

## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Part 4262

RIN 1212-AB53

### Special Financial Assistance by PBGC

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule with request for comment.

**SUMMARY:** On July 9, 2021, PBGC issued an interim final rule setting forth the requirements for special financial assistance applications and related restrictions and conditions pursuant to the American Rescue Plan Act of 2021. PBGC is making changes to its regulation in response to public comments received on the interim final rule, with an additional opportunity for comment solely on the condition requiring a phased recognition of special financial assistance in a plan's determination of withdrawal liability.

**DATES:**

*Effective date:* This final rule is effective on August 8, 2022.

*Applicability dates:* This final rule is applicable to plans that apply or have applied for special financial assistance.

For a plan that received special financial assistance under part 4262 in effect before August 8, 2022, § 4262.14 will not apply unless and until the plan files a supplemented application under this part. Before the date that the plan files a supplemented application under this part, the rules under § 4262.14 in effect before August 8, 2022 apply to the plan.

For a plan that received special financial assistance under part 4262 in effect before August 8, 2022, § 4262.16(g)(2) will not apply unless the plan files a supplemented application under this final rule. If the plan files a supplemented application, § 4262.16(g)(2) applies to the plan in determining withdrawal liability for withdrawals occurring on or after the date the plan files the supplemented application.

*Comment date for withdrawal liability condition in § 4262.16(g)(2):* Comments, which should address only the withdrawal liability condition in § 4262.16(g)(2), must be received on or before August 8, 2022 to be assured of consideration.

**ADDRESSES:** Comments on § 4262.16(g)(2) of this final rule may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the

online instructions for submitting comments.

- *Email:* [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov).
- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026.

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

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

Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026 or calling 202-229-4040 during normal business hours. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

**Executive Summary**

*Purpose and Authority*

On July 9, 2021, the Pension Benefit Guaranty Corporation (PBGC) issued an interim final rule adding to its regulations a new part 4262 to implement the requirements under section 9704 of the American Rescue

Plan Act of 2021, "Special Financial Assistance Program for Financially Troubled Multiemployer Plans."<sup>1</sup> This program enhances retirement security for millions of Americans by providing eligible multiemployer defined benefit pension plans with special financial assistance (SFA) in the amounts required for the plans to pay all benefits due during the period beginning on the date of payment of SFA through the plan year ending in 2051. In consultation with, and with the approval of, PBGC's board of directors (Board of Directors or Board), PBGC is making changes to part 4262 of its regulations in response to public comments received on the interim final rule, including changes to the methodology to calculate SFA, permissible investments for SFA funds (SFA received and any earnings thereon), the application of conditions on a plan that merges with a plan that receives SFA, and the withdrawal liability conditions that apply to a plan that receives SFA.<sup>2</sup>

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

*Major Provisions of the Regulatory Action*

Part 4262 sets forth what information a plan is required to file to demonstrate eligibility for SFA and the amount of SFA to be paid by PBGC to the plan. The regulation identifies which plans will be given priority to file applications before March 11, 2023, and provides for a processing system to accommodate the filing and review of many applications

<sup>1</sup> The rule was published in the **Federal Register** on July 12, 2021, at 86 FR 36598.

<sup>2</sup> Under section 4002(a) of ERISA, PBGC is administered in accordance with policies established by the Board of Directors, which is made up of the Secretaries of the Department of Labor, the Department of the Treasury, and the Department of Commerce.

in a limited amount of time. This part also establishes permissible investments of SFA funds and other restrictions and conditions on plans that receive SFA.

PBGC is making changes in this final rule that revise part 4262, including changes to the SFA measurement date, the methodology to calculate SFA, permissible investments of SFA funds, the application of conditions on a plan that merges with a plan that receives SFA, and the withdrawal liability conditions that apply to a plan that receives SFA.

## Background

### *PBGC and the Multiemployer Insurance Program*

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

The multiemployer insurance program provides PBGC with tools to help plans that are insolvent or approaching insolvency to be able to pay guaranteed benefits.<sup>3</sup> This help is primarily in the form of financial assistance loans under section 4261(a) of ERISA. Under that provision, when a multiemployer plan becomes insolvent, PBGC provides periodic financial assistance payments to the insolvent plan in amounts that, together with existing plan assets and any other plan income, are sufficient to pay guaranteed benefit amounts to participants and beneficiaries. In general terms, a plan is insolvent if it cannot pay benefits under the plan when due during the current plan year.

The Multiemployer Pension Reform Act of 2014 (MPRA) created pathways under ERISA to enable certain distressed plans to avoid insolvency. Plans that are in critical and declining status<sup>4</sup> may apply to the U.S.

<sup>3</sup> Multiemployer plan guaranteed benefits are primarily nonforfeitable benefits and the maximum guarantee is set by law under section 4022A of ERISA.

<sup>4</sup> A multiemployer plan is in critical and declining status if the plan satisfies the criteria for critical status under section 305(b)(2) of ERISA and is projected to become insolvent within the meaning of section 4245 during the current plan year or any of

Department of the Treasury (Treasury Department) for a suspension of benefits under section 305(e)(9) of ERISA, which requires plans to show that the proposed suspension would enable them to avoid insolvency. Without such a showing, the Treasury Department cannot approve the application for a suspension of benefits. Generally, under this process, plans may propose a reduction of benefits to no less than 110 percent of PBGC's guaranteed benefit amount. A plan that has taken all reasonable measures, including applying for a suspension of benefits, may also request partition assistance from PBGC (under section 4233 of ERISA). A partition allows the plan to transfer responsibility for paying monthly guaranteed benefits for a portion of the plan's participants and beneficiaries to a newly created successor plan that receives financial assistance from PBGC. When a partition is approved, the original plan has an ongoing obligation to pay and preserve benefits for all participants at levels above PBGC's guaranteed amounts. All plans approved for benefit suspensions under MPRA as of March 11, 2021, certified—and Treasury confirmed through review of plan applications—that the proposed suspensions (in combination with any partition) would enable the plans to avoid insolvency indefinitely, as set forth in the Treasury Department's implementing regulations.

MPRA also allows critical and declining plans to request financial assistance from PBGC upon merging with another multiemployer plan ("facilitated mergers" under section 4231(e) of ERISA) if such financial assistance is necessary for the multiemployer plan to become or remain solvent. Financial assistance to the merged plan may promote mergers with more viable plans and eliminate the need for benefit reductions.

In recent years, Congress considered a range of proposals to address the funding crisis in the multiemployer pension system, including proposals to expand PBGC's partition authority, loan programs, and broader reforms to stabilize multiemployer plans and extend the solvency of PBGC's multiemployer insurance program. Many of the prominent efforts to address issues facing the multiemployer pension system included ideas to effectively reverse MPRA benefit suspensions and provide for reinstatement of the suspended benefits.

the 14 succeeding plan years (or 19 succeeding plan years if the plan has a ratio of inactive participants to active participants that exceeds 2 to 1 or if the funded percentage of the plan is less than 80 percent).

On March 11, 2021, the President signed into law the American Rescue Plan (ARP) Act of 2021 (Pub. L. 117–2), which amended title IV of ERISA to address the immediate crisis facing severely underfunded multiemployer plans and the solvency of PBGC, and to assist plans by providing funds to reinstate suspended benefits.

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

Section 4262 of ERISA creates a program to enhance retirement security for millions of Americans by providing SFA to financially troubled multiemployer plans. Under current conditions, the SFA program is expected to assist about 200 financially troubled plans. The SFA provided to these plans will forestall their insolvency for many years into the future and includes funds to reinstate suspended monthly benefits going forward, and for make-up payments to restore previously suspended benefits. In addition, the SFA program improves the financial outlook for PBGC's multiemployer insurance program.

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

Section 4262 of ERISA sets forth the provisions for SFA, including which plans are eligible to apply, the cutoff date for applications, rules relating to actuarial assumptions and PBGC's determinations on applications, restrictions on the use of SFA, and that certain plans with suspended benefits<sup>5</sup> must reinstate those benefits prospectively and provide make-up payments to restore previously suspended benefits. Unlike the financial assistance provided under section 4261 of ERISA, which is in the form of a loan, a plan receiving SFA under section 4262 has no obligation to repay SFA.

Section 4262 of ERISA requires PBGC to prescribe in regulations or other guidance the requirements for SFA applications, including an alternate application for plans with an approved

<sup>5</sup> Plans with suspended benefits pursuant to section 305(e)(9) or 4245(a) of ERISA.

partition under section 4233 of ERISA. In addition, PBGC may prioritize applications during the first 2 years after March 11, 2021, prescribe how SFA funds are to be invested, and impose reasonable conditions on plans that receive SFA.

Although PBGC's rulemakings generally involve coordination and consultation with two other agencies that have jurisdiction over pension plans (the Treasury Department and the U.S. Department of Labor (Department of Labor or Department)), section 4262 of ERISA specifically provides for coordination and consultation with the Treasury Department, particularly on SFA applications involving a plan's reinstatement of benefits suspended under section 305(e)(9) of ERISA.<sup>6</sup> The statute also provides for consultation with the Treasury Department with respect to a plan that proposes in its application to change certain assumptions, with respect to a plan that files an application under PBGC regulations or guidance prioritizing certain applications, and on the conditions imposed on plans that receive SFA.<sup>7</sup> This final rule is a result of that coordination and consultation, which will continue during the SFA program's operation as plans apply for SFA.

### Interim Final Rule

On July 9, 2021, PBGC issued an interim final rule on Special Financial Assistance by PBGC. Before the interim final rule was issued, PBGC held listening sessions with interested parties at their request. Representatives of PBGC's Board of Directors (the Secretaries of the Department of Labor, the Treasury Department, and the Department of Commerce) also participated in these listening sessions. Most of the requesters provided letters or agendas outlining their concerns. In addition, other interested parties sent PBGC letters communicating their views. PBGC considered the views and concerns expressed, which helped to inform the interim final rule.

PBGC provided a 30-day comment period<sup>8</sup> for the interim final rule and received over 100 comment letters from multiemployer plans and associations representing multiemployer plans, contributing employers and associations representing employers, labor organizations, actuarial consulting firms and practitioners, financial services

firms, other plan professionals, participants, members of Congress, and other individuals. The comments, PBGC's responses to the comments, and a summary of changes made to the interim final rule are discussed in the next section.

### Section-by-Section Discussion of Public Comments

#### Overview and Purpose

The final rule amends part 4262, including changes from the interim final rule regarding the SFA measurement date, the determination of eligibility and the amount of SFA (including interest rate assumptions and the calculation of SFA for plans with an approved MPRA benefit suspension as of March 11, 2021), the content of an application for SFA, the process of applying, PBGC's review of applications, and restrictions (including permissible investment of SFA funds) and conditions on plans receiving SFA. The final rule also makes other clarifying and editorial changes to part 4262.

In this document, PBGC is providing for a 30-day comment period solely on the condition requiring a phased recognition of SFA in a plan's determination of withdrawal liability in § 4262.16(g)(2), because it is an area of complexity that may benefit from additional public comment. This will provide an opportunity for additional public comment on the condition and will allow PBGC to assess the effectiveness of this withdrawal liability condition, consider adjustments or changes, and determine whether more clarification is needed regarding the condition or the mechanics of implementation. To the extent PBGC determines that adjustments or changes to this withdrawal liability condition are appropriate and authorized, or that further clarification is needed, PBGC may revise the condition accordingly.

Broadly, PBGC is interested in hearing from commenters about whether the condition requiring a phased recognition of SFA in a plan's determination of withdrawal liability strikes the correct balance among stakeholders, or if a different condition might work better. Additionally, PBGC is interested in hearing from stakeholders about what the expected impact of such a condition is likely to be, and whether additional clarification or guidance would be useful.

PBGC also requests comments about whether the phased recognition of SFA, which reflects projected rather than actual market earnings and losses, expenses, and benefit payments, strikes the correct balance. If commenters

disagree with this condition, PBGC is interested in comments that articulate the rationale supporting such disagreement. PBGC requests comments on whether the determination of the timeline under the final rule appropriately balances the interests of various stakeholders, or whether a shorter (or longer) phase-in period might protect the financial security of plan participants and beneficiaries without placing an undue burden on withdrawing employers. PBGC is also interested in comments about a partial phase-in condition, including how such a condition might work, and whether a partial phase-in condition has any benefits or drawbacks as compared to the phase-in condition in this rule. Finally, should there be a different phase-in rule for plans that will receive a large amount of SFA compared to their non-SFA assets than for plans that will receive a relatively small amount of SFA compared to their non-SFA assets (so that the SFA account is projected to be exhausted after a relatively short period)?

#### Definitions—SFA Measurement Date

The SFA measurement date used in calculating the amount of SFA under § 4262.4 was defined in § 4262.2 of the interim final rule as the last day of the calendar quarter immediately preceding the date the plan's application was filed. This date was established by the filing of the plan's initial application for SFA.

A few commenters raised general concerns about the uncertainty of the plan's SFA measurement date and having to change the SFA measurement date immediately after the end of the calendar quarter because of PBGC's metering system described in § 4262.10. One of the commenters recommended that PBGC consider adjusting the SFA measurement date to allow plans intending to file, but unable to file during a temporary closure of the filing window, to use the plan's original intended SFA measurement date. A suggestion was made to allow plans to submit a notice of intent to file. Another commenter recommended that non-priority group plans be given the option to freeze the SFA measurement date as of the earliest date a plan in priority group 6 could apply or the end of the calendar quarter before the date PBGC begins to accept applications for non-priority group plans. The commenters stated this would save plans the burden and expense of having to re-do their applications if the applications cannot be filed until the following calendar quarter.

PBGC understands that some commenters would like greater certainty

<sup>6</sup> See section 4262(n) of ERISA.

<sup>7</sup> See sections 4262(m) and 4262(n) of ERISA.

<sup>8</sup> PBGC considered comments received up to 1 week after the 30-day comment period as timely received during the comment period.

about when an initial application may be filed to establish the plan's SFA measurement date. To address timing concerns related to preparing a plan's application, in the final rule, PBGC is changing the definition of the SFA measurement date in § 4262.2 from "the last day of the calendar quarter immediately preceding the date the plan's application was filed" to "the last day of the third calendar month immediately preceding the date the plan's initial application for special financial assistance was filed." For example, if the plan's initial application was filed on March 15, 2023, its SFA measurement date would be December 31, 2022; if the plan's initial application was filed on July 1, 2023, its SFA measurement date would be April 30, 2023.

In addition, based on a commenter suggestion, PBGC is adding a provision in § 4262.10 to provide a mechanism for plans to file a "lock-in application." If a plan files a lock-in application, it will be considered the plan's initial application for SFA, establishing the filing date for a plan's initial application and the plan's base data (SFA measurement date, census data, non-SFA interest rate assumption, and SFA interest rate assumption). This provision is described in more detail later in the preamble under the subheading *Lock-in Application*.

