NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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March 30, 2021

The Honorable Gordon Hartogensis
Director
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005

RE: Implementation of the American Rescue Plan Act of 2021

Dear Director Hartogensis:

The National Coordinating Committee for Multiemployer Plans (NCCMP) is pleased that Congress has passed, and President Biden has signed into law, the American Rescue Plan Act of 2021 (ARPA). Although the vast majority of multiemployer pension plans are able to meet their promised pension obligations, ARPA provides a lifeline to troubled plans in the form of a special financial assistance program, offers smoothing and extended recovery time for all multiemployer plans, and takes an enormous step toward protecting the pensions of all multiemployer participants. As President Biden expressed in his March 12th address, "It's one thing to pass the American Rescue Plan. It's going to be another thing to implement it." He concluded saying "We have to get this right. Details matter, because we have to continue to build confidence in the American people that their government can function for them and deliver." We agree that the details matter greatly in successfully implementing the program as Congress and its leadership intended.

NCCMP is the only national organization devoted exclusively to protecting the interests of the job-creating employers of America and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America's working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code (IRC) Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. Those segments include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking industries. Multiemployer plans are jointly trusteed by employer and employee trustees.

NCCMP was instrumental in the passage of the Multiemployer Pension Reform Act of 2014 and has served as a resource to Congress for many years leading up to the enactment of the ARPA because of its depth of knowledge regarding multiemployer pension plans. NCCMP has provided technical support to members of Congress and their staff in their extraordinary efforts to pass ARPA.

NCCMP offers its continued support to ensure that the agencies charged under ARPA with issuing guidance do so in a way that reflects Congress's intent to provide a long-term solution to troubled plans that helps protect participants' and retirees' hard-earned pension benefits. Accordingly, NCCMP provides, in the attached document, issues and suggested resolutions for consideration by PBGC and Treasury.

Additionally, notwithstanding the broad scope of its membership, the NCCMP reached out well beyond its constituent organizations in developing these comments and suggestions. The attached document is the product of extensive consultation with numerous stakeholders and professionals throughout the multiemployer plan community, including employers, labor organizations, asset managers, investment consultants, actuaries, and attorneys. Together, these individuals, and the entities to which they are associated, are affiliated with or advise multiemployer plans covering well over 80% of all participants in the multiemployer pension plan universe.

We welcome the opportunity to discuss the attached document with you further.

Regards,

Michael D. Scott
Executive Director

NCCMP's Recommendations for PBGC and Treasury Department Guidance for Implementing the American Rescue Plan Act of 2021 (ARPA)

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I. Executive Summary

On behalf of its members, and in consultation with multiple pension stakeholders and professionals throughout the multiemployer pension plan community, NCCMP is pleased to provide recommendations that the PBGC and Treasury are encouraged to consider when implementing the American Rescue Plan Act (ARPA). As a guiding principle, NCCMP's recommendations reflect Congress's intent that ARPA provide a long-term solution to troubled multiemployer pension plans.

Amount of special financial assistance. ARPA provides for the appropriation of federal funds to the PBGC so that the PBGC may provide to eligible plans the special financial assistance necessary to pay all benefits due through the end of the 2051 plan year. The language in the statute, however, may be subject to several different interpretations with regard to how plans are to determine the amount of special financial assistance. NCCMP provides three possible interpretations but recommends that the PBGC consider Interpretation 1 (including Interpretation 1A) or Interpretation 2. Both Interpretations reflect Congressional intent to provide a long-term solution for troubled plans.

Bifurcation of interest/discount rate assumptions. The interest rate limit used to determine the required amount of special financial assistance is separate from and inconsistent with the investment rate return available to be earned by the special financial assistance amounts. Special financial assistance amounts must be invested in investment-grade bonds or as otherwise permitted by the PBGC. The investment-return rate on investment-grade bonds is significantly below the interest rate limit. These requirements create a mismatch of interest rates that is likely to create a significant funding shortfall. To avoid this, PBGC's guidance should clarify that the interest rate limit does not apply to the discount rate used to determine the amount of financial assistance.

Investments and asset allocation. ARPA authorizes the PBGC to regulate how a plan that has received special financial assistance should allocate its assets. Given the current low yields on fixed-income securities, NCCMP recommends that the PBGC issue guidance that allows trustees to consider the segregated special financial assistance as an allocation to the fixed-income asset class as part of the plan's non-segregated assets. This approach would allow trustees to reduce their fixed-income allocation in the plan's non-segregated assets, allow more return-seeking investments consistent with a long-time horizon, and avoid the otherwise likely scenario of plans running out of money before 2051. Appendix 1 includes a detailed listing of recommended investments that fit within the "investment-grade bond" category for the special financial assistance as well as a list of recommended "other permitted investment" subject to maximum allocations to provide return and inflation protection.

Recommendations regarding various technical issues. NCCMP offers a number of additional recommendations regarding technical issues related to eligibility, post-assistance issues, and issues regarding coordination of efforts with Treasury. NCCMP also has identified technical issues specifically within Treasury's purview and offers recommendations regarding such issues.

II. Special Financial Assistance: Amount and Eligibility Considerations

ARPA provides for the appropriation of federal funds to the PBGC so that the PBGC may, as provided under Sec. 4262,[1] pay amounts necessary to provide special financial assistance to eligible plans. Special financial assistance is provided in the form of a one-time, nonrefundable, lump sum payment to plans.

Sec. 4262(j) describes how plan sponsors are to determine the amount of special financial assistance that may be requested. Sec. 4262(e) requires that amounts must be determined using the assumptions used in the plan's most recent zone status certification, subject to an interest rate limit. Sec. 4262(l) provides that special financial assistance amounts must be invested in investment-grade bonds or other investments as permitted by the PBGC. All three of these subsections, however, include language that may be subject to different interpretations. To ensure that financial assistance is provided in a manner that is consistent with plain language of the legislation to effectively secure the benefits earned by terminated vested participants, retirees and active participants, NCCMP requests that the following be considered by the PBGC in its development of appropriate guidance.

A. Amount of assistance

1. Funding target

Issue: Sec. 4262(j) describes how eligible plans are to determine the amount of special financial assistance required to be provided so that plans may pay benefits through the end of the 2051 plan year. However, the language used in Sec. 4262(j), as indicated below, is ambiguous and may be subject to several different interpretations. For the reasons provided, Interpretation 1 (including Interpretation 1A) or 2 should be adopted and implemented in PBGC guidance.

> **Sec. 4262(j) Determination of Amount of Special Financial Assistance.—**
>
> (1) In General.—The amount of financial assistance provided to a multiemployer plan eligible for financial assistance under this section ***shall be 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,*** with no reduction in a participant's or beneficiary's accrued benefit as of the date of enactment of this section, except to the extent of a reduction in accordance with section 305(e)(8) adopted prior to the plan's application for special financial assistance under this section, and taking into account the reinstatement of benefits required under subsection (k). (emphasis added)

Interpretation 1: The amount of special financial assistance provided to eligible plans is the present value of all benefit payments that would be made by the plan to participants until the end of the 2051 plan year. This calculation would not take into consideration any of the plan's current assets or future contributions.

Comments on Interpretation 1: This approach reflects the literal reading of the statutory language. That language makes no provision for deducting the amount of existing assets or other sources of revenue from the amount of the financial assistance to be provided. Existing assets, and the

[1] All citations are to ERISA, as modified by ARPA, unless otherwise noted.

earnings thereon, would then be available to pay benefits after 2051. If this approach is followed, however, the PBGC would need to clarify whether the calculation includes future accruals, including accruals by new hires, as the language suggests, in addition to benefits accrued to date.

Although this approach achieves Congress's goal of rescuing troubled plans, it is also the most expensive and may result in uneven results for plans that may fatigue tax-payers. Some plans that receive special financial assistance may become overfunded whereas other plans that do not receive assistance may continue to struggle under the onerous provisions of rehabilitation plans. The consequence of these unintended results is that multiemployer plan reform efforts, which may be needed in the future, would be more difficult to achieve.

