Multiemployer Program Update

National Coordinating Committee for Multiemployer Plans
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All remarks are off-the-record and not for attribution.

PBGC Pension Benefit Guaranty Corporation

SFA Update

SFA Overview

- The SFA Program authorized under the American Rescue Plan Act ensures that millions of America's workers, retirees, and their families receive the pension benefits they earned through many years of hard work.

- Additionally, it assists plans by providing funds to reinstate suspended benefits and addresses the solvency of PBGC's Multiemployer Insurance Program, which was projected to become insolvent in 2026.

- PBGC's final rule implements the program and establishes conditions to keep multiemployer plans sustainable long into the future.

- PBGC Final Rule 87 FR 40968 - https://www.govinfo.gov/content/pkg/FR-2022-07-08/pdf/2022-14349.pdf (effective 8/8/2022). (Amended Federal Register Special Financial Assistance by PBGC-Withdrawal Liability Condition Exception effective January 26, 2023)

Special Financial Assistance Expected Reach

The American Rescue Plan Act provides for special financial assistance to enhance retirement security for millions of Americans.

Pension Benefit Guaranty Corporation

SFA Applications – Current Status

(as of September 8, 2023)

	Applications Approved	Applications Denied	Applications in Review**
Number of Applications	98*	1	22
Aggregate $ SFA (approved or requested)	$53.4 billion	$132.2 million	$6.3 billion
Aggregate Participant Count	766,940	1,122	353,478

* Includes 63 full applications and 35 supplemented applications.

** 14 plans have withdrawn their applications and not yet reapplied. In addition,110 plans have submitted requests to be added to the application waiting list,17 of which have since applied.

SFA Application Metering Process

- The priority group application period ended March 10, 2023.
- Due to the extensive review process required for SFA applications, PBGC is limited in the number of applications it can review at any time. SFA regulation includes a metering system that permits the temporary closure of the e-Filing portal until PBGC has capacity to process more applications.
- While the portal is closed, PBGC accepts requests to be placed on a waiting list for plans seeking to apply for SFA.
  - As of September 1, the waiting list includes 110 plans.
- PBGC has provided updates of the intended date the e-Filing portal will be re-opened and has provided advance notice to the plans at the top of the waiting list that will be allowed to apply at that time.
  - To date, 18 plans on the waiting list have been allowed to submit applications, and 17 of those plans have done so.
- Eligible plans that are insolvent or expected to be insolvent within one year of an application retain the ability to submit emergency filings when the e-Filing portal is closed.
- Plans may “lock-in” base data when the e-Filing portal is closed by submitting a pro-forma initial application
  - Base data includes the SFA measurement date, interest rates and participant census data
  - 109 plans have submitted lock-in applications to date.

SFA Application Process Changes

- Applicants are now required to submit a listing of all terminated vested participants (name and social security number only) to facilitate an independent death audit.
  - Plans near the top of the waiting list are invited to send the listing of terminated vested participants to PBGC prior to submitting the application in order to reflect the independent death audit in the initial application.

- PBGC is implementing an expedited reapplication process for applicants that only need to make minor changes.
  - The goal is to complete the review process within 120 days of submission of the previous application.

- With the advent of the waiting list to submit an SFA application, applicants will be limited to two revisions before being required to go to the end of the waiting list.

SFA Permissible Investments

- What does “investment grade” mean in the context of SFA?
  - “Investment grade” is defined in § 4262.14 of the SFA regulation as “securities for which the issuer (or obligor) has at least adequate capacity to meet the financial commitments under the security for the projected life of the asset or exposure.”

- Will PBGC identify whether a particular investment strategy is permissible before a plan invests?
  - No, it is not anticipated that PBGC will provide upfront advice about, or confirmation of, whether a particular asset class, sub-asset class, fund structure or investment strategy is permissible. However, upon review of a plan’s Annual Statement of Compliance or an audit, PBGC may determine that a particular asset is not permissible.

Mergers Involving SFA Plans

- PBGC approval required for multiemployer plan merger involving a plan that receives SFA.

- Transaction must comply with the merger rules under ERISA section 4231.
  - Merger must not unreasonably increase PBGC's risk of loss respecting any plan involved in the merger.
  - Merger is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans involved in the transaction.

- SFA final rule clarifies how the conditions on SFA plans apply to a plan following a merger.
  - Some conditions, including prospective benefit increases, do not apply to a merged plan.
  - Plan meeting specified requirements may request a waiver of certain conditions including retrospective benefit increases.