#### *Eligible Multiemployer Plans*

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

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

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

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

(4) A plan that became insolvent<sup>9</sup> for purposes of section 418E of the Internal Revenue Code (the Code) after December 16, 2014 (the date MPRA

became law) and has remained insolvent and has not terminated under section 4041A of ERISA as of March 11, 2021.

In its interim final rule, PBGC noted that a plan that terminated by mass withdrawal in a plan year that ended before January 1, 2020, is not eligible for SFA under section 4262(b)(1)(A) of ERISA and § 4262.3(a)(1) (plans that are in critical and declining status in any plan year beginning in 2020, 2021, or 2022). This is because the rules under section 432 of the Code, for plans in endangered, critical, and critical and declining status, do not apply to such a plan in any of those plan years.<sup>10</sup> The interim final rule provided as an example that, if a plan that was in critical and declining status in 2019 terminated by mass withdrawal in that year, the plan would not be eligible for SFA under § 4262.3(a)(1) because it was not in critical and declining status in 2020, 2021, or 2022. To provide further clarification, PBGC notes that for the same reason, a plan that terminated by mass withdrawal in a plan year beginning before 2020 cannot be eligible for SFA under section 4262(b)(1)(C) of ERISA or under § 4262.3(a)(3) (plans that are in critical status in any plan year beginning in 2020, 2021, or 2022).

Two commenters stated that plans terminated by mass withdrawal should be eligible to apply for SFA. In particular, one commenter suggested that if a plan terminated by mass withdrawal, but is not currently

<sup>10</sup> Section 412(a)(1) of the Code requires a pension plan to satisfy the minimum funding standard applicable to the plan for each plan year. In the case of a multiemployer plan, section 412(a)(2)(C) provides that participating employers must make contributions under the plan for a plan year that, in the aggregate, are sufficient to ensure that the plan does not have an accumulated funding deficiency under section 431 as of the end of the plan year. Section 412(e)(4) provides that the minimum funding rules under section 412 apply to a multiemployer plan until the last day of the plan year in which a plan terminates within the meaning of section 4041A(a)(2) of ERISA (that is, termination by mass withdrawal or a cessation of the obligation of all employers to contribute under the plan). Accordingly, the rules of section 431 of the Code do not apply to such a plan for periods after the plan year of termination.

The Internal Revenue Service (IRS) has informed PBGC that section 432 of the Code, which provides rules for multiemployer plans in endangered status or critical status, likewise does not apply to a multiemployer plan for periods after the plan year of termination within the meaning of section 4041A(a)(2) of ERISA. This is consistent with section 301(c) of ERISA (over which the Secretary of the Treasury has interpretive jurisdiction pursuant to section 101 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App.)), which provides that part 3 of title I of ERISA, including the minimum funding rules parallel to sections 412, 431, and 432 of the Code, applies until the last day of the plan year in which the plan terminates within the meaning of section 4041A(a)(2) of ERISA.

insolvent, it should be eligible to apply for SFA, arguing that section 4262 of ERISA does not state that any plan terminated before 2020 through mass withdrawal is not eligible for relief. Section 4262(b)(1) of ERISA provides a list of four types of plans that are eligible to apply for SFA, and PBGC cannot extend eligibility for SFA through its regulation to a plan that is not included in that list. As noted above, a plan that is terminated by mass withdrawal in a plan year beginning before 2020 does not meet the eligibility requirements under section 4262(b)(1)(A) or (C) of ERISA or § 4262.3(a)(1) or (3).

Section 4262.3(c)(1) of the regulation provides that a plan that has elected to be in critical status under section 305(b)(4) of ERISA, but is not certified to be in critical status under section 305(b)(2), is not an eligible multiemployer plan. In response to a commenter, PBGC is further clarifying that a plan is an eligible multiemployer plan if it is certified to be in critical status under section 305(b)(2) of ERISA during the 2020, 2021, or 2022 plan years (and otherwise meets the other criteria for an eligible critical status plan under § 4262.3(a)(3)), regardless of whether the plan made an election under section 305(b)(4) of ERISA to be in critical status in a previous year.

In addition, a commenter requested clarification as to how an election under section 9701(a) of ARP affects SFA eligibility. Section 9701(a) of ARP permits a multiemployer plan sponsor to make an election relating to the plan's status under section 432(b) of the Code and section 305(b) of ERISA (section 432 status) for certain plan years. If the plan sponsor makes the election under section 9701(a) of ARP for a plan year, then, notwithstanding the actuarial certification of the plan's status for the plan year, the plan will have the same status as it had for the preceding plan year. IRS Notice 2021-57, 2021-44 IRB 706, refers to an election under section 9701(a)(1) of ARP as a "freeze election," and a multiemployer plan sponsor may make a freeze election for the first plan year beginning on or after March 1, 2020, or the next succeeding plan year. That guidance also provides that if a freeze election applies for a plan year, then the plan has an elected section 432 status, which may be different than the plan's section 432 status as certified by the plan's actuary under section 432(b)(3) of the Code for that plan year. Accordingly, if a plan is certified to be in critical status (within the meaning of section 305(b)(2) of ERISA) in any plan year beginning in 2020 through 2022 and meets the other criteria for an

<sup>9</sup> A multiemployer plan is regarded as insolvent as of the first day of the plan year in which it is projected to have insufficient resources to pay all benefits under the plan when due during the plan year.

eligible critical status plan under § 4262.3(a)(3), the plan would be eligible to apply for SFA regardless of whether the plan has made a freeze election.

To ensure uniformity for applications and clarify what data to use to satisfy eligibility requirements for critical status plans under section 4262(b)(1)(C) of ERISA, § 4262.3(a)(3) and (c)(2) of the final rule specify the data that is used for this purpose on the Form 5500 Schedule MB to determine the “modified funded percentage,” and the data on either the Form 5500 or the Form 5500 Schedule MB to determine the ratio of active to inactive participants.

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

The numerator for the plan’s funded percentage under § 4262.3(c)(2) is calculated using the current value of assets on line 2a of Form 5500 Schedule MB,<sup>11</sup> which is also required to be reported on line 1l, column (a) of the Schedule H,<sup>12</sup> and adding to it the current value of withdrawal liability payments due to be received by the plan on an accrual basis reflecting a reasonable allowance for amounts considered uncollectible<sup>13</sup> (if not already included in the current value of net assets reported on line 2a). The value calculated for the numerator is consistent with the meaning of current value of assets under section 3(26) of ERISA.<sup>14</sup> The current value of assets includes total cash contributions due to be received on an accrual basis. One commenter suggested that the inclusion of withdrawal liability receivables in the asset value may cause some plans to be ineligible and that, due to the uncertain

nature of future withdrawal liability payments, PBGC should consider excluding these payments from the determination of the plan’s eligibility for SFA. PBGC considered the comment but is not making the suggested change. The inclusion of withdrawal liability payments due to be received by the plan is consistent with the meaning of current value of assets under section 3(26) of ERISA, and the provision, as drafted, recognizes the uncertain nature of future withdrawal liability payments by providing for an allowance for amounts of withdrawal liability considered uncollectible.

As explained earlier in this section of the preamble, section 4262(b)(1)(C) of ERISA requires, as one of the conditions of eligibility, that critical status plans have a ratio of active to inactive participants that is less than 2 to 3. The statute does not specify what participant count to use. To fill in this gap, the interim final rule referred to end-of-year participant counts on the Form 5500. On the 2021 Form 5500, these are the number of participants identified on line 6a(2) (for total number of active participants) and the sum of lines 6b, 6c, and 6e (for inactive participants: retired or separated participants receiving benefits, other retired or separated participants entitled to future benefits, and deceased participants whose beneficiaries are receiving or are entitled to receive benefits). One commenter suggested that plans be permitted to use either the participant counts from the Form 5500 or the participant counts reported on the Form 5500 Schedule MB, which the commenter noted may be different for a variety of reasons from the counts reported on the Form 5500. PBGC considered the comment and decided to permit plans to use either the participant counts from the Form 5500, as described above, or the beginning-of-the-year participant counts on the Form 5500 Schedule MB. On the Form 5500 Schedule MB, these are the number of participants identified on line 2b(3)(c) (for total number of active participants) and the sum of lines 2b(1) and 2b(2) (for inactive participants: retired participants and beneficiaries receiving payment and terminated vested participants).

In the final rule, PBGC makes changes to § 4262.3(a)(4) to clarify that an eligible insolvent plan must have become insolvent after December 16, 2014, and remained insolvent and not terminated as of March 11, 2021. In order to have remained insolvent as of March 11, 2021, the plan must have become insolvent before that date.

### *Summary of Changes Affecting the Amount of Special Financial Assistance*

The calculation of the amount of SFA under section 4262 of ERISA has multiple interacting and technical components, including factors that the statute does not define and leaves to PBGC’s reasonable interpretation. Congress’ instruction to PBGC under section 4262(c) of ERISA to “issue regulations or guidance setting forth requirements for special financial assistance applications” therefore requires PBGC, in coordination with its Board agencies,<sup>15</sup> to apply its expertise in, and responsibility for, the administration of title IV of ERISA to promulgate regulations and application instructions that comport with the statutory requirements.

Many commenters argued that PBGC should exercise its discretion to interpret various components of the calculation of the amount of SFA differently than in the interim final rule. PBGC has considered these comments and assessed whether any proposed changes to the interim final rule would better achieve the statutory purpose evidenced by the text of the statute, which is discussed later in the preamble. Following extensive analysis, including projections of various proposed changes on long-term plan solvency and funded status through 2051, as well as implementing the statutory instruction that PBGC consult with the Treasury Department regarding considerations specific to the calculation of the amount of SFA for plans with approved suspensions of benefits under section 305(e)(9) of ERISA as of March 11, 2021 (MPRA plans), PBGC has decided to adjust some of the interpretive choices set forth in the interim final rule on which PBGC received comments. Among the adjustments in this final rule are the expected rate of return on SFA assets to be used in determining the amount of SFA and the calculation of the amount of SFA for MPRA plans.

#### 1. Pay All Benefits Due Through 2051

Section 4262(j) of ERISA sets certain requirements for how much SFA an eligible plan is to receive. Section 4262(j)(1) provides that “[t]he 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 . . . and ending on the last day

<sup>11</sup> All line references in this section are to the 2021 Form 5500 and schedules.

<sup>12</sup> The 2021 Form 5500 instructions provide that, with certain exceptions, assets reported on line 2a of Form 5500 Schedule MB should be the same as reported on line 1l, (column (a)) of the Schedule H.

<sup>13</sup> PBGC notes that Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) 960, Plan Accounting—Defined Benefit Pension Plans 960–310–25–3A states: “A multiemployer plan may also have a receivable for a withdrawing employer’s share of the plan’s unfunded liability. The plan should record the receivable, net of any allowance for an amount deemed uncollectible, when entitlement has been determined.”

<sup>14</sup> The withdrawal liability payments due to be received by the plan are not included in the actuarial value of assets or the fair market value of assets for purposes of sections 431 and 432 of the Code and the corresponding sections 304 and 305 of ERISA.

<sup>15</sup> The Departments of Labor, the Treasury, and Commerce.

of the plan year ending in 2051, with no reduction in” benefits. Section 4262(j)(2) provides that “the funding projections for purposes of this section shall be performed on a deterministic basis.”

Many commenters argued that the mandatory language of section 4262(j)(1) of ERISA, which states that the amount of SFA “shall” be such amount “required for the plan to pay all benefits due” through the end of 2051, means that if an eligible plan does not receive SFA sufficient to project solvency through 2051, taking into account the amount that SFA assets can reasonably be expected to earn given the statutory investment restrictions imposed by section 4262(l), then the statute has not been implemented properly. Section 4262(j)(1) clearly requires an eligible plan’s SFA to be the amount necessary for the plan to pay all benefits through 2051. In addition to the use of the term “shall” in section 4262(j)(1) itself, other provisions of section 4262 refer to section 4262(j) as “required” or a “requirement.”<sup>16</sup>

## 2. Interest Rates for SFA and Non-SFA Assets

Plans will necessarily invest—and pay benefits out of—two separate pools of assets between the date of SFA payment and the end of 2051. This is because section 4262(l) of ERISA requires plans to “segregate” SFA assets from “other plan assets” and circumscribes investment of SFA assets. For a plan to project accurately how much SFA is “required” for the plan “to pay all benefits due” through the end of the plan year ending in 2051, it must project the SFA assets, adjusted for earnings, needed to cover each year’s benefit payments and expenses until exhausted, and the non-SFA “other plan assets,” adjusted for contributions and earnings, needed to cover each year’s benefit payments and expenses after the SFA assets are exhausted through the end of the SFA coverage period. Thus, an amount of SFA that accounts for existing plan assets under section 4262(j), and the segregation and separate investment of those assets from SFA assets under section 4262(l), requires two asset projections: one for a plan’s SFA assets, and one for a plan’s non-SFA assets.

To make these two projections, plans must make assumptions about future events—including expected returns on investments—for each pool of assets to calculate that pool’s projected value. Differences in expected investment returns for each pool of assets affect the

amount of SFA needed to meet projected liabilities through 2051. Using an accurate projected rate of return for each pool is critical for determining whether SFA paid now is in the amount projected to “pay all benefits due” through the end of 2051, as required by section 4262(j)(1) of ERISA.

In the interim final rule, PBGC concluded that the same investment-return assumption should be used to project both pools of assets. In reaching this conclusion, PBGC gave substantial weight to section 4262(e)(2) of ERISA which, as noted in the preamble to the interim final rule, requires a plan to use an interest rate that is based on the rate used in the plan’s most recent certification of plan status before January 1, 2021, subject to an interest rate limit. PBGC also gave substantial weight to section 4262(e)(4), which provides that if a “prior assumption is unreasonable,” a plan may propose to change that assumption if it explains why the assumption “is no longer reasonable,” except that the plan “may not propose a change to the interest rate otherwise required under this subsection.”

Many commenters raised concerns with PBGC’s approach. If the interest rate in section 4262(e) of ERISA (which, for many plans would be close to 5.3 percent based on pension funding segment rates in December 2021), were used to project the value of both SFA and non-SFA assets, but SFA investments are limited to investment grade bonds under section 4262(l) (which would likely result in an actual rate of return close to 2 percent as of December 2021, assuming that PBGC permitted no investments other than investment grade bonds and that current yields on such bonds continued through 2051), the SFA amount would be insufficient to meet the requirement of section 4262(j)(1) that it be the “amount required for the plan to pay all benefits due” through the end of 2051. There is thus, asserted the commenters, an inconsistency between these two provisions of the statute. Providing a separate investment-return assumption for SFA assets that reflects the investment restrictions under section 4262(l) of ERISA would avoid this inconsistency. PBGC recognizes that the interim final rule, without giving more weight to the requirement of section 4262(j)(1), did not sufficiently address this inconsistency. PBGC agrees with commenters that this concern would be alleviated by giving more weight to the language of section 4262(j) than was given in the interim final rule.