Interpretation 1A: Like Interpretation 1, the amount of special financial assistance provided to eligible plans is the present value of all benefit payments that would be made by the plan to participants until the end of the 2051 plan year without consideration of the plan's current assets. Unlike Interpretation 1, the amount of special financial assistance determined under Interpretation 1A would take account plan expenses and future contributions, as well as future benefit accruals, through the end of the 2051 plan year.

Comments on Interpretation 1A: Interpretation 1A achieves Congress's goal of rescuing troubled plans but, unlike Interpretation 1, takes into account plan expenses which may be significant.

Interpretation 2: The amount of special financial assistance provided to eligible plans is the amount of additional assets needed to pay all benefit payments made by the plan to current and future participants until the end of the 2051 plan year. However, in determining the amount of financial assistance, the actuary would determine the portion of current plan assets that are required to fund benefits due after 2051 for current participants. Only the amount of current assets as of the date of the application not needed for post-2051 benefit payments, as well as projected future contributions through 2051, would be considered in the projection to offset the amount of additional financial assistance required to pay benefits through 2051. Under this interpretation, special financial assistance would be used to secure the continuation of benefits through 2051 and a portion of existing plan assets would be reserved and invested to pay benefits beyond 2051 and well into the future for current participants.[2]

Comments on Interpretation 2:

- Although Interpretation 2 is a less literal interpretation of the language of the statute, it is consistent with the Congressional intent of providing a long-term solution. Interpretation 2 secures the payment of benefits through the 2051 plan year, while also allowing for payment of benefits beyond 2051 and is therefore consistent with Congress's intent of ensuring that the current crisis does not recur.
- Interpretation 2 also secures bargained-for benefits. This interpretation, which allows for the payment of benefits without reduction (except as provided under an existing rehabilitation plan) beyond 2051 recognizes the past and current bargained-for commitments. Unions, on

[2] Consider the following example: as of the date of the application, the plan has $100 million in plan assets. The actuary determines that of that amount, $25 million of plan assets will be needed to pay post-2051 benefit payments to current participants, leaving $75 million available to pay pre-2051 benefit amounts. To determine the amount of special financial assistance, the actuary would use in her calculation $75 million in plan assets and future contributions projected through 2051. The $25 million in plan assets needed to pay post-2051 benefits to current participants would be invested and reserved to pay benefits in the plan year beginning in 2052 and thereafter.

behalf of employees, bargain with employers over employees' compensation packages. Compensation packages include wages and contributions made by employers to the multiemployer pension plan and other benefit plans. In the case of financially-troubled pension plans, the bargaining parties have taken measures to help put the plan in a better financial position so that the plan may continue on in to the future. To do that, employers increased contributions and active participants saw their wages decreased over time so that additional money could be paid into the plans. This bargained-for "shared sacrifice" was necessary, despite other measures also taken under rehabilitation plans, to allow for the funding of past liabilities. Interpretation 2 recognizes these past and current "shared sacrifices" and helps ensure that the benefit of that bargain, the continuation of the plan beyond 2051, is realized.

Interpretation 3: The actuary is required to complete a 30-year projection of current plan assets using the plan's 2020 zone status assumptions (as required under Sec. 4262(e)(2)) subject to the interest rate limit (as described under Sec. 4262(e)(3)). The actuary is then required to perform a full cash-flow analysis to determine the minimum amount of additional assets needed to pay all benefits under the plan through the 2051 plan year, including all benefits accrued under the plan as of the application date, all future accruals, as well as all future benefits accrued by new participants coming into the plan. The present value of the additional assets is the amount of special financial assistance that may be provided.

Comments on Interpretation 3:

- Interpretation 3 is designed to fail. At best, special financial assistance would provide plans with sufficient assets to pay benefits to participants for 30 years. If reality matches the projections, each of these plans would become insolvent at the close of the 2051 plan year (or far earlier, depending on the interpretation of the interest rate limit as discussed in the next section and the actual experience of the plans). As of 2052 (or earlier), the PBGC would be required to assume responsibility for providing benefits at guaranteed levels, to the detriment of the plans' participants and beneficiaries, the PBGC, and the multiemployer pension system overall.
- Interpretation 3 is inconsistent with Congressional intent. Congress intended a permanent solution to the current pension crisis. Interpretation 3 merely pushes the crisis off for a period of something less than 30 years.[3]
- The time-limited relief provided by Interpretation 3 strongly discourages new employers and new groups from participating in multiemployer plans and encourages existing employers to withdraw. Rather than bargaining into a plan that faces a 30-year funding cliff, the parties are more likely to bargain into alternative plan types, including defined contribution plans, that

[3] The following is an excerpt from the floor statement made by Majority Leader Schumer on March 5, 2021 regarding ARPA:

> 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.

offer less pension security to participants and retirees. At the same time, active employees likely will not support a plan that they know will not provide the benefits they were promised, and will pressure their employers to withdraw.

- If Interpretation 3 is adopted, some plans eligible for financial assistance may not receive any relief. Many critical status plans that are eligible for special financial assistance currently have sufficient assets to pay benefits for 30 years using pre-pandemic assumptions. These plans would receive no financial assistance whatsoever.

2. Actuarial assumptions under Sec. 4262(e)

Issue: To determine the amount of financial assistance required, Sec. 4262(e) provides that the plan actuary must use the interest rate assumption used in the plan's 2020 zone certification, subject to an interest rate limit. In the event the interest rate assumption used in the plan's 2020 zone certification is lower than the interest rate limit, the lower rate is to be used. (It appears that for most plans, the interest rate limit would apply.)

Sec. 4262(l), however, places restrictions on the use of special financial assistance, including that the amounts received must be segregated and invested in investment-grade bonds or as otherwise provided by the PBGC. Sec. 4262(e) on its face requires that the lesser of the interest rate assumption used on the plan's 2020 zone certification or the interest rate limit be used to determine the amount of the benefits that the plan's existing assets are expected to provide. Use of that same interest rate to discount the present value of the benefits not expected to be provided by current assets, however, is inconsistent with the investment restrictions provided in Sec. 4262(l) applicable to the segregated proceeds of the financial assistance, which would be expected to earn far less. This would lead to funding shortfalls and plan insolvencies well before 2051.

> **Sec. 4262(e) Actuarial Assumptions.—**
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> * * *
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> (2) Amount of Financial Assistance.--In determining the amount of special financial assistance in its application, an eligible multiemployer plan shall—
>
> > (A) 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; and
> >
> > (B) for other assumptions, 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
>
> (3) Interest Rate Limit.—The interest rate limit for purposes of this subsection is the rate specified in section 303(h)(2)(C)(iii)(disregarding modifications made under clause (iv) for such section) for the month in which the application for special financial assistance is filed by the eligible multiemployer plan or the 3 preceding months, with such specified rate increased by 200 basis points.
>
> * * *
>
> **Sec. 4262(l) Restrictions on the Use of Special Financial Assistance.—**Special financial assistance received under this section and any earnings thereon may be used by an eligible multiemployer plan to make benefit payments and pay plan expenses. Special financial

assistance and any earnings on such assistance shall be segregated from other plan assets. Special financial assistance shall be invested by plans in investment-grade bonds or other investments as permitted by the corporation.

Approach 1: No plans had segregated proceeds of special financial assistance at the time of their 2020 zone certifications. As such, 2020 zone certifications do not include an interest or other discount rate assumption for such proceeds. Accordingly, PBGC's guidance should clarify that the interest rate limit described under Sec. 4262(e)(3) does not apply to the discount rate used to determine the amount of financial assistance required to pay for the benefits not provided by current assets.