4213 Proposed Rule

Actuarial assumptions for determining an employer's withdrawal liability

4213 Proposed Rule

- Published Oct. 14, 2022, at 87 FR 62316.
- Comment period closed on December 13, 2022.
- 28 comments received.
- Comments available on PBGC's website at https://www.pbgc.gov/prac/pg/other/guidance/pending-proposed-rules.

4213 Proposed Rule Solicitation of Comments

- Whether the final rule should restrict the allowable options to a narrower range of interest rates or to only specific methodologies for determining interest rates.
    - In particular, should the top of the range of permitted interest rates under section 4213(a)(2) be lower than the typical funding interest rate assumption (which represents the expected return on a portfolio with a significant allocation to return-seeking assets)?
- What should be the relationship, if any, between (a) the estimated date of plan insolvency, expected investment mix, and/or funded ratio, and (b) permitted withdrawal liability assumptions.
- Whether the final rule should specify assumptions or methods other than interest assumptions.
- If PBGC were to specify assumptions under section 4213(a) of ERISA that included demographic assumptions, such as mortality assumptions, that differed from plans' demographic assumptions, would plans be unlikely to use the PBGC assumptions because of those differences? If so, why?
- Comment on any other issue relating to section 4213 withdrawal liability assumptions.

Section 4213(a) of ERISA

- 29 USC 1393(a)

(a) Use by Plan Actuary in Determining Unfunded Vested Benefits of a Plan for Computing Withdrawal Liability of Employer.—The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of —

> **(1)** actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or
>
> **(2)** actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

4213 Proposed Rule

- Proposed 29 CFR 4213.11

§ 4213.11 Section 4213(a)(2) assumptions.

(a) In general. Withdrawal liability may be determined using actuarial assumptions and methods that satisfy the requirements of this section. Such actuarial assumptions and methods need not satisfy any other requirement under title IV of ERISA.

(b) Interest assumption

(1) General rule. To satisfy the requirements of this section, the single effective interest rate for the interest assumption used to determine the present value of the plan's liabilities must be the rate in paragraph (b)(2) of this section, the rate in paragraph (b)(3) of this section, or a rate between those two rates.

4213 Proposed Rule (continued)

(2) The rate in this paragraph (b)(2) is the single effective interest rate for the interest assumption prescribed in § 4044.52 of this chapter for the date as of which withdrawal liability is determined.

(3) The rate in this paragraph (b)(3) is the single effective interest rate for the interest assumption under section 304(b)(6) of ERISA for the plan year within which the date in paragraph (b)(2) of this section falls.