PBGC is therefore adjusting the rules set forth in the interim final rule to

account for the fact that section 4262(l) of ERISA requires plans receiving SFA to have two separate pools of assets and expressly contemplates that they will be invested separately—with different expected rates of return. PBGC also believes that this approach better harmonizes sections 4262(e), (j), and (l) with each other. The statute must be read as a whole, and each section construed in a manner that renders them compatible, not contradictory.

## 3. SFA for MPRA Plans

As described earlier in the preamble, the interim final rule provided a method for eligible multiemployer plans to calculate the amount of SFA based on the “amount required for the plan to pay all benefits due during the period beginning on the date of payment of the special financial assistance payment . . . and ending on the last day of the plan year ending in 2051 . . .” under section 4262(j)(1) of ERISA. The interim final rule provided only one way to calculate the “amount required” for both MPRA plans and plans that are not MPRA plans.<sup>17</sup> PBGC received several comments that raised issues with how this calculation would work for MPRA plans. The commenters stated that the final rule should treat MPRA plans differently when calculating the amount of SFA.

Commenters raised several issues that were unique to MPRA plans. For example, as part of the MPRA process, all MPRA plans now eligible for SFA were required statutorily to demonstrate that a proposed benefit suspension would improve their funded status such that the plan would avoid insolvency “indefinitely.” To accept SFA, MPRA plans must permanently reinstate those suspended benefits. Under the interim final rule, however, MPRA plans would not receive more SFA than an amount necessary to avoid insolvency through 2051. Thus, commenters described MPRA plan trustees as facing an unenviable choice between retaining the existing benefit suspensions (enabling the plan to avoid insolvency indefinitely at the cost of forgoing SFA) or applying for and receiving SFA and reinstating the suspended benefits (potentially jeopardizing the long-term financial health of the plan which MPRA was originally intended to promote). Either choice would involve favoring one set of participants over

<sup>17</sup> For purposes of determining the amount of SFA under § 4262.4, the final rule defines a MPRA plan under § 4262.4(a)(3)(ii) as a plan that is eligible for SFA under § 4262.3(a)(2).

<sup>16</sup> Sections 4262(i)(1) and 4262(n)(1)(B) of ERISA.

another.<sup>18</sup> A discussion of the comments on determining the amount of SFA, including for plans that implemented MPRA benefit suspensions, is presented later in this preamble under the subheading *Comments on Amount of Special Financial Assistance*.

Section 4262(n) of ERISA requires PBGC to coordinate with the Secretary of Treasury in prescribing the application process for eligible multiemployer plans, and the amount of SFA needed by a plan that has suspended benefits under section 305(e)(9) of ERISA that takes into account the projected funded status of the plan at the end of 2051, the payment of previously suspended benefits, and other relevant factors. Following consideration of the issues raised by commenters, and as determined after consultation with the Treasury Department, the final rule provides a methodology for determining an amount of SFA for MPRA plans that considers these factors. PBGC's consultation with the Treasury Department and the methodology for MPRA plans are discussed later in the preamble under the subheading *Calculating the Amount of SFA*.

#### 4. Permissible Investments

One explicit avenue under the statute that could assist plans in being able to pay all benefits due through 2051 is through PBGC's authority under section 4262(I) of ERISA to allow SFA assets to be invested in types of investments other than investment grade bonds. Such other investments, for example, could have both a higher potential for reward and a higher risk than investment grade bonds, though the higher risk of these investments may raise different concerns about a plan's

likelihood of paying all benefits due through 2051.

As noted in the interim final rule, PBGC shares the concerns expressed by some commenters that overly conservative limits on investment of SFA could adversely impact plans' financial health. Permitting a wider range of investments could help plans be able to pay all benefits due through 2051. But the language of section 4262(I) of ERISA also evinces an intent that SFA investments be relatively safe. Allowing SFA assets to be invested predominantly in return-seeking assets risks plans not being able to pay all benefits due through 2051 given the potential for severely adverse market events. It could also put taxpayer-funded assistance at significant risk of loss.

As discussed later in the preamble, in consideration of comments received in response to PBGC's specific request, PBGC has amended in the final rule the investment limitations set forth in the interim final rule. Given PBGC's intention that the investment choices provided under the interim final rule were always only a starting point for discussion to find a more appropriate balance between certainty and safety of investments on the one hand, and the opportunity for plans to have flexibility to decide appropriate overall investment policies on the other, PBGC examined how to adjust permissible investments in light of the feedback from commenters. In the final rule, PBGC is allowing plans that have received SFA to invest a percentage of SFA assets and earnings thereon in certain "return-seeking assets," with the remainder invested in investment grade fixed income securities to help ensure that risk of investment losses is mitigated.

While expanding the range of permissible investments to include a percentage of return-seeking assets eases the path for the plans to be able to pay all benefits due through 2051, PBGC's modeling showed that it alone is unlikely to close the gap between the interest rate assumption to calculate the amount of SFA and the expected rate of return on investment of SFA. Thus, PBGC and its Board examined other approaches that, in combination with greater flexibility in investments, could fulfill the expectation of being able to pay all benefits due through 2051 for all eligible plans. Alternatives are described in the *Regulatory Impact Analysis* section later in this preamble.

PBGC and its Board have considered the commenters' views and the alternative approaches for assisting plans to be able to pay all benefits due through 2051. As noted earlier in the

preamble, the final rule allows plans to use a separate, specified interest rate assumption for projecting SFA assets that is more closely aligned with the rate of return estimated to be achievable on the permitted investments of SFA assets. PBGC determined that this change, together with the change in permitted investments, was necessary to help enable eligible plans to pay all benefits due through 2051, while limiting the risk that plans would incur significant losses through the investment of SFA dollars. This is supported by PBGC modeling and analysis. The changes to the interest rate assumption and to permissible investments are discussed later in this preamble under the subheadings *Interest Rates for SFA and Non-SFA Assets* and *Permissible Investments*, respectively.

#### *Comments on Amount of Special Financial Assistance*

Under section 4262(a)(1) of ERISA, PBGC is to provide SFA to an eligible multiemployer plan upon application. As discussed earlier in the preamble, under section 4262(j)(1) the amount of SFA to be provided is the "amount required for the plan to pay all benefits due during the period beginning on the date of payment of the special financial assistance payment . . . and ending on the last day of the plan year ending in 2051. . . ." This is referred to in section 4262(i)(1) as "the amount necessary as demonstrated by the plan sponsor." Section 4262.4(a) of the interim final rule implemented section 4262(j)(1) by providing that the amount of SFA for a plan is the amount (if any), by which the value of all plan obligations exceeds the value of all plan resources, determined as of the plan's SFA measurement date and limited to the SFA coverage period (the period ending on the last day of the last plan year ending in 2051).

PBGC received numerous comments on this section of the rule, as noted earlier in the preamble. Many of the commenters on the interim final rule argued that PBGC's implementation of section 4262(j)(1) was contrary to Congressional intent and the statutory direction for plans to receive SFA in an amount required for the plan to pay all benefits due through 2051.

Many commenters disagreed with PBGC that the statute should be interpreted to require all plan assets and future income (together, a plan's resources) to be considered when determining the amount of SFA.

Several commenters raised the concern that some critical status plans that meet statutory eligibility

<sup>18</sup>In July of 2021, the Department of Labor issued the "Statement on PBGC 'Special Financial Assistance' Interim Final Rule for Eligible Multiemployer Plans." In that Statement, the Department said that in its "view, ARP's inclusion of plans that suspended benefits under MPRA and the prohibition against a future MPRA suspension for a plan receiving SFA reflects a clear legislative objective to allow plan fiduciaries to restore benefits that were previously suspended and to encourage all eligible plans to apply for SFA without raising potential fiduciary liability concerns about undoing current or precluding future MPRA suspensions." The Department has advised PBGC that in its view the approach of the final rule removes the risk that receipt of SFA will harm the projected status of a MPRA plan at the end of 2051 more than not applying for and receiving SFA. Accordingly, the Department takes the view that a plan sponsor's decision to apply for SFA would not violate section 404 of ERISA and the Department will bring no enforcement action with respect to such decision. The implementation of such decision, however, will be subject to the fiduciary and other requirements of title I of ERISA.

requirements and that may apply under § 4262.3 will not receive SFA or will receive only minimal SFA under § 4262.4 of the interim final rule. Commenters said this is because many of these plans will have assets and other resources that equal or exceed the present value of benefit obligations through 2051, although insolvency may be projected after that date. Some commenters also noted that the outcome of some eligible plans receiving zero or minimal SFA is inequitable and will penalize plans whose trustees and associated bargaining parties have been proactive under collective bargaining agreements or rehabilitation plans to improve plan finances. Commenters suggested this outcome would be contrary to Congress' intent in including these plans as eligible for SFA. Without SFA, these critical status plans will remain "financially vulnerable" according to the commenters.

One commenter described SFA as an important tool to address the current crisis, but the commenter said that it does not address the structural issues that created the need for SFA. Another commenter expressed support for the interim final rule's implementation of the amount of SFA. The commenter said to exclude current assets and future contributions from the calculation of SFA would be irresponsible.

Some commenters suggested there is support in the statute for alternatives to § 4262.4(a) of the interim final rule. Suggested alternatives include disregarding certain plan resources, such as future contributions and future accruals, or carving out a portion of current assets or future contributions to fund benefits after 2051. Others suggested that the interim final rule's standard based on a projection of sufficiency to the last day of the plan year ending in 2051 should be replaced with one consistent with MPRA's standard to avoid insolvency indefinitely. One commenter suggested this can be accomplished by interpreting section 4262(j)(1) of ERISA as providing SFA in an amount required for a deterministic projection of plan assets to be increasing during the last plan year ending in 2051. Under one suggested approach, the present value of plan resources needed to increase plan funding post-2051 would not be included in SFA-eligible plan resources. Other commenters suggested disregarding all plan resources in determining the amount of SFA.

Some MPRA plans commented that the receipt of SFA in the amount provided for under the interim final rule will put their long-term solvency projections at risk. They noted that the

interim final rule would result in these plans receiving less in SFA than the present value of the benefits the plans would be required to restore. Some of these commenters suggested excluding from the calculation of SFA that portion of existing assets or future contributions to fund post-2051 benefit obligations. Others suggested providing an amount of SFA sufficient to pay the reinstated benefits beyond the plan year ending in 2051. Commenters said the rule should allow MPRA plans to receive SFA and continue to meet the MPRA solvency standard.

As explained in the preamble to the interim final rule, the heart of the matter is found in the requirement that SFA be "the amount necessary" or "required for the plan to pay all benefits due." The statutory text provides not merely that the amount of SFA be what is "required" in the abstract to pay benefits due through the end of 2051, but specifies that SFA be in the amount required "for the plan" to pay all benefits due during this period. PBGC believes that Congress' choice to modify the term "required" with "for the plan" indicates that the amount of SFA should take into account what resources the plan already has to pay benefits through the end of 2051.

Moreover, since the statute requires deterministic projections to be made through the end of the last plan year ending in 2051, the resources to be considered must include plan assets and income. If Congress had contemplated a different approach from accepted actuarial practice, Congress would have explicitly excluded the resources that it did not intend to be included in the determination of the amount of SFA "required for the plan." Accordingly, the additional funding necessary for the plan to pay benefits depends on what funding—plan assets, contributions, investment returns, etc.—the plan already has available to pay those benefits. To the extent that a plan has other means available to pay benefits, it does not require or need SFA for that purpose.

According to PBGC's modeling, not accounting for plan's non-SFA assets would easily enable all eligible plans to pay all benefits due through 2051, as SFA would cover the entirety of plans' projected liabilities from "benefits due" over the next 3 decades. However, PBGC's modeling also shows that this approach could potentially triple the cost of the SFA program.

One exception added to the final rule in § 4262.4(c)(3) permits plans to exclude from plan resources certain contribution rate increases agreed to on or after July 9, 2021. This change is

being made in response to comments PBGC received on assumptions guidance it issued on July 9, 2021—specifically, on the acceptable changes to a plan's contribution rate assumption. An example provided in the assumptions guidance showed contribution rate increases negotiated before March 11, 2021, being included in the plan's contribution rate assumption. Practitioners asked whether the example meant that contribution rate increases negotiated after March 11, 2021, could be excluded. PBGC is providing in the final rule that contribution rate increases agreed to on or after July 9, 2021, the date PBGC's interim final rule and initial assumptions guidance were issued, are excluded from employer contributions paid and expected to be paid to the plan during the SFA coverage period (and, if applicable, any benefit increases that result from the contribution increases are excluded from plan obligations under § 4262.4(b)(1) and (c)(1)). PBGC does not expect that excluding these negotiated contribution rate increases will result in an increase in the amount of SFA that a plan would receive without the new provision. This is because, without the provision, PBGC expects that bargaining parties would wait until after the plan applies for SFA to negotiate contribution rate increases (so as to exclude the contribution increases from plan resources in the calculation of SFA). However, this practice would be detrimental to the plan's financial health. PBGC expects that the new provision will eliminate this reason for delaying negotiation of contribution rate increases.

Except for excluding the contribution rate increases described directly above, the final rule does not adopt the suggestions from commenters to exclude some or all of a plan's resources. However, the final rule changes the methodology for calculating the amount of SFA in § 4262.4, by specifying the interest rate assumption used to project returns on SFA assets and by providing a methodology for determining SFA for MPRA plans that are eligible for SFA under § 4262.3(a)(2), and changes § 4262.14 to allow more flexibility in permissible investments of SFA. PBGC's modeling shows that these provisions are expected to enable plans to pay benefits due through the plan year ending in 2051 if future experience is in line with plan assumptions. The provisions are discussed in detail in the preamble under the subheadings *Calculating the Amount of SFA, Interest Rates for SFA and Non-SFA Assets, and Permissible Investments*.

### Calculating the Amount of SFA

Section 4262.4(a) of the interim final rule provided that the amount of SFA for a plan is the amount (if any), subject to adjustment for the date of payment as described in § 4262.12, by which the value of all plan obligations exceeds the value of all plan resources, determined as of the plan's SFA measurement date and limited to the SFA coverage period (the period ending on the last day of the last plan year ending in 2051). Under the interim final rule, the value of plan obligations was the sum of the present value of specified benefit payments and administrative expenses. The value of plan resources was the total of the fair market value of assets on the SFA measurement date and the present value of future contributions, withdrawal liability payments, and other payments expected to be made to the plan (excluding the amount of financial assistance under section 4261 of ERISA and the amount of SFA to be received by the plan) during the SFA coverage period.