Comment on Approach 1: The interest rate limit (currently approximately 5.5%) as described under Sec. 4262(e)(3) used to determine the required amount of special financial assistance is in contrast to the investment rate return available to be earned by special financial assistance. Sec. 4262(l) requires that special financial assistance amounts be invested in investment-grade bonds or as otherwise permitted by the PBGC. The investment return rate on investment-grade bonds is significantly below 5.5%, and even at long durations is typically no more than half of that rate. Significantly, many qualifying investments (for example, U.S. Treasuries) today earn negative real-returns (yield minus inflation), which, over time, means that the investment is losing its future purchasing power needed to honor the plans future benefit payments. The requirements of Sec. 4262(e) and Sec. 4262(l), therefore, create a mismatch of the interest rates that is likely to create a significant funding shortfall.[4]

To avoid this, PBGC's guidance should clarify that, in determining the amount of required special financial assistance, plans may bifurcate assumptions used for different purposes as described above.

The statutory requirements of §4262(e)(2) and (3) for the interest rate assumption should be used to project the value of the benefits expected to be paid by plan assets. However, to determine the value of the shortfall required to be funded by financial assistance, the plan's actuary must be able to select a discount rate that is consistent with the investment restrictions imposed on the segregated proceeds of that assistance – that is, investment-grade bond rates.

Approach 2: Require that the interest rate used to project investment returns on current assets (that is, cash flows to determine the depletion point of plan assets under *Funding target*, Interpretations 2 and 3) be used to discount the present value of the remaining, unfunded benefits.

Comment on Approach 2: Unless the PBGC dramatically expands the range of permitted investments for the segregated proceeds of the financial assistance to include higher-yielding, riskier assets, this approach would ensure that the vast majority of plans would fail by the end of the 2051 plan year, if not before. This is directly contrary to the intent of Congress and is not required by the language of the statute. Section 4262(e)(3) provides restrictions on the "interest

[4] Consider the following example: the actuary projects, using the assumptions required under §4262(e)(2) and (3), that plan assets total $90 million and, projected forward at the statutorily required rate, those assets will run out in 2048; the amount necessary to pay benefits through the 2051 plan year is an additional infusion that will provide $5 million for benefits in each of the last three years. To determine the present value of the $15 million needed in financial assistance, the plan actuary applies a discount rate to the amounts that are needed in special financial assistance using his or her best estimate of the return that those assets will earn. The discount rate used by the actuary will reflect the return rate for current investment-grade bond rates because, as required ERISA §4262(l), special financial assistance amounts must be invested in investment-grade bonds.

rate", which suggests that it is referring to the expected rate of return for the existing assets of the plan. Furthermore, there were no segregated proceeds of special financial assistance in any of these plans at the time of their 2020 zone certifications, so, necessarily, that zone certification did not have an interest or other discount rate for them.[5]

B. Eligibility

1. Sec. 4262(b)(1)(A), (e)(1)(assumptions other than the discount rate)

Issue: For certifications beginning in 2021, plans are required to use the assumptions used for the 2020 certification of zone status, unless they are unreasonable. If the assumptions are no longer reasonable, the PBGC and Treasury review the changes and must approve them unless they are unreasonable. This appears to set a high standard of deference to a plan's selection of assumptions, and is consistent with Congress's intent that the application process be efficient to provide timely relief to troubled plans.

Approach 1: Acknowledge the deference given to the plan's selection of assumptions, and add an additional presumption that industry-activity related assumptions and other assumptions that have been affected by the pandemic are not unreasonable.

Comment on Approach 1: Assumptions relating to industry activity, including employment and amount of contributions, will need to change in those industries even modestly hit by the pandemic. Furthermore, guidance to the actuary in the selection of industry assumptions is currently entrusted to the plan sponsor (in nearly all cases the board of trustees) for zone certification purposes, precisely because it is within the plan sponsors' area of expertise. Certain other actuarial assumptions, such as retirement rates, have been affected by the pandemic as well. Both the high level of deference and the added presumption for industry and pandemic-related changes are entirely consistent with the statute and the intent of Congress to address the effects of the pandemic.

Approach 2: Acknowledge the high standard of deference, without any additional presumptions.

Comment on Approach 2: While also consistent with the statutory language, this does not fully reflect either Congressional intent or the reality of the impact of the pandemic.

2. Provisions of Rehabilitation Plan for purposes of post-2020 certifications

Issue: Plan sponsors are not only permitted, but required to modify their Rehabilitation Plans on an ongoing basis to reflect changed realities. May plans modify their Rehabilitation Plans from the terms in place for the 2020 zone certification for purposes of ascertaining whether the plans are in critical or critical and declining status for purposes of determining eligibility?

Approach 1: Yes, with notice to the PBGC.

Comment on Approach 1: Under existing law, plan sponsors are required to annually adjust their Rehabilitation Plans. Sec. 305(e)(3)(B). There is nothing in ARPA that prohibits such changes, as they are not "assumptions", but the substantive terms adopted by the plan sponsor. Nevertheless,

[5] This interpretation of the statute is also consistent with Section 3.9 of Actuarial Standard of Practice No. 27 (June 2020), which explicitly provides that the "primary factor" in selecting a discount rate is the purpose for which it will be used.

because there is some possibility of abuse, such changes should be highlighted to the PBGC in order to avoid abuse.

Approach 2: No, plans should not modify their Rehabilitation Plans from the terms in place for the 2020 zone certification.

Comment on Approach 2: This approach is likely beyond the PBGC's authority, as ARPA appears to explicitly permit changes to Rehabilitation Plans following the 2020 zone certification. Furthermore, preventing plan sponsors from modifying their Rehabilitation Plans would effectively lock their plans into provisions that are not sustainable, and deny them the assistance that Congress intended for them to have. In some situations where the plans' current Rehabilitation Plans are particularly onerous, this may also speed up employer withdrawals.

3. Modified funded percentage for purposes of Sec. 4262(b)(1)(C) and (2)

Issue: To determine the modified funded percentage, Sec. 4262(b)(2) requires the use of the plan's "current liabilities (as defined in . . . section 304(c)(6)(D) . . .)." Rather than specifying a rate, Sec. 306(c)(6)(D) provides that the rate is selected by the plan's actuary within a narrow range that changes periodically. Additionally, although the interest rate used to determine whether a plan is in critical or critical and declining status must be the rate used in the 2020 zone certification, this rule does not apply to determining the modified funded percentage (nor could it be, since current liability is not used to determine zone status).

Approach 1: The plan's actuary selects the discount rate, within the permitted range.

Comment on Approach 1: Under the cited sections of ERISA and the Code, the plan's actuary decides what discount rate is used for current liability, provided it falls within the permitted range. Thus, the most logical and literal reading of the statutory language is that the selection of the discount rate for determining current liability under this section is to be determined in the same manner – by the Plan's actuary, provided it is within the narrow range established by the IRS pursuant to Internal Revenue Code ("IRC") Sec. 431(c)(6)(D) and Sect. 304(c)(6)(D).

Approach 2: Require the use of the top end of the permitted range for determining current liability.

Comment on Approach 2: This is not what the statute says and is inconsistent with Sec. 304(c)(6)(D). Furthermore, it is inconsistent with Congress's clear intent to provide a solution that protects these plans, and would arbitrarily exclude some plans that need assistance to survive.

4. Timing under Sec. 4262(b)(1)(C)

Issue: The statute does not state whether the ratio of active to inactive participant threshold and the modified funded percentage threshold must be met in the same year.

Approach 1: The ratio and percentage criteria must be met within the same plan year.

Comment on Approach 1: While the statutory language may be read either way, the most logical reading of the statutory language is that Congress intended these two criteria to be met within the same plan year. This is the narrower approach that will result in excluding plans that otherwise might be eligible for assistance. Nevertheless, we recognize that this likely reflects the actual intent of Congress.