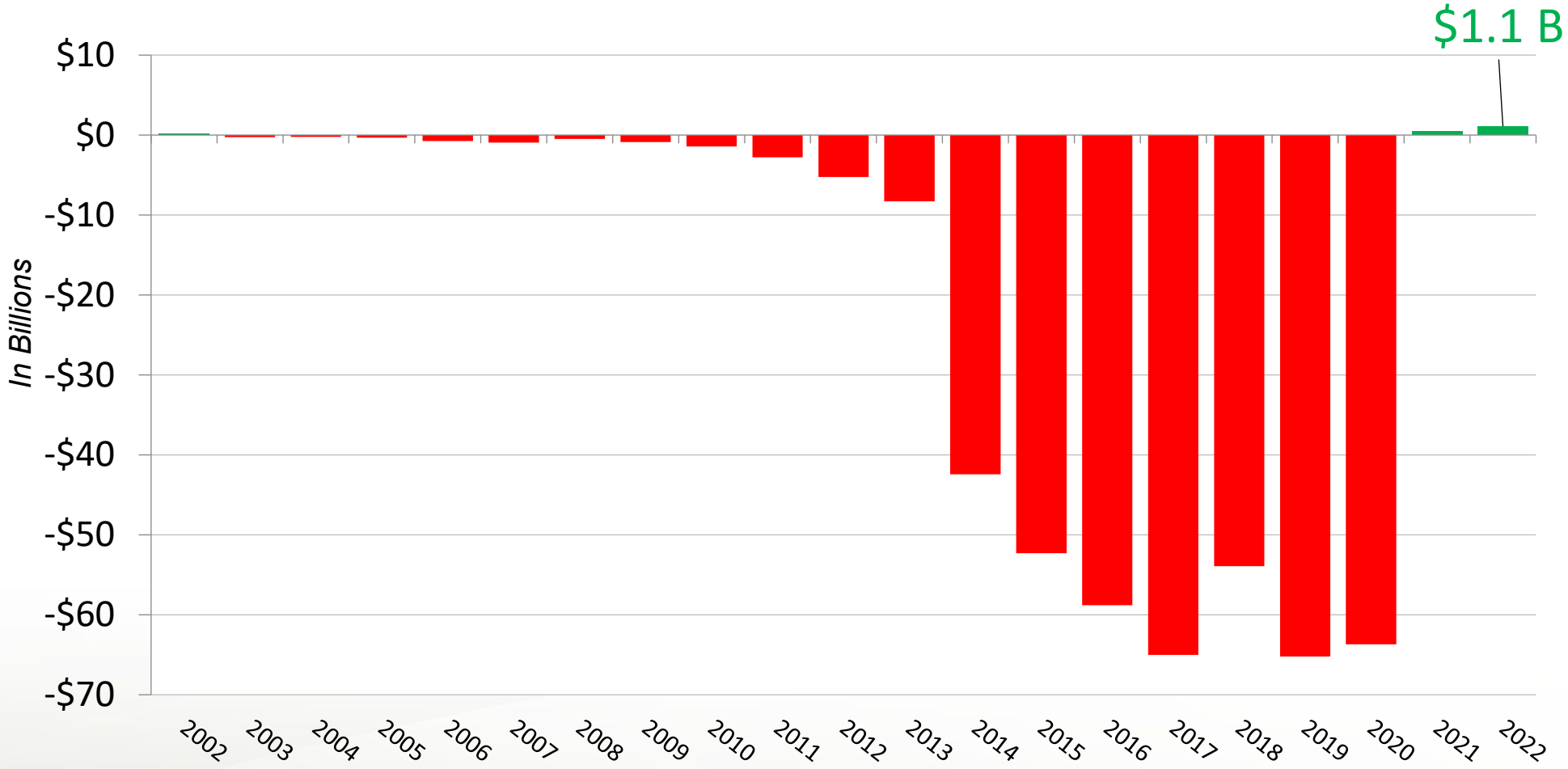
(c) Other assumptions. The assumptions and methods (other than the interest assumption) satisfy the requirements of this section if—

(1) Each is reasonable (taking into account the experience of the plan and reasonable expectations), and

(2) In combination, they offer the actuary's best estimate of anticipated experience under the plan.

Multiemployer Program Financial Condition

Multiemployer Program
FY 2002-2022 Net Financial Position



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Multiemployer Program Financials

Impact of ARP

Net Position	FY 2020	FY 2021	FY 2022
Assets	$ 3.0 B	$ 3.5 B	$ 3.5 B
Liabilities (includes “probable” losses)	67.0 B*	3.0 B	2.4 B
Net position	$ 64.0 B	$ 0.5 B	$ 1.1 B

* All but $3 billion related to “probable” insolvent plans.

With the enactment of ARP, most of those plans are no longer “booked” as probable insolvencies because they are expected to receive Special Financial Assistance (SFA) and thus, will be able to pay benefits well into the future.

Multiemployer Program – Highlights

- In fiscal year (FY 2022), PBGC paid $226 million in traditional financial assistance to 115 insolvent multiemployer (ME) plans paying 93,525 participants.
- An additional 46,480 participants in the insolvent plans are eligible to receive benefits when they retire.
- Cumulative results of operations improved from $478 million, as of 9/30/2021, to $1,055 million, as of 9/30/2022.
- Due to SFA payments made under the American Rescue Plan (ARP) Act in FY 2022, the number of participants relying on traditional financial assistance has decreased by 20,916 for participants receiving guaranteed benefits and by 10,470 for participants eligible to receive benefits once they retire.

King v. USA

King v. USA – U.S. Court of Claims

- In 2018, plaintiffs filed suit against the USA in the Court of Claims alleging that the USA violated their Fifth Amendment rights by approving the NY State Teamsters suspension application which on average reduced participant benefits by approximately 29%.

- After years of litigation, the court granted the USA's motion for summary judgment in 2023.

- The court ruled that no taking in violation of the Fifth Amendment had occurred.

King v. USA – U.S. Court of Claims

- There are two tests used to determine whether a taking has occurred – the Physical Takings Test and the *Penn Central* test.

- The court held that the Physical Takings Test does not apply. Supreme Court precedents reject the application of the Physical Takings Test to ERISA amendments applicable to multiemployer plans when the government takes nothing for its own use.

- Case on appeal at the Court of Appeals for the Federal Circuit.

Thank you!

For official PBGC statements, please contact PBGC Public Affairs at 202-229-4343 or PBGCExternalAffairs@PBGC.gov.

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