Two commenters stated that the present value approach to determine the amount of SFA in the interim final rule does not properly take into account the timing of cash flows. The commenters were concerned that under the present value approach, plans with positive cash flow toward the end of the projection period could receive an amount of SFA that results in a projected plan asset value below zero before the end of the SFA coverage period. However, the commenters acknowledged that plans eligible for SFA are not expected to have a positive cash flow during the projection period. In addition, as described in detail in other sections of the preamble, PBGC received many comments related to the interest rate assumption a plan was required to use under the interim final rule to calculate the amount of SFA in the plan's application. To address these comments and to meet the statutory requirements of section 4262(j) of ERISA, in the final rule, PBGC is changing the methodology that a plan must use to determine the amount of SFA from a present value approach to a projection approach that ensures that plan assets cannot go below zero before the end of the SFA coverage period.

In addition, the final rule, in § 4262.4(a)(1) and (2), prescribes methodologies to determine SFA for plans that are not MPRA plans and for plans that are MPRA plans. Section 4262(n) of ERISA requires PBGC to coordinate with the Secretary of Treasury in prescribing the application process for eligible multiemployer plans

and the amount of SFA needed by a plan that has suspended benefits under section 305(e)(9) of ERISA. To determine the amount of SFA under § 4262.4, the final rule defines a MPRA plan under § 4262.4(a)(3) as a plan that is eligible for SFA under § 4262.3(a)(2) (a plan with an approved MPRA benefit suspension as of March 11, 2021). Thus, a plan that is eligible for SFA under § 4262.3(a)(1), (3), or (4) and has implemented a suspension of benefits that has been approved under section 305(e)(9) of ERISA *after* March 11, 2021, is not eligible for the amount of SFA determined under § 4262.4(a)(2) for a MPRA plan.

#### 1. Calculation of SFA for MPRA Plans

Following consideration of the issues raised by commenters described earlier in the preamble and of the harmonization of the statutory text and structure, and after consultation with the Treasury Department regarding the administration of the MPRA program, this final rule provides a different methodology for the calculation of SFA for MPRA plans than was provided in the interim final rule. Section 4262(n)(1)(B) of ERISA requires PBGC to consult with the Treasury Department regarding the amount of SFA needed for a MPRA plan based on the projected funded status of the plan at the end of 2051, the payment of previously suspended benefits, and other relevant factors. These factors are distinct from the generally applicable provision in section 4262(j)(1) of ERISA and reflect that Congress sought to ensure that PBGC accounts for MPRA plans' unique circumstances.

As described earlier in the preamble, under the interim final rule, MPRA plans faced the predicament where either accepting or not accepting SFA could raise fiduciary concerns. In deciding whether to apply for and accept SFA, MPRA plans must consider not only the positive impact of reinstated benefits on participants and beneficiaries currently receiving benefits, particularly current retirees receiving benefits, but also consider whether the plan may put the future benefits of active participants at risk if it cannot project to avoid insolvency indefinitely.

Under the final rule, a MPRA plan can apply for the greatest of: (1) the amount of SFA calculated for a plan that is not a MPRA plan; (2) the lowest amount of SFA that is sufficient to ensure that the plan will project rising assets at the end of the 2051 plan year; and (3) an amount of SFA equal to the present value of reinstated benefits (accounting for both make-up payments needed, as well as

payments of the reinstated portion of benefits through 2051, and any restoration of benefits under 26 CFR 1.432(e)(9)–1(e)(3)). These additional SFA calculations in (2) and (3), set forth in the final rule, accord with requirements and considerations that are unique to MPRA plans.

Under the second calculation, the amount of SFA is the lowest amount necessary for actuarial projections to show the plan's assets are increasing as of the last day of the plan year ending in 2051. In calculating the amount of SFA for plans that are not MPRA plans, the statute requires that the amount of SFA "shall be such amount required for the plan to pay all benefits" due through the end of the coverage period.<sup>19</sup> The statutory text in section 4262(n)(1)(B) of ERISA, which applies specifically and only to MPRA plans, adds a further consideration—the plan's "projected funded status." The final rule draws upon the demonstrations of "projected funded status" that current MPRA plans made as part of the MPRA process, which distinguishes them from other SFA-eligible plans. As discussed earlier, all SFA-eligible MPRA plans demonstrated to the Treasury Department that their proposed suspensions of benefits under MPRA would be sufficient for the plan to avoid insolvency indefinitely. Thus, the methodology under the final rule provides the amount of SFA projected to be necessary to ensure that a MPRA plan's projected funded status at the end of the plan year ending in 2051 continues to correspond to avoiding insolvency indefinitely, which the plan demonstrated as a requirement of suspending benefits under MPRA. In particular, MPRA plans will be able to accept SFA without harming their projected funded status at the end of the 2051 plan year.

PBGC has consulted with the Treasury Department as required by section 4262(n)(1)(B) of ERISA. The final rule aligns with the standard for avoiding insolvency indefinitely in the Treasury Department's final regulations on the suspension of benefits under MPRA. This requirement generally is satisfied under the Treasury Department's MPRA regulations if the value of plan assets is projected to increase at the end of the relevant measurement period.<sup>20</sup> This approach in the final rule, based on the Treasury Department's MPRA regulations, takes into account Congress' direction in section 4262(n)(1)(B) of ERISA that PBGC consult with the Treasury

<sup>19</sup> 29 U.S.C. 1432(j)(1).

<sup>20</sup> 26 CFR 1.432(e)(9)–1(d)(5)(ii).

Department regarding the amount of SFA needed “based on the projected funded status of the plan as of the last day of the plan year ending in 2051.”

Under the third calculation, the amount of SFA is the amount equal to the present value of reinstated benefits, including make-up payments and the reinstated portion of future benefits through 2051. Section 4262(n)(1)(B) of ERISA requires PBGC to consult with the Treasury Department to consider the “projected funded status” of MPRA plans and “any other relevant factors” and that “the amount of assistance . . . is sufficient to pay benefits as required in subsection (j)(1).” The determination of the amount of SFA under section 4262(j)(1) of ERISA must take into account “the reinstatement of benefits required under subsection (k).” The “benefits required under subsection (k)” include both make-up payments to account for previously suspended past benefits, *i.e.*, those benefits described in section 4262(k)(2), and the reinstated portion of future payments effective as of the month SFA is paid to the plan, *i.e.*, those benefits described in section 4262(k)(1). Thus, the statute requires MPRA plans that receive SFA to reinstate benefits and requires the amount of SFA to take into account the “reinstatement of benefits” by MPRA plans. This present value approach does that by providing MPRA plans an amount of SFA that is sufficient to pay reinstated benefits. The “amount of assistance” is sufficient only if a MPRA plan takes into account the reinstatement of suspended benefits under both section 4262(k)(1) and (k)(2) of ERISA. The present value approach is consistent with Congress’ direction that PBGC should consult with the Treasury Department regarding the amount of SFA needed “to ensure the amount of assistance is sufficient . . . to pay benefits as required in subsection (j)(1).”<sup>21</sup>

Following PBGC’s consultation with the Treasury Department, this final rule provides a MPRA plan the amount of SFA that is the greatest of these three calculations, which take into account the enumerated considerations the statute sets forth in section 4262(n)(1)(B).

## 2. Calculation of SFA for a Plan That Is Not a MPRA Plan

The amount of SFA for a plan that is not a MPRA plan is calculated under § 4262.4(a)(1) of the final rule as the lowest whole dollar amount (not less than \$0) for which, as of the last day of each plan year during the SFA coverage

period, projected SFA assets and projected non-SFA assets are both greater than or equal to zero.

The projected SFA assets for a plan are determined by projecting SFA forward annually until fully exhausted, using the annual cash flows specified in § 4262.4(b) of the final rule, including benefits and administrative expenses paid and expected to be paid by the plan during the SFA coverage period (excluding benefit increases resulting from certain contribution increases and excluding the amount owed to PBGC under section 4261 of ERISA), and investment returns expected to be earned on the SFA assets (calculated using the SFA interest rate described in new § 4262.4(e)(2)).

The projected non-SFA assets for a plan are determined by projecting the fair market value of plan assets on the SFA measurement date forward annually, using the annual cash flows specified in § 4262.4(c) of the final rule, including: the benefits and administrative expenses paid and expected to be paid by the plan during the SFA coverage period (excluding benefit increases resulting from certain contribution increases and excluding the amount owed to PBGC under section 4261 of ERISA) after the projected SFA assets are fully exhausted; employer contributions (excluding certain contribution rate increases), withdrawal liability payments reflecting a reasonable allowance for amounts considered uncollectible, and other payments expected to be made to the plan (excluding the amount of financial assistance under section 4261 of ERISA and SFA) during the SFA coverage period; and investment returns expected to be earned on the non-SFA assets (calculated using the non-SFA interest rate described in new § 4262.4(e)(1)).

Under § 4262.4, the deterministic projections must be based on recent participant census data. Section 4262.4(d) of the interim final rule provided that participant census data must be as of the first day of the plan year in which the plan’s initial application is filed, or, if the date on which the plan’s initial application is filed is less than 270 days after the beginning of the current plan year and the actuarial valuation for the current plan year is not complete, the projections may instead be based on the participant census data as of the first day of the plan year preceding the year in which the plan’s initial application is filed. PBGC received one comment stating that some plans may be unable to complete the actuarial valuation report within 270 days due to reporting delays and plan complexity. The

commenter recommended extending the 270 days to 1 year to enable these plans to apply without having to wait until the current valuation is completed. PBGC considered this comment and has concluded that a simpler rule will provide for data that are adequately up to date. Under § 4262.4(d), as revised by the final rule, projections must be based on participant census data used to prepare the plan’s actuarial valuation report for the plan year that includes the plan’s SFA measurement date, or, if there is no such report for that plan year, for the preceding plan year.

If a plan experiences a significant change in plan experience between the date of the plan’s participant census data used to prepare the SFA projections and the plan’s SFA filing date, PBGC’s assumptions guidance (issued on PBGC’s website at [www.pbgc.gov/guidance](http://www.pbgc.gov/guidance)) provides guidelines on how to reflect that significant change. Plans may, but are not required to, use the guidelines if they are reasonable for the plan.

## Interest Rates for SFA and Non-SFA Assets

As discussed earlier in the preamble, PBGC interprets the requirement in section 4262(j)(1) of ERISA that SFA be provided in the “amount required for the plan to pay all benefits due” through the end of 2051 to mean the amount required in addition to the plan’s non-SFA assets. This means that plans will pay benefits from two separate pools of assets which, under the statute, must be segregated and invested separately. Therefore, to calculate the amount of SFA “necessary for the plan to pay all benefits due” through the end of 2051, plans must perform separate calculations to project the value of each pool of assets, each of which requires the use of an interest rate assumption to reflect expected returns on that pool of assets.

Section 4262(e)(2)(A) of ERISA provides an interest rate that plans must use as part of the determination of the amount of SFA under section 4262(j)(1). This rate is based on the rate used in the plan’s most recently completed certification of plan status before January 1, 2021, subject to an interest rate limit. The interest rate limit specified in section 4262(e)(3) is the rate that is 200 basis points higher than the rate specified in section 303(h)(2)(C)(iii) of ERISA (disregarding modifications made under clause (iv) of such section) “for the month in which the plan’s application for SFA is filed or the 3 preceding months.” This provision places a “cap” on the interest rate, which is any permissible rate for a

<sup>21</sup> Section 4262(n)(1)(B) of ERISA.

month during the 4-month period ending with the month in which the plan's initial application was filed.

The interim final rule provided that a plan must use this interest rate as an assumption for the expected rate of return for both the SFA and the non-SFA assets. Under § 4262.4(e)(1) of the interim final rule, the "assumed interest rate" was the interest rate that is the lesser of the rate used by the plan for funding standard account projections in the plan's most recently completed certification of plan status before January 1, 2021, or the rate that is 200 basis points higher than the rate specified in section 303(h)(2)(C)(iii) of ERISA (disregarding modifications made under clause (iv) of such section) for any month selected by the plan in the 4-month period ending with the month in which the plan's application was filed (or the month in which the initial application was filed if there was more than one filing date).

Many commenters discussed the difference between the interest rate assumption used to calculate SFA under § 4262.4(e)(1) of the interim final rule, and the expected lower return on SFA assets invested in permissible investments under § 4262.14. These commenters argued that the approach of applying a single interest rate to each pool of plan assets would be at odds with the statutory language in section 4262(j) of ERISA that the amount of SFA "shall be such amount *required* for the plan to pay all benefits due during the period beginning on the date of payment of [SFA] and ending on the last day of the plan year ending in 2051" (emphasis added). As noted earlier, commenters argued that, under the interim final rule approach, many, if not most, SFA-eligible plans would not receive the SFA amount "required" to enable the plans to pay benefits through the 2051 plan year. These commenters suggested that an interest rate assumption required to be used to calculate the amount of SFA under section 4262(e) and the expected rate of return on permissible investments under section 4262(l), which were limited in the interim final rule primarily to investment grade bonds, would make it impossible for plans to receive the amount of SFA required to pay benefits through 2051. Some commenters illustrated this point by noting that their modeling showed that their plans would run out of money before 2051, a conclusion that PBGC has confirmed through its own additional, more detailed modeling performed since issuance of the interim final rule. Commenters argued that plans therefore should not be required to use the rate in section 4262(e) to project both SFA

and non-SFA assets, given their different expected rates of return, and that allowing plans to apply a different reasonable rate to SFA assets would be a permissible exercise of PBGC's discretion that would better achieve the statute's requirements.

In contrast, a few commenters stated that the interest rate set forth in section 4262(e) of ERISA and the investment restrictions in section 4262(l) are plain directives of the statute. These commenters instead asked PBGC to reinterpret section 4262(j)(1) to change the determination of the amount of SFA by, for example, disregarding certain categories of plan resources (or all plan resources) in determining the amount of SFA required by a plan.