Approach 2: The ratio and percentage criteria do not need to be met within the same plan year, provided they are each met sometime within the three plan years beginning on or after January 1, 2020.

Comment on Approach 2: This approach is consistent with the statutory language and it would result in an increased scope of eligible plans. Nevertheless, it is likely not what Congress intended.

5. How to count participants for purposes of Sec. 4262(b)(1)(C)

Issue as to date of participant count: The statute does not specify the date on which participants must be counted.

Approach 1: Permit plans to select a date within the measurement period, as well as the most recently filed PBGC premium filing.

Comment on Approach 1: As a result of the pandemic, the number of participants in many plans has been in a state of flux. Allowing plans to select which date to use balances the ease and convenience of using a known number against providing plans the opportunity to select an accurate number that reflects changes caused by the pandemic and other structural issues. This approach clearly reflects the express statutory directive under Sec. 4262(c) to streamline the application process, as well as the clear Congressional intent to address the effects of the pandemic.

Approach 2: Require applicants to use information as of the date of the most recently filed PBGC premium filing.

Comment on Approach 2: While simple, this approach may not be accurate because the data may be out of date, which may impede the ability of eligible plans to get the assistance Congress intended for them to receive. Furthermore, it may impede the application process, since the premium filing for a plan year is made late in the year. This will delay filings and potentially lead to a crush of filings on the PBGC during the months of November and December, following the October 15 deadline for calendar year plans.

Approach 3: Use the most currently available data as of the date of the application.

Comment on Approach 3: This approach would violate the plain language of ARPA, which does not limit eligibility to plans that meet the necessary criteria for special financial assistance as of the date of the application, but extends eligibility to plans that meet the criteria at any time during the three-year eligibility period. Furthermore, plans not in a priority category could be excluded entirely from eligibility, contrary to the plain language of the statute.

Issue as to count method: The statute does not specify how to count participants, and in particular, how to distinguish between active and inactive participants. This becomes more complicated because of a subtle difference between the instructions for Form 5500 and those for the PBGC's premium filing. Whereas the instructions for Form 5500 requires that a plan apply the break in service rules under the plan, the PBGC instructions apply a uniform one-year break in service rule for determining whether non-vested employees previously covered under the plan continue to be considered participants. This distinction both changes the allocation between active and inactive participants and whether separated non-vested participants are counted as participants. Neither approach fully acknowledges the effect of the pandemic on particular industries, where there have been mass layoffs that are expected to be permanent.

Approach 1: Require plans to use the PBGC methodology generally but also allow plans to reflect pandemic-related layoffs that have not yet resulted in breaks in service for purposes of determining whether participants are active or inactive. This means that separated participants who are vested and have had a one-year break in service would be treated as inactive, and separated participants who are not vested would cease to be counted as participants following a one-year break in service. Additionally, plans would have the option to count employees laid off as the result of the COVID-19 pandemic who are vested as inactive prior to suffering a one-year break in service.

Comment on Approach 1: This approach both streamlines the application process consistent with the statutory directive, since plans are not required to adjust their numbers from the ones previously filed, as well as achieves the explicit Congressional intent of addressing the impact of the pandemic. Importantly, neither ARPA nor the PBGC's premium filing reports define the terms active and inactive. For PBGC purposes generally, premiums are payable on the same basis for active and inactive participants, so that the PBGC has had no cause to establish a definition before now. This gives the PBGC broad discretion in defining these terms for purposes of determining eligibility for special financial assistance.

Approach 2: Require plans to use the PBGC methodology.

Comment on Approach 2: As noted above, the PBGC does not currently distinguish between active and inactive participants. Thus, the PBGC would still have to issue guidance clarifying that the one-year break in service rule applies with respect to that distinction. Additionally, although this approach creates a more uniform standard, it does not fully account for pandemic-related layoffs.

6. Application priorities

Issue: The law permits, but does not require, the PBGC to restrict applications for up to the first two years of the program to plans that meet certain criteria. Nor does it fully flesh out all of the criteria.

Approach 1: Permit priority status for plans meeting the criteria set out in the statute for a fixed period (*e.g.,* one year), with flexibility to either end the period sooner or extend it up to the permitted two years. An additional priority category should also be added for plans that are expected to become insolvent within the next three years and can show that prompt payment will avoid the need to go through the insolvency process. Additionally, the PBGC should publish a list of those plans that it has identified as meeting the $1B potential liability threshold.

Comment on Approach 1: Including a priority scheme is a very good idea, particularly for plans that are facing imminent insolvency. There are several plans that may fail during any period of delay, and others where participants would be forced to continue to survive on reduced benefits, either as of the result of a suspension or a reduction to guaranteed levels due to plan insolvency. This would also lead to an unnecessary drain on the PBGC's guarantee fund. Priorities are a way to ameliorate this problem, while also allowing the PBGC to even out the flow of applications and give it more time to make the program fully operational.

Publishing the list of plans potentially meeting the $1B liability criteria would eliminate confusion, reduce costs to plans in determining eligibility, and significantly streamline the priority application process.

Approach 2: Do not adopt any priorities.

Comment on Approach 2: We have concerns that this may result in the PBGC being inundated with a crush of applications and the need to meet the statutory approval deadline, which may result in mistakes and, in particular, arbitrary denials of assistance to eligible plans. Additionally, as noted above, some plans cannot afford to wait for assistance, while others are better able to continue without assistance for an additional few years provided that once a plan has met the eligibility requirements it remains eligible for special financial assistance.

7. PBGC financial assistance for current insolvent plans: repayment

Issue: How should an insolvent plan that applies for special financial assistance reflect the repayment of "standard" financial assistance?

Plans that became insolvent after December 16, 2014, have remained insolvent, and have not terminated as of the enactment of ARPA are eligible for special financial assistance. In addition, plans meeting other eligibility requirements may become insolvent prior to receiving special financial assistance. Until the application for special financial assistance is approved and those funds are received, these insolvent plans would receive "standard" PBGC financial assistance, which provides benefits to retirees and beneficiaries up to guaranteed benefit amounts. Under Sec. 4261(b)(2), a plan receiving "standard" financial assistance is required to repay such assistance to the PBGC.

Approach 1: The PBGC discharges the entirety of an eligible plan's repayment obligation for "standard" financial assistance when approved for special financial assistance.

Comment on Approach 1: Under this approach, a plan is not required to repay its obligation for "standard" financial assistance.

Approach 2: The PBGC requires repayment, in some capacity, of the "standard" financial assistance and such repayment is considered a plan expense that is reflected in the determination of the amount of financial assistance.

Comment on Approach 2: Under this approach, a plan is required to pay for all, or a portion, of its "standard" financial assistance payment obligation, consistent with current law. The amount necessary to repay this obligation is included in the amount of special financial assistance provided. This approach has the added benefit of helping to restore some of the depleted PBGC multiemployer guarantee fund.

Approach 3: The PBGC requires repayment, in some capacity, of the "standard" financial assistance and such repayment is not considered in the determination of the amount of financial assistance.

Comment on Approach 3: Depending on other interpretations of the law, this approach could result in the plan becoming insolvent much sooner than 2051; this is inconsistent with the language of the statute.

III. Post-Assistance Issues

A. Withdrawal liability

Issue: The statute does not have any provision dealing with the effect of the special financial assistance on the liability of employers who withdraw subsequent to the year in which the assistance is received. The House bill provided that there would be no effect for the first 15 years,

at which time the assistance becomes fully realized for withdrawal liability purposes. This provision was stripped from the Senate bill as being non-germane under the Byrd rule. Because the PBGC has express discretionary authority under Sec. 4262(m)(1) to impose conditions relating to withdrawal liability on plans that receive assistance, the PBGC has some flexibility, subject to existing law.

Approach 1: Phase-in recognition of the proceeds, for example, in level amounts over the period ending with the end of the last plan year beginning in 2051, and provide a simplified method for applying such phase-in.

