plans in the building and construction industry.)

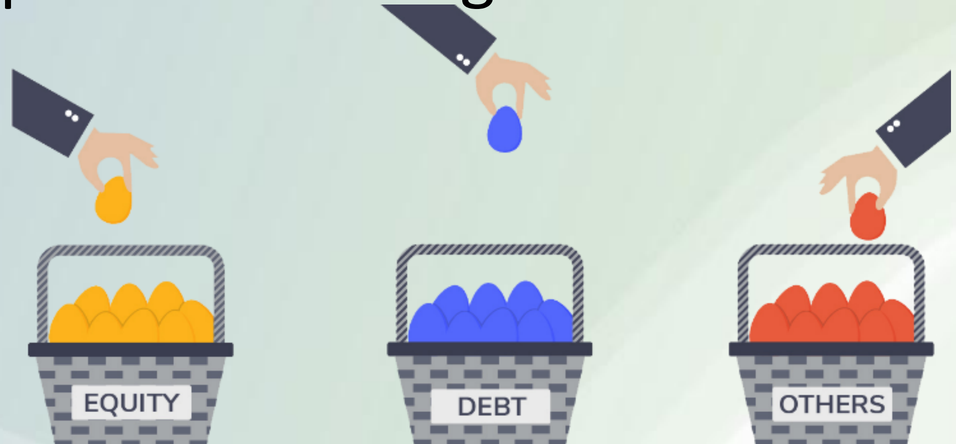
Allocation of Expenses



- The statute permits PBGC to regulate shared administrative expense arrangements.
- Apparently, someone must have been concerned that Trustees would allocate excessive expenses to plans that have received SFA.
- This is an area already extensively regulated.
    - *See* ERISA Secs. 404(a), 406, 408(b)(2), and PTEs 76-1, 77-10.
- It is not clear why additional regulation is needed, particularly by an agency that has not previously regulated these types of issues.

Investments and Asset Allocation

- PBGC has the authority to regulate both the investment of the segregated SFA proceeds *and* the balance of the plan's assets.
- Therefore, the questions are:
  - What types of vehicles will the segregated SFA proceeds be permitted to invest in, and
  - What, if any, additional restrictions will be placed on the investment of the plan's remaining assets.

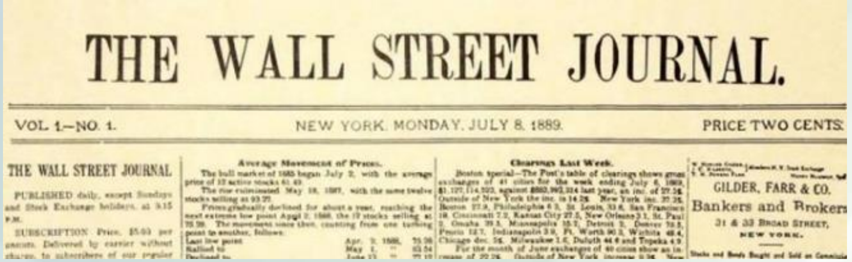


Investment of the Segregated SFA Proceeds

- Sec. 4262(m)(1) restricts investments to “investment grade bonds or other investments as permitted by the [PBGC].”
  - This suggests that Congress may have intended that these proceeds be invested more conservatively than ordinary fiduciary prudence would dictate.
  - As noted above, unless the bifurcated approach is taken to the discount rates used to determine the amount of SFA, such an approach would be an *unmitigated disaster*, and result in the failure and insolvency of plans receiving SFA well before the end of their 2051 plan years.

Investment of the Segregated SFA Proceeds

- Should PBGC require that a singular discount rate be used to determine the amount of SFA, it would also have to permit the full range of appropriate investment options currently available to plans in order to avoid sabotaging the SFA program from the start.
- This would include much riskier investments, including public equities, private equity investments, and more.
- Even if PBGC uses a bifurcated approach, it would still need to permit a reasonably broad range of investments to help ensure the success of the program, in view of today's artificially low fixed income yields.


THE WALL STREET JOURNAL.

VOL. 1—NO. 1. NEW YORK. MONDAY, JULY 8, 1889. PRICE TWO CENTS.

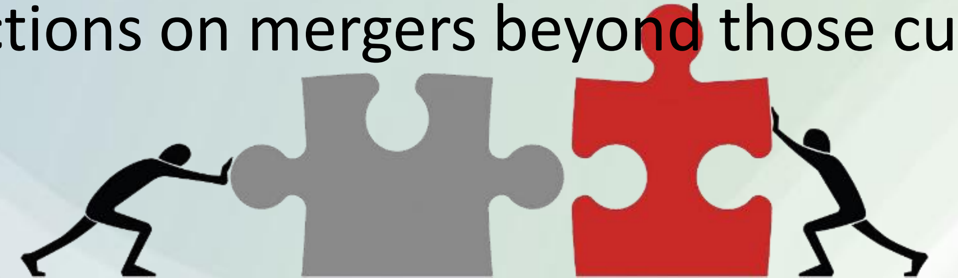
THE WALL STREET JOURNAL

GILDER, FARR & CO.

Bankers and Brokers

Mergers

- Congress’ and PBGC’s clear policy has been to encourage and, in some instances, facilitate mergers, which can strengthen all of the plans involved, both in terms of efficiencies of scale and broadening the risk pool.
- Mergers are already heavily regulated by the PBGC.
- The new law is silent on the treatment of mergers, either between plans that have received SFA and between ones that have and ones that have not.
- Consistent with Congress’ intent to “do no harm,” and both Congress’ and PBGC’s policies towards plan mergers, PBGC should impose no additional restrictions on mergers beyond those currently in place.



Partition and Suspension

- Sec. 4262(m) prohibits plans in receipt of SFA from adopting MPRA suspensions, but is silent on partition.
- Sec. 4233(b)(2) makes “the maximum benefit suspensions . . . , if applicable” a prerequisite for partition.
- Because plans that received SFA are ineligible for suspensions, such suspensions would be inapplicable and should not be required for partition.
- Some plans, based upon their benefit structures and demographics, may also not be eligible for suspensions.
- Partition of these, where otherwise beneficial and the other requirements are met, should be permitted.

Coordination with Treasury

- There are several discrete areas where PBGC is required to consult with Treasury, including:
  - Method of reinstating suspended benefits;
  - Whether the amount of SFA is sufficient to provide the required benefits;
  - Whether a plan may change its assumptions solely for purposes of determining the amount of SFA; and
  - In determining eligibility for priority categories based on funded status or impending insolvency.

Coordination With Treasury (cont.)

- Such consultation should be with respect to issuing guidance and not in individual cases, as the latter would impede the application process in violation of Congress' express directive.
- In addition to the guidance listed above, Treasury should also clarify that all plans receiving SFA will have their rehabilitation periods automatically extended to the end of the 2051 plan year, since they will remain in critical status until then.

Amortization and Smoothing Relief

- For the two plan years beginning on or after March 1, 2020, plans meeting the solvency test may:
  - Smooth investment losses for up to 10 years, as long as the actuarial value of assets is no more than 130% of the market value.
  - Amortize investment losses and any other losses related to the pandemic for up to 30 years.
    - Some losses, such as reduced contributions, do not typically result in amortizations since they are immediately added to the funding standard account.
    - Treasury should issue guidance permitting plans to recognize expected contributions and amortize the shortfall over the 30-year period.
  - IRS must accept plan sponsors' treatment of losses unless they are clearly erroneous.
  - Plans receiving SFA are not eligible for this relief.