Other commenters provided a number of suggestions regarding what interest rate assumptions plans should be permitted to use for SFA and non-SFA assets. The most common suggestion was that the interest rate required under section 4262(e) of ERISA should apply only to non-SFA assets and that PBGC should allow a separate rate to apply to SFA assets. Many commenters contended that the statute did not specify an interest rate for SFA assets, providing several arguments in support of these contentions. Some pointed out that although section 4262(e) requires plans to use the rate identified in that section in calculating the amount of SFA, the statute does not specify how it is to be used, nor require that such rate be used for all purposes. Commenters also argued that using the rate under section 4262(e) to project returns on SFA assets would not make sense given that section 4262(l) provides that SFA assets will be invested separately and likely at lower rates of return than non-SFA assets, and because section 4262(j)(1) cannot be satisfied without SFA assets being projected—for most plans—using an investment-return assumption lower than the interest rate in section 4262(e). Thus, many commenters argued that PBGC should allow plans to use a different interest rate for SFA assets so that plans will receive sufficient SFA to pay full benefits through 2051, as required by section 4262(j)(1). These commenters argued that PBGC has the authority and the mandate to harmonize the various provisions of section 4262 in this manner.

Some commenters further argued that, because the 2020 certifications of plan status did not include an interest rate assumption for projecting investment returns on SFA assets, the interest rate should be a newly established assumption and reflect expected returns on SFA assets. A few other commenters

suggested that PBGC should provide a rate equal to the IRS' third segment rate, without adding the 200 basis points. One commenter requested allowing plans to submit two calculations, with one calculation based on the interest rate assumption in the interim final rule and a second calculation using interest rate assumptions that would more reasonably project actual returns for SFA and non-SFA assets. PBGC would then provide the plan an amount of SFA to make up any discrepancy between the two calculations.

In the interim final rule, PBGC explained that to determine eligibility for SFA, for certifications of plan status completed after December 31, 2020, section 4262(e)(1) of ERISA requires a plan to use assumptions from its most recently completed certification of plan status before January 1, 2021, unless such assumptions (excluding the plan's interest rate) are unreasonable. To determine the amount of SFA, the interim final rule noted that section 4262(e)(2) provides that a plan must "use the interest rate used by the plan in its most recently completed certification of plan status before January 1, 2021, provided that such interest rate may not exceed the interest rate limit." Under section 4262(e)(4), if a plan determines that use of one or more prior assumptions is unreasonable, the plan may propose to change such assumption. Section 4262(e)(4) also provides that, notwithstanding this language, plans cannot propose a change to the interest assumption. In the interim final rule, PBGC interpreted these subsections of 4262(e), read together, to mean that plans should use the section 4262(e) interest rate to determine the amount of SFA, without a separate interest rate assumption for projecting SFA assets. In interpreting section 4262(e), PBGC, in the interim final rule, stated that it does not have authority to provide a different rate or bifurcate the statutorily mandated interest rate.

After further review of the statute, PBGC observes that section 4262(e) of ERISA is general in its language regarding the determination of the amount of SFA and does not speak directly to the precise question of the use of an interest rate to project returns on SFA assets. Thus, PBGC has, after this further review of the statute, additional consultation with its Board agencies, consideration of comments, and extensive actuarial modeling, determined that an alternative interpretation of section 4262(e) that addresses the limitations imposed by the statute and PBGC on permissible investments, is reasonable and more

likely to result in the SFA an eligible plan receives being sufficient for the plan to pay full benefits through 2051, as provided under section 4262(j)(1) of ERISA, than the interpretation adopted in the interim final rule. This result would not be possible solely by the increased flexibility in the investment of SFA assets under revised § 4262.14. Therefore, after considering section 4262(e) together with sections 4262(j)(1) and 4262(l) of ERISA, and in order to harmonize these provisions of the statute more effectively than in the interim final rule, PBGC is providing for two interest rate assumptions in the final rule.

PBGC has considered, but does not agree with, comments that argued that PBGC has discretion to permit plans to not use in any manner the interest rate identified in section 4262(e) of ERISA when calculating the amount of SFA. The text of section 4262(e)(2) states that “[i]n determining the amount of special financial assistance in its application, an eligible multiemployer plan *shall 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” (emphasis added). Because the statute speaks directly to whether plans must use this rate, PBGC does not have discretion to allow plans not to use the interest rate in section 4262(e)(2) at all. Although plans may be able to forgo using other assumptions from their most recently completed certification of plan status before January 1, 2021, if they demonstrate to PBGC that those assumptions “are no longer reasonable,” section 4262(e)(4) makes clear that plans cannot propose to change the requirement to use the interest rate in section 4262(e)(2). This final rule therefore maintains the requirement that plans use the section 4262(e) rate when calculating the amount of SFA. Under the final rule, plans must use this rate as the assumed rate of return on non-SFA plan assets.

PBGC has considered arguments from commenters that the statute does not expressly speak to whether the section 4262(e) rate must also be used as the assumed rate of return on SFA assets, which did not exist at the time of a plan’s most recent certification of plan status before January 1, 2021, and which will be invested separately, and under different statutory restrictions, from non-SFA assets. As explained earlier in the preamble, the final rule maintains that at least one of the components of this overall calculation must be projected using the rate specified in section 4262(e)(2) of ERISA because of

the statute’s instruction that plans “shall” use that rate in determining the amount of SFA.<sup>22</sup>

However, after further statutory analysis and consideration of comments, PBGC recognizes that the statute does not specify the pool of assets for which that rate must be used as the assumed rate of return. In light of this statutory silence, PBGC is exercising discretion to make a reasonable choice, consistent with section 4262(j)(1), about the pool of assets for which the interest rate assumption in section 4262(e)(2) shall be used. As discussed earlier in the preamble, PBGC has interpreted the requirement in section 4262(j) that SFA shall be the amount “required for the plan” to pay all benefits due through the end of the plan year 2051 to mean that plans must consider existing assets in calculation of the SFA amount. Plans receiving SFA will therefore pay these benefits from two pools of assets: SFA assets and non-SFA assets. Section 4262(l) expressly contemplates that the SFA assets may have a different expected rate of return than non-SFA assets. In addition, as many commenters noted, a mismatch between the investment restrictions in section 4262(l) and the interest rate identified in section 4262(e)(2) also supports the reasonableness of allowing plans to apply a different and more realistic rate to SFA assets, including to meet the requirements of section 4262(j)(1). Given the investment restrictions under section 4262(l), if the section 4262(e)(2) interest rate assumption were required to be used in projecting SFA assets, PBGC would not be providing the amount of SFA reasonably projected to be “required for the plan to pay all benefits due” through the plan year ending in 2051.

Requiring plans to use the section 4262(e) rate for projecting the value of non-SFA assets, while providing for a different rate for projecting the value of SFA assets, is a reasonable interpretation of the statute that harmonizes sections 4262(e), (j), and (l).

Accordingly, to calculate the amount of SFA for a plan under § 4262.4, the plan must use two interest rate assumptions: (1) the plan’s non-SFA interest rate used for calculating investment returns expected to be earned on the plan’s non-SFA assets, and (2) the plan’s SFA interest rate used for calculating the investment return expected to be earned on the plan’s SFA assets.

The first interest rate, defined in § 4262.4(e)(1) of the final rule, is the

plan’s “non-SFA interest rate.” This rate replaces the “assumed interest rate” under the interim final rule. The “assumed interest rate” was defined as the interest rate that is the lesser of the rate used by the plan for funding standard account projections in the plan’s most recently completed certification of plan status before January 1, 2021, or the interest rate “cap” selected by the plan in the 4-month period ending with the month in which the plan’s application was filed (or the month in which the initial application was filed if there was more than one filing date). PBGC recognizes that it is always to a plan’s advantage to use the rate for the month in which the rate is lowest. For simplicity, therefore, in the final rule PBGC is revising § 4262.4(e)(1)(ii) by specifying that the non-SFA interest rate “cap” is the interest rate that is 200 basis points higher than the rate specified in section 303(h)(2)(C)(iii) of ERISA (disregarding modifications made under clause (iv) of such section) for the month in which that rate is the lowest among the 4 calendar months ending with the month in which the plan’s initial application for special financial assistance is filed, taking into account only rates that have been issued by the Internal Revenue Service as of the day that is the day before the date the plan’s initial application is filed.

The second interest rate, defined in § 4262.4(e)(2) of the final rule, is the plan’s “SFA interest rate.” The SFA interest rate is the lesser of the rate used by the plan for funding standard account projections in the plan’s most recently completed certification of plan status before January 1, 2021, and an interest rate cap that is lower than the non-SFA interest rate cap. This lower cap reflects the restrictions on investment of SFA funds and the investment returns plans can reasonably expect to earn on SFA funds.<sup>23</sup> The SFA

<sup>23</sup> PBGC determined that the average of the first and second segment rates specified in sections 303(h)(2)(C)(i) and (ii) of ERISA (disregarding modifications made under clause (iv) of such section) is likely to reasonably represent the yield and therefore the expected return at any point in time on the portion of the SFA required to be invested in investment grade fixed income. As discussed later in the preamble under the subheading *Permissible Investments*, up to 33 percent of SFA may be invested in return-seeking assets and the expected return on SFA assets is the weighted average of the expected returns for the component parts. Using the interest rate cap applicable to plan assets that are not subject to an investment limitation (200 basis points above the third segment rate) as a cap for return-seeking assets and an allocation of 33 percent of SFA to those assets, the cap on the SFA interest rate—the weighted average of the caps for the component

<sup>22</sup> See section 4262(e)(2) of ERISA.

interest rate cap is the interest rate that is 67 basis points higher than the average of the rates specified in section 303(h)(2)(C)(i), (ii), and (iii) of ERISA (disregarding modifications made under clause (iv) of such section) for the month in which such average is the lowest among the 4 calendar months ending with the month in which the plan's initial application for special financial assistance is filed, taking into account only rates that have been issued by the Internal Revenue Service as of the day that is the day before the date the plan's initial application is filed.

Section 4262(f) of ERISA suggests that a plan may have multiple filing dates by providing two application deadlines: One for initial applications and one for revised applications. Until an application is approved, there is no limit to the number of times that a plan sponsor may file a revised application as long as the last revised application is filed by the statutory deadline of December 31, 2026. Once PBGC has accepted an application for processing, PBGC believes that it is in the best interest of all parties to avoid the duplicative work and delays that would result if a revised application were to use different interest rate assumptions. To prevent multiple filings for purposes of changing the interest rate assumptions, if a plan's application is revised as provided under § 4262.11, the non-SFA interest rate and SFA interest rate used for any revised application must be the same as the non-SFA interest rate and SFA interest rate required to be used for the plan's initial application for SFA.

#### *Calculating the Amount of SFA With Respect to Certain Events*

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

SFA a plan (or all plans in the case of a merger) would have received had the events not occurred. PBGC included these provisions in the interim final rule in consultation with the Treasury Department.

With respect to mergers, § 4262.4(f)(1)(ii) of the regulation provides that if two or more plans are merged, then the SFA is limited so that it does not exceed the sum of the SFA that would have been calculated for all of the plans involved in the merger had the plans applied separately for SFA. Thus, a plan that would not have been entitled to any SFA if not for a merger that occurs on or after July 9, 2021, cannot become entitled to SFA by merging with a plan that also would not otherwise be entitled to any SFA. A plan eligible for SFA may remain eligible after the merger; however, a plan may not increase the amount of SFA to which it is entitled by merging with another plan or plans on or after July 9, 2021.

PBGC considered two comments it received related to these provisions and decided not to make any changes to § 4262.4(f) in the final rule. One commenter stated generally that PBGC should not limit SFA or access to SFA because the protections already in place under the Pension Protection Act of 2006, MPRA, and ARP are sufficient to avoid abuse. A second commenter suggested that the amount of SFA available to merged plans should not be limited to the amount each plan would have been separately eligible to receive. The commenter argued that PBGC does not have authority to make rules limiting SFA for two or more plans that are merged, that a prohibition is not a reasonable condition regarding diversion of contributions, and that the rule denies needed assistance to plans that are facing insolvency.

PBGC disagrees with the commenter's assertion that PBGC does not have authority to address possible abuse of the SFA program or to limit SFA, in the case of a merger, to the amount each plan would have been separately eligible to receive. As explained in the interim final rule, section 4262(b)(1) of ERISA establishes criteria for eligibility of a multiemployer plan for SFA, and section 4262(j) provides for determining the amount of the SFA. It is appropriate for PBGC, with its responsibility for carrying out the purposes of the title IV insurance program,<sup>24</sup> to impose conditions on plans receiving SFA

designed to ensure that plans do not receive more than the amount of SFA to which they are entitled. As provided in the interim final rule, PBGC concludes that, to achieve that end, it is reasonable not to give effect to changes made to a plan's structure or terms on or after July 9, 2021, if such changes would either artificially inflate the amount of SFA to which a plan is entitled or convert an ineligible plan into an eligible plan.

Informing this conclusion, section 4262(e)(2)(B) of ERISA provides, as a general rule, that the actuarial assumptions to be used by a plan are the assumptions used in the plan's actuarial certification for the most recently completed certification of plan status before January 1, 2021 (unless those assumptions are unreasonable), indicating that the plan applying for SFA must have been in existence and had an actuarial certification as to its status before January 1, 2021. The provisions regarding interest rate assumptions under section 4262(e)(2)(A) are specific to the plan in its most recent certification of plan status completed before January 1, 2021, and, under section 4262(e)(4), those assumptions may not be changed. A manipulation of those rates via a merger would not be consistent with that prohibition. Although the statute does not directly address plan mergers, in the case of merged plans, each plan's assumptions from the most recently completed pre-2021 certification of plan status must be maintained in order for section 4262(e) to be given effect with respect to the plans that merged. PBGC's rule fills the gap left in the statute for the calculation of SFA for plans that have been involved in a merger occurring on or after July 9, 2021.

In addition, section 4262(m)(1) of ERISA expressly authorizes PBGC, in consultation with the Secretary of the Treasury, to impose reasonable conditions "on an eligible multiemployer plan that receives special financial assistance" relating to certain aspects of plan terms or operations. Such conditions include those relating to the diversion of contributions to and allocation of expenses to other benefit plans, increases in future accrual rates, retroactive benefit improvements, and reductions in employer contribution rates. PBGC's authority to impose reasonable conditions under section 4262(m)(1) is not limited to restrictions on a plan following its receipt of SFA. PBGC is authorized to impose conditions on a plan that "receives" SFA. PBGC's authority is not limited to imposing conditions on a plan that *has received* SFA. That understanding of

parts—is the average of the three segment rates plus 67 basis points.

<sup>24</sup> PBGC's inherent authority under section 4002(b)(3) of ERISA allows PBGC to adopt regulations to carry out the purposes of the title IV insurance program.

section 4262(m)(1) finds further support in section 4262(m)(2), which restricts the conditions that PBGC can impose not only “following receipt of” SFA, but also “as a condition of” SFA. That broad prohibition would be unnecessary if PBGC’s authority under section 4262(m)(1) were limited to imposing only post-receipt conditions.