Comment on Approach 1: This approach has the benefit of creating the right incentives – in general, employers would have an incentive to remain in the plan for as long as possible while the unfunded vested benefits (UVBs) decline. However, it is important to note that in some circumstances and, depending on other restrictions introduced on contributions, the long recognition of special financial assistance may lead some employers to determine that it is more cost effective to withdraw than to remain in the plan. Under this approach, as a condition for receiving financial assistance, plans would be required to adopt an appropriate amendment to their withdrawal liability rules.

Approach 2: Do not recognize any of the financial assistance proceeds for the first 15 years, and recognize all assistance at the start of year 16.

Comment on Approach 2: While delaying the recognition of the special financial assistance will provide incentives for some employers to remain in the plan for 15 years, there is no magic to sudden recognition in the 16th year, and the net result may be a mass exodus of employers in that year. Nevertheless, this is a compromise approach that Congress sought to adopt to address the concerns of contributing employers. The lack of any reduction in UVBs for the first 15 years, however, may have the paradoxical effect of encouraging employers to withdraw as soon as possible rather than bear the burden of potentially increased contributions over that 15-year period.

Approach 3: Immediately recognize the financial assistance proceeds.

Comment on Approach 3: This would be very bad policy, as it would incentivize employers to immediately withdraw, particularly if contribution rates continue to increase. This would undermine and destabilize the system, and is not what Congress intended.

B. Benefit improvements

Issue: Other than with respect to suspended benefits, ARPA does not provide any parameters for when plans that have received financial assistance should be permitted to increase benefits, whether prospectively or retroactively. Presumably, these parameters would also apply to any restoration of adjustable benefits that had previously been reduced under Se. 305(e)(8). The PBGC has discretionary authority under Sec. 4262(m)(1) to adopt rules in this area.

Approach 1: Impose no additional restrictions on benefit improvements beyond what is currently provided for under applicable law.

Comment on Approach 1: Because ARPA provides that plans that have accepted financial assistance will remain in critical status through the end of the plan year beginning in 2051, such plans are already subject to restrictions on benefit increases (including with respect to restoring adjustable benefits previously reduced or eliminated) under Sec. 305(f)(1)(B), *to wit* any benefit

increases must be paid from contributions not contemplated under the Rehabilitation Plan and the improvements will not delay the plan's emergence from critical status under its Rehabilitation Plan, which, under Sec. 4262(m)(4), could not be prior to the end of its 2051 plan year.

For plans operating under amortization extensions, Sec. 302(c)(7) prohibits benefit improvements absent an IRS determination that the improvement is both reasonable and *de minimis*, a determination that requires a plan to expend $10,000 to pay the user fee to obtain a private letter ruling. Rev. Proc. 2021-4, App. A., Category .01(4), 2021-1 C.B. 239. These requirements are already strict, and although the PBGC may wish to note them in the guidance issued, no additional restrictions should be imposed.

Additionally, in distressed plans, participants have suffered from onerous reductions, both in terms of the reduction of accrued adjustable benefits and future accruals, most of which have fallen on the active workforce. Allowing benefit increases from these low levels (where otherwise permitted under the already strict existing standards) will have the effect of demonstrating to the active employees why they should continue to support their plans.

Approach 2: Prohibit any increases.

Comment on Approach 2: Current accrual rates in many of these troubled plans have dropped dramatically. Even though a default program of benefits under a Rehabilitation Plan may not be reduced below 1% of contributions, that contribution baseline is determined without consideration of contribution rate increases required under the Rehabilitation Plan. That means that it is common to see accrual rates of less than 0.3%. Since employer contributions are essentially a type of compensation that potentially would be available to the employees as wages or other benefits, these employees are receiving very little value for their lost compensation. Without the prospect of benefit improvements, employees are unlikely to continue to tolerate the significant loss of wages and will demand that their employers withdraw from these plans. This would have a destabilizing effect on the multiemployer system.

C. Contribution rate freezes, reductions, and diversions

Issue: Sec. 4262(m)(1) allows the PBGC to impose conditions on plans that have received financial assistance with respect to reductions in employer contribution rates, but provides no criteria. It is silent on contribution rate increases, including those that have not yet taken effect under Rehabilitation Plans and existing collective bargaining agreements.

Approach 1: Permit adjustment of future increases and impose a reasonable floor on rate reductions, such as normal cost, as determined under the unit credit funding method including administrative expenses, plus 20%. Furthermore, the so-called diversions of contributions to other plans should be treated in the same manner as other contribution rate reductions.

Comment on Approach 1: Deeply troubled multiemployer plans often build rehabilitation plans that contemplate aggressive, compounding contribution rate increases. Such increases are detrimental to the long-term financial wellbeing of: employers (because increasing amounts of their income stream are devoted to employees' wage/benefit packages), employees (because increasing amounts of their wage/benefits packages are devoted to paying for retirees' benefits) and the plans (because the pressures faced by employers and employees as just described factor into the decision of whether employers and employees remain in the plans). To help ensure that plans are stable in the long term, we encourage the PBGC to work to restore the delicate balance

needed between the contributions that are paid into a pension plan, the cost of the benefits already earned, and the benefits that the active participants earn going forward.

Allowing plans to adjust future contribution rates has the benefit that it reflects the impact of ever-rising contribution rates on plans, their participants, and their contributing employers. By contrast, Approach 3 (below) would only lead to the additional deterioration of these troubled plans, at the expense of their participants and the contributing employers. This is especially true in declining industries and industries on which the pandemic has taken a heavy toll. The employers are becoming increasingly less viable as their cost of supporting these plans has increased. Participants suffer as well, because excessive pension contributions represent amounts that could otherwise be available to be paid as wages or other benefits. Taken together, these factors will adversely affect the long-term viability of the contributing employers and push both employers and employees to seek to withdraw from these plans. The net effect would be an overall decline in contributions, largely attributable to the excessive contribution rates.

Where plans can afford it, and particularly where actual contributions would be likely to decline due to reduced employment, these employers and active employees need relief. Employers would not, of course, be permitted to take such relief unilaterally, but would remain bound to their collectively bargained commitments and the terms of a plan's Rehabilitation Plan. In the case of collective bargaining agreements, modifications or future reductions would require the agreement of the union, and in the case of the Rehabilitation Plan, the plan sponsor, typically the plan's board of trustees, would have to modify the rates set out in the Rehabilitation Plan.

Approach 2: The same as Approach 1, except that the PBGC would need to be consulted about rate reductions. The PBGC could establish guidelines such that conditions for each plan are developed in consultation with the PBGC and the plan or in response to the application. In that way any restrictions or reductions would be tailored specifically to that plan.

Comment on Approach 2: Although this provides an additional layer of protection to ensure the viability of the plans, it is also likely unnecessary based upon the existing requirements applicable to plans in critical status. Additionally, it would impose an ongoing administrative burden on the PBGC.

Approach 3: Prohibit any reductions and require all previously scheduled increases.

Comment on Approach 3: This is bad policy in that it fails to recognize the growing burden on the employers that support these plans and on their employees. Furthermore, it would likely result in long-term harm to the plans, their participants, and the employers because it would ultimately reduce contributions to the plan, either because of increased employer withdraws or because of reductions in industry employment.

D. New groups and new employers

Issue: The statute is silent as to the treatment of new groups and new employers, whether for purposes of withdrawal liability, employer contribution rates, or benefit levels.

Approach 1: Impose no additional restrictions beyond what is already required under existing law. Thus, plans would be permitted to create new pools for withdrawal liability for new employers where currently permitted under ERISA and the PBGC's regulations, and allow different contribution rates and benefit levels for new bargaining units.

Comment on Approach 1: Existing law permits plans, other than plans in the building and construction industry, to adopt multiple withdrawal liability pools, subject to PBGC approval. Plans that receive special financial assistance should not be treated differently. Trustees should have the same tools to try to attract new employers and new groups, since that is the way to build long-term sustainability for these plans.