The condition respecting mergers is consistent with PBGC’s authority under section 4262(m)(1) of ERISA to impose reasonable conditions relating to the “diversion of contributions to, and allocation of expenses to, other benefit plans.” When two or more plans merge, each predecessor plan has diverted its contributions and allocated its expenses to the merged plan and thereby to each other merging plan. A merged plan, which combines assets and liabilities of two or more plans, each with its own set of participants and beneficiaries, to all of whom all the assets (and, thus, all the contributions) must be available following the merger, is, in effect, diverting contributions intended to benefit one set of participants (the participants in the plan that received SFA) to another (the participants in each other merging benefit plan).

Accordingly, under section 4262(m) of ERISA, in conjunction with section 4002(b)(3), PBGC is authorized to impose reasonable conditions that ensure that SFA is provided to plans in an amount that is not artificially inflated by plan mergers. Conditions regarding events other than mergers are discussed in the preamble of the interim final rule and examples illustrating the provisions are included in § 4262.4(f)(6).

#### *Calculating the Amount of SFA for Plans That Applied for SFA Under the Interim Final Rule*

Pursuant to its authority under section 4262(c) of ERISA, PBGC in the final rule adds new § 4262.4(g) to provide guidance on the requirements for SFA applications for plans that applied for SFA under the interim final rule.

If a plan’s application for SFA was approved under the regulation as in effect before August 8, 2022 (meaning under the interim final rule), the plan should look to the rules set forth under § 4262.4(g)(1) for “approved applications.” Those rules provide that the plan may supplement its application after SFA is paid under the terms of the interim final rule. When a plan files a supplemented application, the amendments in this final rule to permissible investments in § 4262.14 and to the withdrawal liability condition in § 4262.16(g)(2) become applicable upon the date the

supplemented application is filed even if the supplemented application is not approved. A supplemented application may be filed even if a plan would not receive additional SFA as the result of the filing. If the plan chooses to supplement, the plan will file a supplemented application with the changes and information specified in the SFA supplemented application instructions on PBGC’s website at [www.pbgc.gov](http://www.pbgc.gov) to implement the provisions of the final rule for determining the amount of the plan’s SFA, including the interest rate assumptions under § 4262.4(e). A supplemented application, like a revised application, must be filed by December 31, 2026, and in accordance with the processing system (including priority groups) described in § 4262.10. PBGC must review a supplemented application within 120 days of the filing date. The plan cannot change the plan’s SFA measurement date, fair market value of assets, or participant census data used in the plan’s application approved under the interim final rule. The plan also cannot propose a change in assumptions, except to propose a change to the plan’s employer contribution assumption to exclude contribution rate increases agreed to on or after July 9, 2021, as permitted under § 4262.4(c)(3) (in which case, the plan must exclude any benefit increases resulting from those contribution increases). A plan may withdraw the plan’s supplemented application and file a new supplemented application at any time before the supplemented application is denied or approved. If PBGC denies a plan’s supplemented application, the plan may file a new supplemented application. Any new supplemented application filed by the plan must address the reasons cited by PBGC for the denial. Any SFA paid to the plan under the provisions of the final rule will be adjusted as described in § 4262.12, including to reflect the prior receipt of SFA.

If a plan applied for SFA under the interim final rule and the plan’s application was not approved, withdrawn, or denied, and was pending, as of August 8, 2022, the plan should look to the rules set forth under § 4262.4(g)(2) for “pending applications.” They provide that the plan’s pending application may be withdrawn (as described in § 4262.11(d)) and a revised application filed, or not withdrawn and determined under terms of the interim final rule. Any revised application must use the plan’s base data defined in § 4262.4(g)(5). Base data include the

plan’s SFA measurement date, determined under the interim final rule as the last day of the calendar quarter immediately preceding the date the plan’s initial application for SFA was filed; the plan’s participant census data required to be used in the plan’s initial application for SFA under the interim final rule; and the plan’s non-SFA interest rate and SFA interest rate determined under § 4262.4(e)(1) and (2) of the final rule. Any SFA paid to the plan under the provisions of the final rule will be adjusted as described in § 4262.12. A plan with a “pending application” that chooses not to withdraw and revise its application will be paid the amount of SFA as determined under the interim final rule. The plan is not precluded from later filing a supplemented application.

If a plan applied for SFA under the interim final rule and it was not pending as of August 8, 2022, because the plan’s application was denied or the filer withdrew the plan’s application in accordance with § 4262.11(d), the plan may file a revised application (see the provisions for a “withdrawn application” and a “denied application” under § 4262.4(g)(3) and (4) respectively). Any revised application must use the plan’s base data defined in § 4262.4(g)(5). Base data include the plan’s SFA measurement date, determined under the interim final rule as the last day of the calendar quarter immediately preceding the date the plan’s initial application for SFA was filed; the plan’s participant census data required to be used in the plan’s initial application for SFA under the interim final rule; and the plan’s non-SFA interest rate and SFA interest rate determined under § 4262.4(e)(1) and (2) of the final rule. Any SFA paid to the plan under the provisions of the final rule will be adjusted as described in § 4262.12.

#### *PBGC Review of Plan Assumptions*

PBGC’s review of an application for SFA focuses on the reasonableness of the plan’s demonstration regarding the amount of SFA for the plan. Section 4262.5 sets forth how PBGC reviews plan assumptions.

Section 4262 of ERISA generally looks to plan assumptions previously selected by the plan actuary for determining eligibility for and calculating the amount of SFA. A mechanism is provided for a plan to propose changes to actuarial assumptions if it determines that the use of one or more of its original assumptions (other than the interest rate) is unreasonable.

Under section 4262 of ERISA, actuarial assumptions generally are

derived from a plan's certification of plan status under section 305 of ERISA. In general, PBGC believes that a plan's actuarial assumptions adopted for the certification of plan status (and not for entitlement to SFA) represent a neutral view of circumstances, unbiased by the prospect of receiving a substantial sum of money. Accordingly, as provided in the interim final rule, PBGC expects to give less intensive scrutiny to "original" assumptions than to changed assumptions.

Section 4262(e)(1) of ERISA requires PBGC to accept actuarial assumptions incorporated in a plan's certification of plan status completed before 2021 for purposes of eligibility unless PBGC determines that such assumptions are "clearly erroneous." For all other purposes (including determining the amount of SFA), the statute requires PBGC to accept the assumptions used unless PBGC determines that they are unreasonable.

Several commenters recommended that PBGC take a deferential approach when reviewing assumptions used by a plan's actuary in the most recent certification of plan status completed before 2021. These commenters argued that if a plan sponsor does not propose a change, PBGC should refrain from challenging the plan's assumptions because the intent of the statute is to allow those assumptions to serve as default assumptions. They argue that this would allow SFA applications, in comparison to MPRA applications, to be expeditiously reviewed by avoiding the level of scrutiny that was imposed when reviewing actuarial assumptions for MPRA applications. These commenters requested guidance from PBGC stating that the pre-2021 assumptions are deemed acceptable. One commenter requested that PBGC accept the plan's assumptions unless they are clearly erroneous or unreasonable. Another suggested that PBGC not challenge pre-2021 assumptions unless clearly unreasonable. Yet another commenter requested that PBGC clarify that pre-2021 assumptions that were reasonable for purposes of the pre-2021 certification of plan status will not be deemed unreasonable for purposes of the SFA application because of the passage of time, subsequent events, or the different purpose of measurement.

PBGC agrees that, in comparison to a plan's changed assumptions, for the reasons discussed earlier in the preamble, PBGC should take a more deferential approach in reviewing a plan's use of pre-2021 assumptions. However, given the language in section 4262(e)(2)(B) of ERISA that a plan shall use the pre-2021 assumptions "unless

such assumptions are unreasonable," PBGC disagrees that a lesser standard, such as clearly erroneous or clearly unreasonable, should be used by PBGC when reviewing a plan's assumptions used to determine the amount of SFA for the plan. In addition, PBGC disagrees with the one commenter's assertion that the passage of time, subsequent events, or the different purpose of the measurement should not be considered by the plan's actuary. As described later in this section of the preamble, the statute provides a mechanism for changing prior assumptions that are no longer reasonable (excluding the interest rate assumption). This indicates that the passage of time, subsequent events, and the purpose of the measurement should be considered by the plan's actuary. If the plan's actuary does not determine that one or more of the pre-2021 assumptions are unreasonable for the purpose of determining the amount of SFA, PBGC will defer to the plan's use of those assumptions unless PBGC finds the assumptions unreasonable. PBGC, however, may request additional information from the plan to determine whether a pre-2021 assumption is unreasonable.

Each of the actuarial assumptions and methods used for the actuarial projections (excluding the interest rate assumptions) must be reasonable in accordance with generally accepted actuarial principles and practices,<sup>25</sup> taking into account the experience of the plan and reasonable expectations. To be reasonable, an actuarial assumption or method generally must, among other things, be appropriate for the purpose of the measurement, reflect the actuary's professional judgment, take into account current and historical data that is relevant to selecting the assumption for the measurement date, reflect the actuary's estimate of future experience, and reflect the actuary's observation of the estimates inherent in market data (if any). In addition, an actuarial assumption or method must be expected to have no significant bias (*i.e.*, it is not significantly overly optimistic or pessimistic).

The statute provides a mechanism for changing prior assumptions (other than the interest rate assumption) that are no longer reasonable. If a plan actuary

<sup>25</sup> Actuarial Standards of Practice (ASOPs) are issued by the Actuarial Standards Board and are available at <http://www.actuarialstandardsboard.org/standards-of-practice>. Certain ASOPs, including ASOPs Nos. 4, 23, 27, 35, 41, and 56 may be relevant to the actuary's work related to special financial assistance, including the assessment of the reasonableness of the actuary's assumptions and methods.

determines that one or more original assumptions are unreasonable and must be changed, § 4262.5(c) provides that the plan's application must describe why the original assumption is no longer reasonable, propose to use a different assumption (the changed assumption), and demonstrate that the changed assumption is reasonable. If there is a change in assumptions, each of the actuarial assumptions and methods (other than the interest rate assumptions) must be reasonable, and the combination of actuarial assumptions and methods (excluding the interest rate assumptions) also must be reasonable. Plans are required to provide detailed information about any changed assumptions, and PBGC will perform a less deferential analysis of those assumptions than of the original pre-2021 assumptions.

Concurrent with the interim final rule, PBGC issued assumptions guidance containing guidelines for changes to certain assumptions that plans may use for purposes of determining eligibility for SFA and the amount of SFA. Plans may, but are not required to, use the guidelines. Plans that do not use the guidelines may demonstrate that the change is reasonable by providing additional information beyond what would be required under the guidelines. Guidelines are available for contribution base units (CBUs), administrative expenses, mortality, contribution rates, and new entrant profiles, and can be found in the guidance issued on PBGC's website at [www.pbgc.gov/guidance](http://www.pbgc.gov/guidance). In addition, for various reasons, a plan may have a gap in the assumption for projected CBUs and administrative expenses used in the prior certification of plan status such that the assumption cannot be used "as is" for determining SFA. To assist applicants and aid in the review of a plan's CBU assumption and administrative expense assumption, PBGC developed standard extensions that plans can use to complete the assumption set for a plan that otherwise can use its original assumptions. With respect to the § 4262.5(c)(1)(iii) requirement to demonstrate that the changed assumption is reasonable, it is sufficient to include a statement to that effect in the application instead of a detailed demonstration if the plan uses standard extensions described in the assumptions guidance.

Two commenters suggested that PBGC could permit MPRA plans to use projected CBUs consistent with their approved MPRA applications as a safe-harbor assumption. One of these commenters also suggested a safe harbor for MPRA plans to use other actuarial

assumptions from their approved MPRA application. If an assumption used in a plan's approved MPRA application is the same as an assumption used in the plan's last pre-2021 certification of plan status, and the plan's actuary determines that the assumption is not unreasonable for the purpose of determining the amount of SFA, PBGC will provide deference to the actuary's determination unless PBGC finds the assumption unreasonable. If an assumption used in a plan's approved MPRA application is not the same as an assumption used in the plan's last pre-2021 certification of plan status, the plan actuary may propose to change the assumption to the assumption used in the plan's approved MPRA application in accordance with § 4262.5(c). PBGC is amending its assumptions guidance to provide that PBGC will generally accept a change in assumption to an assumption used in a plan's approved MPRA application, including projected CBUs, if the plan includes the information required by § 4262.5(c) in the application and the demonstration provided by the plan shows the assumption is reasonable for the purpose of determining the amount of SFA.

Several commenters requested that PBGC's guidance provide more flexibility in contribution assumptions or recommended specific changes, such as eliminating the requirement that a change in CBU assumption be adequately supported by historical data. The commenters stated that historical data is not necessarily predictive of future changes. One commenter explained that the historical data requirement defies economic trends in many industries, is inconsistent with the reasonableness standard in the statute, and may contravene actuarial standards which require actuaries to consider factors that may affect future experience, such as economic conditions for the industry and the availability of alternative employment due to automation. Another commenter asked for guidance, or clarifications of PBGC's guidance, on various assumptions, including mortality, new entrant assumptions, and employer withdrawals.

PBGC has updated its assumptions guidance to address some of the comments received, provisions of this final rule, and to provide more clarity and additional guidance based on experience in reviewing applications. In addition to the change described earlier in the preamble for plans with approved MPRA applications, PBGC added guidelines on acceptable changes to a plan's disabled life mortality

assumption and on the acceptable adoption of or update to a plan's mortality improvement projection scale. PBGC specified the information needed to show that a plan's assumed new entrant profile and administrative expenses assumption are based on the acceptable methodology as indicated by the guidance. For a plan that reflects significant plan experience between the participant census date and the application filing date, PBGC added that the plan should provide a rationale for how it determined that the plan experience was significant, and made other updates to the related example. PBGC added examples and other clarifications to acceptable assumption changes.

PBGC also added guidelines on projecting future receipt of employer withdrawal liability payments, noting that the projection should reflect the actuary's best estimate of future plan experience and that the plan's actuary should consider reflecting a reasonable allowance for amounts considered uncollectible. PBGC added guidelines for plans where all the assumptions required to be used for projections in the pre-2021 certification of plan status were not identified. The assumptions guidance also provides guidelines on acceptable changes for the exclusion of terminated vested participants over a certain age. Finally, PBGC added information about how applicants can schedule an informal pre-application conference with PBGC.

PBGC considered the comments on CBU assumptions and, except for some clarifying changes, did not adopt the suggestion of commenters to eliminate the guideline that a change in CBU assumption be adequately supported by historical data. Instead, PBGC included examples in the guidelines to illustrate how historical data and industry trends can be used to project future changes in CBUs under the guidelines.

PBGC's guidance on CBUs and other assumptions may not be reasonable for all plans and is not binding on plans. A plan should follow the assumptions guidance only if it is reasonable for the plan to do so. As explained earlier in the preamble, applicants may propose changes to the plan's assumptions by following § 4262.5(c), including describing why the original assumption is no longer reasonable, disclosing the changed assumption, and demonstrating that the changed assumption is reasonable.

#### *Information To Be Filed*

Sections 4262.6 through 4262.8 of the interim final rule described the information that must be included in a

plan's SFA application. Section 4262.6 summarized the requirements for an application to be considered complete, including: plan information; actuarial and financial information (including the amount of SFA requested); a completed checklist (per the SFA instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov)); the signature of an authorized trustee who is a current member of the board of trustees; a signed statement under penalty of perjury; a copy of the executed plan amendment providing that, beginning with the SFA measurement date, the plan must be administered in accordance with the restrictions and conditions specified in section 4262 of ERISA and this regulation; if the plan suspended benefits under sections 305(e)(9) or 4245(a) of ERISA, a copy of the proposed plan amendment to reinstate suspended benefits and pay make-up payments and a certification by the plan sponsor that the plan amendment will be adopted timely; and any information required by PBGC to clarify or verify the information in a filed application. If any of the information required under the regulation and in the SFA instructions is missing from the filed application, the application will not be considered complete.

The SFA instructions (on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov)), including templates, supplement the regulation and provide guidance to plan sponsors and practitioners on how to prepare and file the required application information. Sections 4262.6 through 4262.8 and the instructions specify the minimum necessary plan, actuarial, and financial information that PBGC requires to approve or deny an application for SFA and to verify the amount of SFA within the short 120-day review period provided under section 4262(g) of ERISA.

PBGC in the final rule is amending the information required to be filed as described in §§ 4262.6 through 4262.8 to reflect the new methodology in § 4262.4 for determining the amount of a plan's SFA and making other clarifying changes.

Based on its experience reviewing applications, in the final rule, PBGC is amending § 4262.6(a) to provide that, if information is not accurately completed or not filed with the application, PBGC may, in its discretion, either require the plan sponsor to file additional information to correct the error or omission or consider the application incomplete. If correction of any error or omission requires a change to the amount of SFA requested, the application will be considered incomplete. This provision is intended

to provide some flexibility in the application review process to enable some errors to be corrected without plans having to file revised applications.

In addition, PBGC is modifying the language of the required statement under penalty of perjury in § 4262.6(b) to make the language more precise and is modifying the language of the required amendments to the plan in § 4262.6(e). In the final rule, clarifying language, “notwithstanding anything to the contrary in this or in any other governing document” is added to § 4262.6(e)(1) so that the required language for the amendment reads, “Beginning with the SFA measurement date selected by the plan in the plan’s application for special financial assistance, notwithstanding anything to the contrary in this or any other governing document, the plan shall be administered in accordance with the restrictions and conditions specified in section 4262 of ERISA and 29 CFR part 4262. This amendment is contingent upon approval by PBGC of the plan’s application for special financial assistance.” PBGC is also providing model language for the benefit reinstatement amendments under § 4262.6(e)(2) to assist filers in complying with the amendment requirements. In addition, PBGC is amending § 4262.7(e)(2) to require that the certification by the plan sponsor that the benefit reinstatement amendments will be timely adopted must be signed either by all members of the plan’s board of trustees or by one or more trustees duly authorized to sign the certification on behalf of the entire board of trustees.

As described in the *Paperwork Reduction Act* section of the interim final rule, the application instructions and checklist were submitted to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act. PBGC received approval for this information collection on an emergency basis for a period of 180 days, expiring on January 31, 2022, under control number 1212–0074. Subsequently, OMB extended its approval for the information collection for an additional 3 years, expiring on January 31, 2025.

With the final rule, PBGC is submitting this information collection, with the described modifications, to OMB and its decision will be available at [www.Reginfo.gov](http://www.Reginfo.gov).

Unless confidential under the Privacy Act, all information that is filed with PBGC for an application for SFA may be made publicly available, at PBGC’s sole discretion, on PBGC’s website at [www.pbgc.gov](http://www.pbgc.gov) or otherwise publicly

disclosed. Except to the extent required by the Privacy Act, PBGC provides no assurance of confidentiality in any information or documentation included in an application for SFA.

#### *Application for Plans With a Partition*

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

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

Section 4262.9 does not provide eligibility for SFA. As explained earlier in the preamble under the subheading *Eligible Multiemployer Plans*, section 4262(b)(1) of ERISA lists four categories of plans that are eligible for SFA, and PBGC cannot extend eligibility for SFA through its regulation to a plan that is not included in any of those categories. In the case of a partitioned plan, the original and successor plans must each be separately eligible. Each must have been approved for a suspension of benefits under section 305(e)(9) of ERISA as of March 11, 2021, to be eligible for SFA under section 4262(b)(1)(B) of ERISA and § 4262.3(a)(2). To avoid any confusion about the eligibility of a partitioned plan, PBGC is clarifying this requirement in § 4262.9(a) of the final rule.

The plan sponsor of a partitioned plan where the original and successor plans are each eligible to apply for SFA must apply for SFA using the alternative application, which contemplates PBGC’s rescission of the partition order as prescribed under § 4262.9(c) and other conditions particular to a partitioned plan as described under § 4262.9(b). One of these conditions is that the plan sponsor must file a single application for SFA, consisting of information about the original plan and

the successor plan. The combined information must reflect that, on the date SFA is transferred to the plan, PBGC will rescind the order that created the successor plan, and the plan sponsor will remove plan provisions and amendments that were required to be adopted under the order.

Another condition is that the application must include a statement that the plan was partitioned and a copy of the provisions or amendments that the plan was required to adopt under the partition order. A partitioned plan’s application must include all the required information described in §§ 4262.6 through 4262.8 for applications generally. However, if the plan sponsor of a partitioned plan has already filed any of the required information with PBGC, the sponsor is not required to include that information again with its SFA application. Instead, the sponsor need only note on the checklist described under § 4262.6(a) that the information was already filed.

Partitioned plans also have benefit suspensions that must be reinstated if the plan is approved for SFA. Under § 4262.15, a plan receiving SFA must reinstate benefits suspended under section 305(e)(9) of ERISA and provide make-up payments to participants and beneficiaries to restore previously suspended benefits in accordance with guidance issued by the Treasury Department and the IRS in Notice 2021–38, 2021–30 IRB 155. This requirement applies to both the original plan and the successor plan created by a partition. Having the original and successor plans apply as one will ensure coordinated benefit reinstatements for all participants in the partitioned plan.

The filing of an application for a partitioned plan falls under priority group 2 for purposes of § 4262.10(d) (explained in this preamble under the subheading *Processing Applications*), consistent with other plans that are eligible for SFA because they have implemented a suspension of benefits under section 305(e)(9) of ERISA as of March 11, 2021.

Successor plans created in a partition have also been receiving financial assistance from PBGC with repayment obligations under section 4261 of ERISA. How financial assistance under section 4261 is repaid is prescribed under § 4262.12.

#### *Processing Applications*

Under section 4262(c) of ERISA, PBGC must issue regulations or guidance setting forth requirements for SFA applications. Applications are considered timely filed under section 4262(g) only if they are filed in

accordance with PBGC's regulations. PBGC's inherent authority under section 4002(b)(3) of ERISA allows PBGC to adopt regulations relating to the conduct of its business and to carry out the purposes of the title IV insurance program. Under section 4262(d) of ERISA, PBGC also may limit the filing of SFA applications to filings for plans that are in one or more of four "priority" categories during a period limited to within the first 2 years after March 11, 2021.

Section 4262.10 of the regulation sets forth the system for processing applications within 120 days, as required by section 4262(g) of ERISA and § 4262.11 of the regulation. The processing system will provide every prospective submitter a fair opportunity to file its application by December 31, 2025 (or December 31, 2026, for a revised or supplemented application). This electronic filing system is based on three mechanisms. The first mechanism permits PBGC to accept applications in a manner that, in PBGC's estimation, allows for sufficient review and processing within 120 days of filing. The second mechanism is a priority system permitted by section 4262(d) of ERISA. The third mechanism is a notification system on PBGC's website to keep prospective applicants apprised of when a filing window opens or closes and (if applicable) to what priority groups filing is limited. This mechanism will enable applicants to know when the system is accepting applications from plans in their priority group. The statutory authority and rationale behind these mechanisms are fully explained in the preamble to the interim final rule.

PBGC received several comment letters on this section of the interim

final rule. Most of these commenters focused on allowing more plans to apply earlier during the 2-year priority-group period to speed up the provision of SFA to eligible plans. These commenters wanted plans eligible to file in a later priority group to be given the opportunity to file in an earlier priority group—*e.g.*, allow plans projected to become insolvent within 1 year of filing an application and designated to file in priority group 2 to file in priority group 1, or allow plans that implemented benefit suspensions under MPRA and also able to file in priority group 2 to file in priority group 1. Some of these commenters explained that the plans in priority group 2 that are projected to become insolvent in 2022 should be able to apply earlier to avoid the complexity of preparing for insolvency or even becoming insolvent before receiving SFA, and to avoid the disruption this would cause plan participants. Commenters who are participants in MPRA plans (*i.e.*, plans that implemented benefit suspensions) described the reduction in their benefits as a life-altering loss. They asked that their plans be able to apply in priority group 1 along with insolvent plans because the impact of benefit cuts on plan participants is the same.

Other commenters wanted PBGC to move up the beginning date identified in the interim final rule for a plan in a priority group to file—*e.g.*, priority group 6 plans should be permitted to file before priority group 5.

The filing dates provided in the interim final rule are the latest dates PBGC expects to begin accepting applications from plans in each group. A plan in a priority group may file an application beginning on that date, or an

earlier date as processing capacity permits, as updated on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov). As priority groups open, PBGC will continue to accept applications from plans in earlier priority groups. While the priority mechanism may entail a relatively short deferral of an application for a given plan until its respective priority group opens, the amount of SFA ultimately awarded will reflect the amount required to pay all benefits due pursuant to the statute.

The final rule does not make changes to the filing dates for plans in a priority group under § 4262.10(d)(2), but using its discretion under the regulation, PBGC has updated its website at [www.pbgc.gov](http://www.pbgc.gov) to allow a plan in priority group 2 that is expected to become insolvent within 1 year of the date the plan's application for SFA is filed, to file an application earlier. PBGC agrees with comments that this would lessen the disruption for plans and participants. In November 2021, the earliest date of filing for these plans was changed from January 1, 2022, to December 27, 2021, enabling these plans to prepare and file their applications earlier. PBGC will continue to monitor the flow of applications to consider earlier filing dates as processing capacity permits. PBGC will inform prospective applicants of any earlier dates through updates on its website at [www.pbgc.gov](http://www.pbgc.gov).

Taking into account the previously described change, the following table describes each priority group and the date that it is currently scheduled to open:

Priority group	Description of priority group—date plans may apply for SFA	Description of priority group—date plans may apply for SFA
1 .....	Plans already insolvent or projected to become insolvent before March 11, 2022.	Beginning on July 9, 2021
2 .....	Plans expected to be insolvent within 1 year of the date an application for SFA is filed.	Beginning on December 27, 2021.
.....	Plans that implemented a benefit suspension under ERISA section 305(e)(9) as of March 11, 2021.	Beginning on January 1, 2022.
3 .....	Plans in critical and declining status that had 350,000 or more participants.	Beginning on April 1, 2022.
4 .....	Plans projected to become insolvent before March 11, 2023 ...	Beginning on July 1, 2022.
5 .....	Plans projected to become insolvent before March 11, 2026 ...	Date to be specified on PBGC's website at least 21 days in advance of such date, but no later than February 11, 2023.
6 .....	Plans for which PBGC computes the present value of financial assistance under section 4261 of ERISA to be in excess of \$1 billion (in the absence of SFA).	Date to be specified on PBGC's website at least 21 days in advance of such date, but no later than February 11, 2023.

Other commenters suggested expanding the priority categories to include other similar plans or to expand the number of priority groups by identifying plans for a priority group 7.

The final rule does not change the composition of priority groups as commenters suggested, such as by including in priority group 2 plans that had or still have a benefit suspension application under section 305(e)(9) of

ERISA pending before the Treasury Department (and so had not implemented a benefit suspension as of March 11, 2021) or plans that had applied for a benefit suspension but had their application withdrawn or denied.

A plan in any of the four priority categories identified in section 4262(d) of ERISA will have a fair opportunity to file an application under § 4262.10(d)(2) of the regulation during the 2-year priority period ending on March 11, 2023. As noted in the interim final rule, PBGC's objective is to accept and process as many applications in the highest priority group as possible before opening the submission process to the next priority group. Ultimately—and no later than March 11, 2023—the submission process will be opened to all eligible plans (whether or not in a statutory priority category) to ensure that every prospective applicant has a fair opportunity to file its application during the statutory period.

Other commenters wanted more certainty about which plans fall into the final priority group 6 under the interim final rule, or groups 6 and 7, and when the plans could begin applying. Commenters recommended that PBGC identify and post as quickly as possible the names of the plans it determines to be in priority group 6 to provide certainty to plans expecting to apply in priority group 6. Under § 4262.10(d)(2)(vi), a plan is in priority group 6 if the plan is projected by PBGC to have a present value of financial assistance payments under section 4261 of ERISA that exceeds \$1 billion if SFA is not ordered. PBGC will list the plans in priority group 6 on its website at [www.pbgc.gov](http://www.pbgc.gov) well in advance of the first date filings may be accepted, but not later than the earlier of November 15, 2022, or 30 days before opening the filing period for priority group 6. The date a plan in priority group 6 may file an application will be posted at least 21 days in advance of such filing date, which will be no later than February 11, 2023.

A commenter also recommended including plans with unfunded vested benefits (UVBs) over \$1 billion in a priority group 7, with UVBs determined using current liability assumptions reported in the plan's last Form 5500 Schedule MB filed before 2021. The commenter suggested defining this group so that a plan with the expectation of being in priority group 6, but not named to priority group 6, could know that it could apply shortly thereafter and not have to significantly revise its application.

Commenters also reasoned that providing SFA to these large plans earlier (by allowing them to apply earlier) means the plans will have expended less of their assets to meet obligations, and therefore need less SFA, which in turn may result in less cost to the SFA program overall.

Another commenter argued that plans that do not meet the \$1 billion threshold are likely plans that cover workers in lower wage industries, and that these workers also are entitled to know when their plans may apply for SFA.