Approach 2: Require the same terms for the participation of new groups and employers as for the old.

Comment on Approach 2: This would virtually guarantee that no new employers would join any of these plans. If these plans are to fully recover, they will need to be able to attract new employers and new bargaining units.

E. Allocation of expenses

Issue: Sec. 4262(m)(1) grants the PBGC authority to regulate the allocation of expenses between a plan that has received assistance and other employee benefit plans, but does not provide any explanation of what that means.

Approach 1: Permit the practice of sharing administrative costs among plans as it has been practiced in the past.

Comment on Approach 1: The sharing of administrative services and other expenses between employee benefit plans is a proven and effective means of reducing costs and achieving efficiencies. It is also highly regulated by the Department of Labor (see especially PTE 76-1 and 77-10) and is subject to fiduciary scrutiny under Secs. 404 and 406. There is no good reason to increase that level of regulation, which would impose a new, 30-year burden on the PBGC to regulate an area that is already highly regulated.

Approach 2: Require annual reporting of cost-sharing arrangements.

Comment on Approach 2: As noted above, the sharing of administrative services and other expenses between plans is already heavily regulated and no further changes to the requirements regarding such arrangements are necessary. It would also impose an additional, potentially costly, and unnecessary administrative burden on the plans.

F. Investments and asset allocation

Issue as to asset allocation: Sec. 4262(m)(1) authorizes the PBGC to regulate how a plan that has received special financial assistance should allocate its assets.

Approach 1: Allow plan fiduciaries to manage the plan assets that are not included in the segregated proceeds of the financial assistance as if the segregated financial assistance proceeds are included in the fixed-income allocation of the existing plan assets.

Comment on Approach 1: The investment-grade bond category is particularly damaging as an asset class in today's environment because the net impact of the Federal Reserve's actions and policies is the dramatic lowering of yields on fixed income securities. Throughout the yield curve, investment-grade fixed income securities are actually producing negative real yields (yield minus inflation). For example, the 10-year Treasury was producing a negative real yield of 74 basis points on March 19th, which means that it would lose more that 7% of its purchasing power over the 10-

year term. This is before the segregated special financial assistance fund has incurred any investment expense required to purchase, manage, or dispose of its segregated investments.

Given this environment, we believe that the PBGC should issue guidance that allows trustees to consider the segregated special financial assistance fund as an allocation to the fixed income asset class as part of the plan's non-segregated assets. This holistic approach would allow trustees to reduce their fixed income allocation in the plan's non-segregated assets, allow more return-seeking investments consistent with a long-time horizon, and avoid the otherwise likely scenario of the plan running out of money before 2051.

Approach 2: Require that plan fiduciaries manage the plan assets that are not included in the segregated proceeds of the financial assistance without regard to the segregated financial assistance proceeds.

Comment on Approach 2: The investment of plan assets is subject to strict fiduciary scrutiny, and there is no need to increase the level of scrutiny beyond what is currently in place. The law is, however, unclear whether the obligation to appropriately diversify plan assets would require plan fiduciaries to take into account the assets of the plan as a whole or permit them to invest the non-segregated plan assets in a manner that does not take into account the segregated financial assistance proceeds. Requiring that these two pools of assets be considered separately does two things. First, it provides clarity to plan fiduciaries that they are not required to invest the non-segregated assets of the plan in securities designed to counterbalance against the conservatively invested segregated assets. Second, it reflects ARPA's clear intent that the proceeds of financial assistance be invested in a more conservative manner than other plan assets. However, this approach is likely to overweight low yielding securities with real negative returns when viewed as a combined portfolio and result in the plan being unable to meet its obligations through 2051, and therefore should be rejected.

Issue as to types of investments permitted: Section 4262(l) allows the PBGC to specify the additional types of investments permitted for the segregated proceeds of financial assistance.

Approach 1: Permit plan fiduciaries to invest the segregated proceeds of financial assistance in a broad range of investment-grade bonds and other assets with similar risk characteristics.

Comment on Approach 1: This approach achieves the Congressional goal of ensuring that the proceeds of financial assistance be invested more conservatively than what ERISA's ordinary prudence and asset diversification would normally require. There are serious flaws in the approach taken in the statute. Given that (1) investment-grade bonds are exposed to both mark-to-market volatility as well as a current environment that produces real negative yields, and therefore the loss of purchasing power, and (2) the term is subject to some imprecision in the financial markets, the PBGC should exercise the authority provided under ARPA to provide guidance or regulations on the "or other investments permitted". This should be done with recognition that the overarching intent of Congress is to provide the necessary funding for the period through the plan year ending in 2051. Further, that negative real yields by definition mean that a 30-year calculation assuming a positive yield will actually provide less than 30-years of funding. We suggest consideration of a permitted investment list as attached in Appendix 1, and allocation limits to return seeking investments.

We also believe that the PBGC should clarify the procedure in the event that a security becomes non-investment grade after its purchase. Specifically, that fiduciaries should have flexibility to

continue to hold bonds that are downgraded for a reasonable amount of time before liquidating. Downgrade based forced selling often creates supply-demand imbalances that negatively impact price, and these bonds may recover within a reasonable time frame.

Finally, the expected return on the permitted investments must be consistent with the discount rate used to determine the amount of required financial assistance (*See Actuarial Assumptions under Sec. 4262(e)).* Thus, it is imperative that Approach 1 to the *Actuarial Assumptions under Sec. 4262(e)* be adopted in order for this approach to be viable, and not result in a program that is designed to fail.

G. Mergers

Issue: Prior law grants the PBGC authority over mergers between multiemployer plans. The new law raises the question how the PBGC will treat mergers involving one or more plans that have received financial assistance.

Approach 1: Impose no additional restrictions or burdens beyond what is already embodied in existing law.

Comment on Approach 1: Congress has established a policy of encouraging plan mergers as a means of increasing efficiencies and improving plan stability. Mergers may also be desirable following a merger of sponsoring unions so that all employees represented by the new employee organization are covered by the same plan. Furthermore, the PBGC has extensively regulated this area. There is nothing in the new legislation that changes this. This approach is also the simplest one to administer, both for the plans and for the PBGC. Furthermore, mergers under existing rules are beneficial to all involved, and will only help to ensure their continued solvency well past 2051.

Approach 2: Permit plan mergers but require that the segregated proceeds of the special financial assistance remain available solely to provide benefits for the groups attributable to the plan or plans that originally received the assistance.

Comment on Approach 2: It is not clear that this approach furthers any desirable goal. The overarching goal of the legislation is to avoid plan insolvencies. Imposing additional conditions and burdens on plans merely because one or more of them have received special financial assistance would only discourage mergers, which would harm the affected plans, including both the plans that have received financial assistance and merger candidates that have not.

Approach 3: Prohibit mergers of plans that have received financial assistance.

Comment on Approach 3: This approach runs directly contrary to the Congress's and the PBGC's two clear goals of facilitating mergers and preventing plan insolvencies. It would increase administrative costs by eliminating the efficiencies inherent in plan mergers and prevent the types of risk-sharing inherent in plan mergers that promote long-term stability. This approach is also directly contrary to the Congressional directive that this legislation not leave plans in a worse condition because they took assistance. Some of these troubled plans, particularly smaller plans, will become unsustainable as their participant populations decline in the absence of a merger.

Approach 4: Require plans that merge to repay any unexpended financial assistance proceeds.

Comment on Approach 4: In addition to the fact that it is unclear that the PBGC has the statutory authority to impose such a condition, it is bad policy. It will discourage troubled plans from seeking

the special financial assistance for which they are eligible, as well as impede mergers that would be beneficial to all parties involved, both at the expense of their participants and beneficiaries.

H. Partition

Issue: Although the statute prohibits plans that receive financial assistance from subsequently obtaining suspensions, there is no such restriction against seeking partition.

Approach 1: Permit partition where otherwise legally permitted without requiring suspensions under MPRA.

Comment on Approach 1: Although existing law requires suspensions prior to partition, some plans do not have suspendible benefits. Since the plans receiving the special financial assistance are prohibited from applying for a MPRA suspension, these plans also do not have suspendible benefits. However, for these plans, there is no legal or policy reason to prohibit partition, since it would preserve part of the plan and reduce the eventual liability of the PBGC under its conventional guarantee program.

Approach 2: Prohibit partition.

Comment on Approach 2: This approach eliminates a potentially useful tool for avoiding insolvency and reducing PBGC liability should a plan that received special financial assistance ultimately find that the assistance was inadequate.

IV. Coordination with Treasury

A. Applications from plans that have taken suspensions

Issue: Sec. 4262(n)(1)(A) requires the PBGC to consult with Treasury regarding the manner in which the required reinstatement of suspended benefits is performed (whether in a lump sum or over five years), as well as more generally to ensure that the amount of financial assistance provided to these plans is sufficient for them to remain solvent through at least 2051. How that consultation is to occur is not specified.

Approach 1: Consult with Treasury to establish guidelines and procedures that require appropriately conservative assumptions to ensure that the amounts provided to plans with suspensions are adequate to ensure that suspended benefits are fully restored and that such restoration will leave the plan healthy at the conclusion of the statutory period. This will appropriately delegate any required authority to make the necessary determinations under Sec. 305(e)(9)(E).

Comment on Approach 1: Under existing law, the IRS has authority to regulate, and to make certain determinations, regarding the restoration of suspended benefits. Treasury's general duty in exercising this authority is to ensure that benefit restorations, as well as other benefit improvements by plans that have taken suspensions, do not jeopardize the health of the plan. Because the requirement that plans accepting financial assistance restore suspended benefits is fixed by statute (other than with respect to whether they are restored immediately or over five years[6]), Treasury's

[6] Sec. 4262(k)(1) (and IRC Sec. 432(k)(1)(B)) require that Treasury issue guidance as to the reinstatement of benefits that were suspended under Sec. 305(e)(9). Although ARPA does not impose a deadline for Treasury to issue

role is to help ensure that sufficient assets are provided to the plan to ensure the same outcome – these plans' continued financial health. For this reason, the negotiated guidelines should consist of floors to ensure that sufficient sums are transferred. Additionally, because of the extremely tight time frames imposed by the statute, and its explicit directive that the determinations be made by the PBGC rather than by Treasury, it would be impractical for Treasury to make case-by-case determinations. Therefore, guidelines and delegations of authority appear to be the approach most consistent with Congress's directives and intent.

Approach 2: Consult with Treasury on each application received from a plan that has taken a benefit suspension.

Comment on Approach 2: As noted above, this approach would introduce unnecessary delay into the process, which would make it difficult or impossible for the PBGC to ensure that the statutory deadlines are met.

B. Changes in assumptions

Issue: Sec. 4262(e)(1) and (4) permits plans to change assumptions, other than the interest rate assumption for non-segregated plan assets, for both eligibility purposes and determining the amounts required in financial assistance, which the PBGC must accept unless they are unreasonable or clearly erroneous depending on the purpose. Section 4262(n)(2) requires the PBGC to consult with Treasury regarding such changes, but solely with respect to the amount of assistance provided, not with respect to eligibility. The statute does not specify what level of consultation is required.

Approach 1: Consult with Treasury in establishing guidelines regarding appropriate changes in assumptions. Any such guidelines must be consistent with the express statutory directive that the PBGC accept proposed assumption changes unless it determines that they are unreasonable. *See* ***Error! Reference source not found.***.

Comment on Approach 1: As previously noted, the deadlines under Sec. 4262(g) are very tight: 120-days to make a ruling on the application and one year from approval to disburse the assistance. Additionally, some assumption changes – particularly those that reflect the effects of the pandemic – will be necessary in a large number of cases, perhaps even a majority of cases. Consultation in individual cases will unnecessarily slow things down. Furthermore, these are determinations required to be made by the PBGC and not Treasury. For these reasons, guidelines, particularly guidelines specifying when proposed changes are automatically approved (for example, the adoption of a standard mortality table or projection scale), may be helpful, and should be issued developed within the 120-day period but in no event should they impede the process of delivering financial assistance.

Approach 2: Consult with Treasury on each request to change assumptions.

Comment on Approach 2: As noted above, this would inevitably delay the process, contrary to the dual directives of Congress that the determinations be made by the PBGC and that they be made on a timely basis. Furthermore, the PBGC has the expertise to make any required determinations and to implement any established guidelines.

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such guidance, it would be helpful to plans if Treasury issued its guidance within the 120-day time period required for PBGC guidance.

C. Insolvency or funded status determinations: whether an application satisfies a priority criterion

Issue: Sec. 4262(n)(3) requires the PBGC to consult with Treasury to determine whether plans meet the criteria for priority under Sec. 4262(d) based upon either insolvency or funded status.

Approach 1: Consult with Treasury on establishing guidelines for determining whether a plan is insolvent or that it meets separate priority criteria based upon a plan's funded status under Sec. 305.

Comment on Approach 1: Congress specifically authorized the PBGC to grant priority to certain plans for which any delay in financial assistance could be particularly harmful, whether it is to prevent draconian, if temporary, benefit reductions, to prevent unnecessary expenditures under the program that could have been avoided through prompt payment, or for other reasons. The adoption of appropriate criteria and guidelines in these two areas could be helpful in expediting the process of delivering such assistance.

Approach 2: Consult with Treasury on each priority application related to insolvency or funded status under Sec. 305.

Comment on Approach 2: For all the reasons stated above, such case-by-case consultation will only engender unnecessary delay. In the case of plans eligible for priority treatment, such delay could be particularly devastating.

V. Issues for Treasury

A. Special financial assistance and minimum required contributions

Issue: The law requires that special financial assistance received by a plan be disregarded when determining minimum funding requirements (IRC Sec. 432(k)(2)(D)(i)). Plans receiving special financial assistance will hold these funds in a segregated account. However, it is unclear whether minimum funding requirements need to be adjusted once special financial assistance is used to pay for plan benefits and expenses.

Approach 1: Plan assets are determined without consideration of the segregated account holding special financial assistance funds. When special financial assistance is used to pay for plan benefits or expenses, an actuarial experience gain will be created in the funding standard account because benefits will have been discharged without an offsetting reduction to plan assets. This actuarial experience gain, equal to the amount of benefits and expenses paid from the segregated account, should be amortized over 15 years.

Comment on Approach 1: This is a reasonable approach that is consistent with the law change and current minimum funding standards.

Approach 2: Similar to Approach 1, plan assets are determined without consideration of the segregated account holding special financial assistance funds. However, actuarial experience gains related to the use of special financial assistance are amortized over an extended period ending in 2051.

Comment on Approach 2: Under ARPA, plans receiving special financial assistance are deemed in critical status through the plan year ending in 2051. This approach utilizes that full period to

amortize the special financial assistance gain in the funding standard account over a period ending in 2051.

Approach 3: Require plans to exclude the impact of special financial assistance in the funding standard account such that no experience gain is recognized, even after special financial assistance is used to pay benefits and expenses.

Comment on Approach 3: This approach will throw the Funding Standard Account out of "balance." Any requirement to separately track the imbalance (through a "reconciliation account" to keep track of assets that have already been paid out) could be administratively burdensome for plans, making this calculation unnecessarily complex and costly. In addition, excluding special financial assistance from the funding standard account long-term would have the impact of eventually requiring employers to pay for the special financial assistance with interest. This is counter to the intent of the legislation, where special financial assistance is a grant that requires no repayment.

B. Clarification as to length of the Rehabilitation Period

Issue. ARPA provides that plans that receive special financial assistance are considered to be in critical status through the end of the 2051 plan year but is silent as whether the rehabilitation period is treated as having been extended for that length of time.

Approach 1: Clarify that the rehabilitation continues to apply until the end of the 2051 plan year.

Comment on Approach 1: As the plan continues to be in critical status throughout the period, the rehabilitation period should be treated as having been extended for as long as the plan is required to remain in critical status. This is entirely consistent with the plain language of the statute and is logical, because the statute effectively delays a plans emergence until the end of the 2051 plan year.

Approach 2: Specify the point at which a rehabilitation period would be considered to have ended.

Comment on Approach 2: This appears to provide no benefit to plans that receive special financial assistance and would cause critical status plans (those with and without special financial assistance plans) to be treated differently.

C. Recognition of losses attributable to the pandemic

Issue. There is no clear rule for how the relief for lost contributions attributable to the COVID-19 pandemic should be applied under Sec. 304(b)(8)(F)(ii), IRC Sec. 431(b)(8(F)(ii).

Approach 1: To the extent that COVID-19 is the primary source for a drop-off in contributions for one or both of the plan years covered by the relief provision, the plan may elect to amortize the loss related to the unexpected decline in contributions over the extended time period afforded by this provision. To create a "COVID Contribution Loss" in a given year that can be amortized, expected contributions (instead of actual contributions) are reflected in the funding standard account reconciliation for that year. The recognition of actual contributions in plan assets at the following actuarial valuation date creates a loss equal to the difference between actual and expected contributions (with interest) that can be amortized over an extended time period. We are happy to provide a spreadsheet example of this calculation on request.

Comment on Approach 1: The funding relief provided under ARPA Section 9703 provides that losses attributable to COVID-19, including reductions in contributions and employment, may be amortized over an extended period. Ordinarily, however, contributions are immediately recognized in the funding standard account as they are received, so that an unexpected decline in contributions does not create an experience loss. Approach 1 creates an experience loss that may be amortized. This is also a straight-forward approach that is easy to apply.

Approach 2: Provide no guidance.

Comment on Approach 2: This approach could have a few effects. At worst, plans would not get the benefit of the statutory relief, which violates the language of the statute. At best, some plans would take self-help and figure out their ways to apply the statute, albeit at the risk of violating statutory funding standards should the Service ultimately conclude that the plan's methodology was inappropriate.

D. Extension of funding improvement and rehabilitation periods under Sec. 9702

Issue: ARPA Sec. 9702 provides that plans may elect to add an additional five years to their funding improvement or rehabilitation periods. Some plans, however, previously extended these periods by the three years permitted under prior law.

Approach 1: Clarify that the additional five years is based upon the number of years remaining in the plan's funding improvement or rehabilitation period, notwithstanding the plan having previously taken the three-year extension.

Comment on Approach 1: This is what the statute says and implements Congress's explicit mandate that plans be permitted to extend their funding improvement and rehabilitation periods by five years.

Approach 2: Apply the additional five years only to the original ten- or fifteen-year period, without regard to any prior extension.

Comment on Approach 2: Effectively, this reduces the statutorily mandated extension from five years to two years for those plans that took the prior extension. This is not what the statute says, and clearly not what Congress intended.

E. Rehabilitation Plan updates and potential excise taxes

Issue: ARPA Sec. 9701 allows the plan sponsor of a plan in critical status to make an election that would effectively absolve the plan sponsor of the annual requirement to update its Rehabilitation Plan for one year while it grapples with the impact of the pandemic. IRC Sec. 4971(g)(3)(B) would ordinarily treat a plan in critical status as having an accumulated funding deficiency if, for 3 consecutive plan years, the plan is not making "scheduled progress" in meeting the requirements under the rehabilitation plan (the so-called "three-strike rule"). How does this new provision interact with the three-strike rule, if at all?

Consider a plan that was certified for 2 consecutive plan years (directly before the pandemic) that the plan was not making scheduled progress in meeting its requirements under the rehabilitation plan Without relief, this plan would likely be forced to update its rehabilitation plan (during or directly after the pandemic) to avoid excise tax issues.

Approach 1: The plan sponsor of a critical status plan that makes this election is deemed, for the year elected, to be making scheduled progress in meeting its requirements under the rehabilitation plan.

Comment on Approach 1: This approach would provide plan sponsors the additional flexibility needed to address the potential impact of the pandemic on their plan.

Approach 2: The plan sponsor of a critical status plan that makes this election "pauses" the three-strike rule for one year.

Comment on Approach 2: Similar to Approach 1, this approach would allow plan sponsors to utilize the intended outcome of this relief provision by not requiring an update to the rehabilitation plan. It provides some flexibility, but might require action in the following year, while the pandemic still may have a significant adverse (but temporary) impact in that industry.

Approach 3: The plan sponsor of a critical status plan that makes this election is not granted any relief from the three-strike rule.

Comment on Approach 3: This approach runs counter to the apparent intent of the relief provision to give plan sponsors more time to address plan funding as a result of the pandemic in certain circumstances.

Appendix 1

Permitted Investments for Special Financial Assistance Segregated Fund

The assets of the Special Financial Assistance segregated account may be invested in fixed income securities denominated in U.S. dollars, including:

1. Securities issued or guaranteed by the U.S. Government, its agencies or government sponsored enterprises, including TIPS and STRIPS;
2. Mortgage-Backed Securities ("MBS"), Collateralized Mortgage Obligation ("CMO") bonds and Real Estate Mortgage Investment Conduit ("REMIC") securities (including Interest-Only and Principal Only strips) issued through or backed by GNMA, FHLMC, or FNMA (including securities collateralized by GNMA, FHLMC, and FNMA MBS);
3. CMO bonds, REMIC securities and private mortgage-backed securities collateralized by residential and commercial mortgage securities;
4. Non-convertible corporate bonds and notes of U.S. and non-U.S. issuers;
5. Asset-backed securities;
6. Private Placement securities issued under Rule 144A;
7. Trust Preferred securities (cumulative preferred stock that is fully taxable);
8. Debt securities (taxable and tax-exempt) issued by state and local governments and their agencies, authorities, and other government-sponsored enterprises;
9. Obligations of non-U.S. governments or their subdivisions, agencies, and government sponsored enterprises denominated in U.S. dollars;
10. Obligations of international agencies and supranational entities denominated in U.S. dollars:
11. Money market securities, including commercial paper and repurchase agreements collateralized with Treasury and Agency securities (including agency MBS);
12. Fixed income Exchange-Traded Funds ("ETF's") that replicate investment grade corporate bond indices;
13. Trusts, pools, and structured securities, backed by securities listed in the categories above;
14. Securities not listed above but included in the Bloomberg Barclays U.S. Aggregate Bond Index, or similar indices;
15. Futures and Options – The assets in the Special Financial Assistance segregated account are permitted to invest in exchange-traded fixed income financial futures and options on such future to adjust portfolio risk exposures such as duration, spread duration, convexity, and slope exposure relative to the indices. Such derivative positions may not be used to create duration exposures that are outside of the duration range stated in the Investment Policy Statement.

Other Permitted Investments Subject to Maximum Allocations to Provide Return and Inflation Protection

The maximum allocation of 6% to each permitted investment as listed below applies to the special financial assistance segregated fund and not to total asset allocation.

1. Bank loans and Collateralized Loan Obligations.
2. Global convertibles.
3. High-Yield securities.
4. Investments in well-diversified portfolio of private first mortgages on commercial properties, including construction loans. Subject to diversification, long-term leases or pre-leases with credit worthy tenants, moderate loan-to-value ratio, high debt service coverage ratio, and significant equity and/or subordinated debt.
5. Investments in infrastructure funds that are open-ended in nature and that provide distributed cash flow.
6. Investments in property funds that are open-ended in nature and that provide distributed cash flow.
7. Publicly traded equities.