PBGC considered commenter requests to define a new priority group 7. Section 4262.10(d)(2)(vii) of the interim final rule provides that PBGC may add additional priority groups based on other circumstances similar to those described for priority groups 1 through 6. While PBGC has not made changes to § 4262.10(d)(2) to add additional priority groups, PBGC will continue monitoring its application processing to determine whether additional priority groups should be added. Any additional priority groups added and the date PBGC will begin accepting applications for such groups will be posted in guidance on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

The final rule makes some clarifying changes in § 4262.10(d), including to clarify that an application filed by a plan to which benefit liabilities were transferred (by merger or otherwise) from a plan that filed an initial application for SFA will be treated as a revised application and not an initial application.

#### *Lock-in Application*

Section 4262.10(d)(1) of the interim final rule provides that SFA applications are processed based on capacity to allow for sufficient review and processing by PBGC within the short period of time required by the statute. Once the number of applications reaches that level, the filing window will temporarily close until PBGC has capacity to process more applications. An application will be considered filed on the date it is submitted electronically to PBGC if the application meets applicable filing requirements, including authorized signatures, and can be accommodated in accordance with the processing system. Otherwise, PBGC will not consider the application filed and will notify the applicant that the application must be filed in accordance with the processing system and instructions on PBGC's website. PBGC maintains a dedicated web page for applications on its website at [www.pbgc.gov](http://www.pbgc.gov) to inform prospective applicants about the current status of the filing window, as well as to provide advance notice of when PBGC expects to open or temporarily close the filing window.

One commenter remarked that an effect of the "metering system" is that a plan preparing its initial application for submission on a particular date, with

the plan's SFA measurement date and other base data aligned with that date, may nonetheless be prevented from filing on that date because the filing window has closed temporarily. If a temporary closure extends into the next calendar quarter, a plan's application may have to be significantly revised to include a new SFA measurement date and possibly new census data. The commenter suggested that PBGC could allow plans that were ready to file an application, but that were unable to do so because the filing window closed temporarily, to submit a "notice of intent to file" that would lock in the plan's SFA measurement date and other base data. The suggested notice would allow the plan to apply on a different date when the filing window re-opened but with the same application.

PBGC considered the comment and, to address the problem described by the commenter, has created in § 4262.10(g) of the final rule a simple process for "locking in" a plan's SFA measurement date and other base data, which is available for all plans that file after March 11, 2023, and on or before December 31, 2025. The process also is available for plans in priority groups 5, 6, and any additional priority group PBGC may add before March 11, 2023, if PBGC temporarily closes the filing window when it is otherwise accepting applications for plans in those priority groups. A lock-in application is a pro forma initial application submitted via email and containing the plan's identifying information, priority group information (if applicable), a statement of intent to lock in the plan's base data, a certification signed by an authorized trustee, and other information as described in the lock-in application instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov). If the lock-in application satisfies the requirements for a lock-in application, it will be considered filed and immediately denied for incompleteness.

PBGC may learn, during its review of a plan's revised application, that the plan is not eligible for SFA. In that situation, the lock-in application will not establish the plan's base data. If the plan subsequently becomes eligible for SFA, the plan may file a revised application to demonstrate that the plan is eligible for SFA and establish the plan's base data.

#### *Emergency Filings*

Section 4262.10(f) of the interim final rule provides for an emergency filing process for priority applications from a plan that is insolvent or expected to be insolvent under section 4245(a) of ERISA within 1 year of filing an

application, or a plan that has implemented a suspension of benefits under section 305(e)(9) of ERISA as of March 11, 2021. Beginning with PBGC's acceptance of priority group 2 filings, PBGC is accepting emergency filings from these plans during periods when PBGC would not otherwise accept such applications because the filing window is closed. A filer submitting an application under the emergency filing process must substantiate the claim of emergency status and notify PBGC, in accordance with the SFA instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov), before submission of the impending application.

One commenter suggested that another option for advancing the date that a plan in priority group 2 may apply would be to allow emergency filings beginning with PBGC's acceptance of applications from plans in priority group 1. PBGC has not made a change to the emergency filing process, but as discussed earlier, has advanced to December 27, 2021, the earliest filing date for a plan projected to be insolvent within 1 year of the date the plan's application is filed. Accordingly, insolvent plans and any plan projected to be insolvent within 1 year of the date the plan's application is filed are also eligible to submit emergency applications beginning December 27, 2021. PBGC will continue to monitor application processing and will continue to update its website to advance filing dates as capacity permits.

#### *PBGC Action on Applications*

Section 4262(g) of ERISA provides that PBGC can either approve or deny an application for SFA and establishes a 120-day review period during which PBGC must act or an application is deemed approved. PBGC is given authority to manage the application review process by issuing regulations or guidance under section 4262(c) of ERISA setting forth requirements for SFA applications. Pursuant to that authority, § 4262.11 provides requirements for plan applications that are denied by PBGC or withdrawn by a plan.

As described under § 4262.11, PBGC must act on an application within 120 days after the date an initial, revised, or supplemented application is properly and timely filed. If PBGC approves an application, it will notify the plan sponsor of the payment of SFA in accordance with § 4262.12.

If PBGC denies an application, it will notify the plan sponsor in writing of the reasons for the denial. An application may be denied because it is incomplete (it does not accurately include the

information required to be filed); because an assumption is unreasonable, a proposed change in assumption is individually unreasonable, or the proposed changed assumptions are unreasonable in the aggregate; or because the plan is not an eligible multiemployer plan. For example, pending approval of an application, if PBGC determines that documentation supporting a certification of critical and declining status is missing, or if the plan sponsor has not responded to a PBGC request for information to clarify an item in that documentation, PBGC's notice will identify the missing information or documentation required to complete the application. If PBGC denies an application, the plan sponsor may submit a revised application. If the plan sponsor submits a revised application following a denial, the revised application must address the reasons for denial stated in PBGC's notification. PBGC is not requiring a plan sponsor to refile the entire application. PBGC only needs the information that cures the reasons specified in the denial notice. However, the plan sponsor may address other matters provided that the revised application addresses the reasons for the denial.

The plan sponsor may withdraw an application (in writing and in accordance with the SFA instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov)) at any time before PBGC denies or approves the application. If an application is withdrawn or denied, the plan sponsor may refile the application as a revised application. As explained earlier in the preamble, under section 4262(f) of ERISA, and until the plan's application is approved, there is no limit to the number of times that a plan sponsor may file a revised application (after the application is withdrawn or denied) as long as the last revised application is filed by the statutory deadline of December 31, 2026.

For any revised application, PBGC requires that the base data remain the same as required to be used in the plan's initial application to guard against multiple filings for purposes of changing this data. In the final rule, PBGC clarifies that the base data defined in § 4262.11(c) for an eligible plan includes the plan's SFA measurement date, participant census data, non-SFA interest rate assumption, and SFA interest rate assumption. Once PBGC has accepted an initial application for processing, it is in the best interest of all parties to avoid the duplicative work and delays associated with changes to the base data. Accordingly, if the application is denied or the plan

sponsor withdraws an application, and the plan sponsor submits a revised application, it must use the base data required to be used in its initial application, but it may make other changes. However, in the final rule, PBGC clarifies that if the plan was not eligible for SFA on the date the plan filed its initial application, the plan's base data will not be fixed. Instead, if the plan is able to demonstrate eligibility for SFA at a later date in a revised application, the revised application will establish the plan's base data.

PBGC's decision on an application for SFA is a final agency action for purposes of judicial review under the Administrative Procedure Act (5 U.S.C. 701–706).

#### *Payment of Special Financial Assistance*

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

The final rule clarifies the interest rate applied on the amount of SFA demonstrated under the plan's application from the time between the SFA measurement date and the date PBGC sends payment. For initial or revised applications filed on or after the effective date of the final rule, the interest rate applied is the SFA rate under § 4262.4(e)(2). For applications filed under the interim final rule where the plan has not filed an initial or revised application on or after the effective date of the final rule and there has not been any previous payment of SFA, and where the plan's application is not supplemented, the interest rate applied is the non-SFA rate under § 4262.4(e)(1).

For a supplemented application, where the plan received a previous

payment of SFA, the interest rate applied is the SFA rate required under § 4262.4(e)(2) from the SFA measurement date to the payment date of the additional SFA. Interest is applied on the excess of the amount of SFA determined under § 4262.4 of the final rule as of the SFA measurement date (demonstrated on the plan's supplemented application) over the SFA amount determined under § 4262.4 of the interim final rule as of the SFA measurement date.

Section 4262.12(g) otherwise remains unchanged in substance from the interim final rule by providing that PBGC will pay SFA to a plan in a lump sum or substantially so<sup>26</sup> as soon as practicable upon approval of the plan's SFA application. As stated in the interim final rule, PBGC expects payment to be made usually within 60 days, and no later than 90 days after the plan's SFA application is approved or deemed approved (and in any event not later than September 30, 2030). Payment will be made in accordance with payment instructions provided by the plan in its application. Payment will be considered made when, in accordance with the plan's payment instructions, PBGC no longer has ownership of the amount being paid. Any adjustment for delay will be borne by PBGC only to the extent that it arises while PBGC has ownership of the funds.

For a plan with an obligation to repay financial assistance under section 4261 of ERISA, the process for that repayment is described in § 4262.12(e).

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

#### *Restrictions on Special Financial Assistance*

Section 4262(I) of ERISA places restrictions on the use of SFA. These restrictions are described in § 4262.13 of the regulation. SFA received, and any earnings thereon, must be segregated

from other plan assets and may only be used to make benefit payments and pay plan expenses (but SFA may be used before other plan assets are used for these purposes). In addition, SFA (and earnings) must be invested by plans in investment grade bonds or other investments as permitted by PBGC in § 4262.14. These limitations on the use of SFA reflect the purpose of SFA. As provided for under section 4262(j)(1) of ERISA and in § 4262.4, SFA is the amount required for the plan to pay all benefits due during the SFA coverage period taking into account all plan resources and obligations. SFA should not be used in a manner that would divert SFA funds to other purposes—for instance, reducing sources of plan income, such as employer contributions or withdrawal liability, or increasing plan obligations, such as to pay for additional future increases in benefits (that are not exempted under § 4262.16).

#### *Permissible Investments*

Section 4262(I) of ERISA requires that SFA received, and any earnings thereon, may be used to make benefit payments and pay plan expenses, and such SFA and earnings ("SFA funds" or "amounts attributable to special financial assistance") must be held separately from other plan assets. Section 4262(I) also requires that SFA funds be invested in investment grade bonds or other investments permitted by PBGC. Given the statutory constraints and the likelihood that SFA funds will be paid out before non-SFA funds, PBGC believes that SFA funds should be invested conservatively, in broad, liquid markets.

While the allowance under section 4262(I) for "other investments permitted by the corporation" could provide some flexibility (and limited exposure to other assets), in the interim final rule PBGC did not allow for investments with fundamentally different characteristics than investment grade bonds. Section 4262.14 of the interim final rule permitted SFA funds to be invested only in fixed income securities that are publicly traded, denominated in U.S. dollars, and that must be considered investment grade except for a 5 percent allowance for a plan to hold investments that were considered investment grade at the time of purchase but are no longer of that credit quality. Recognizing that the interim final rule took a conservative approach for permissible investments, PBGC specifically requested comment from the public on how to arrive at an appropriate balance between predictability of returns and safety of investments on the one hand, and the

flexibility to pursue greater asset returns and the opportunity to extend plan solvency on the other.

PBGC received many comments on § 4262.14 of the interim final rule and in response to its specific request for comment on the issue of appropriate risk level. Commenters generally favored allowing plans to have more flexibility in their options for investing SFA funds. They stated that increased flexibility in investment decisions would not necessarily create an excessive level of risk to plans and would enable plans to remain solvent longer.

Other commenters expressed the view that the investment restrictions in the interim final rule do not allow plans to invest SFA funds in a diversified portfolio. They stated that not allowing for diversification will increase overall risk to the plans. Commenters also stated that other investments, some low-risk, likely would yield higher returns and allow plans to remain solvent longer. These commenters suggested various types of fixed income that have higher yields.

As to which investments PBGC should permit, many commenters suggested that PBGC allow plans to invest SFA funds in a manner that targets a specific rate of return. Some commenters recommended permitting plans to target a rate of return close to an interest rate used to calculate the amount of SFA—e.g., the interest rate limit under section 4262(e)(3) of ERISA or approximately 5.3 percent based on pension funding segment rates in December 2021.

Other commenters recommended that PBGC allow specific investment vehicles and approaches. Suggestions included the allowance for various types of fixed income investments, real estate and infrastructure, and risk transfer buy-in contracts offered by life insurers.

Some commenters suggested that PBGC set restrictions for plans individually. They said that PBGC should consider the unique circumstances of each plan and vary the permissible investment options based on the assumptions applicable to the plan.

Some commenters recommended that PBGC allow a percentage of SFA funds in investments other than fixed income. Suggestions ranged from 10 percent to 50 percent. Other commenters recommended having no delineations between SFA and non-SFA assets, meaning that SFA funds could be invested without restriction and would not need to be segregated from non-SFA funds. One commenter suggested that

<sup>26</sup> For example, if a plan's SFA payment exceeds the statutory limitation for a Federal wire of \$10 billion, the plan will receive multiple federal wire payments that will equal the approved lump sum amount.

removing all restrictions would eliminate the incentive to assume added risk in investing non-SFA funds. Another commenter said the restrictions are cumbersome and that, to develop an appropriate investment strategy for a plan, a fiduciary must consider all of the plan's assets.

Finally, two commenters agreed with the investment restrictions on SFA funds in the interim final rule. They stated that allowing additional investment options would lead to an excessive level of risk-taking for taxpayer funds.

PBGC stated in the interim final rule that it was reluctant to allow for investment vehicles with fundamentally different characteristics than investment grade bonds without public input. Although public comments reflected both sides of this issue, the comments largely suggested that the final rule should permit greater flexibility in investments with the objective of extending potential solvency. After considering the comments, and to support projected plan solvency through the plan year ending in 2051 as provided in section 4262(j)(1) of ERISA, PBGC is making changes to § 4262.14 to allow for a wider range of investments for SFA assets.

As provided in § 4262.14(i), the changes to permissible investments in this final rule are applicable to a plan that applies or has applied for SFA. However, for a plan that received SFA under the terms of the interim final rule, the changes to permissible investments under this final rule will not apply unless and until the plan files a supplemented application. Until that date, the provisions of § 4262.14 under the interim final rule apply to the plan.

The changes in the final rule permit plans to invest a specified percentage—up to 33 percent—of their SFA funds in return-seeking assets (RSA) as described in § 4262.14(c) of the final rule. That leaves 67 percent or more of SFA funds to be invested in investment grade fixed income securities (IGFI). PBGC believes this ratio (67 percent IGFI to 33 percent RSA) appropriately considers the need to protect SFA assets to pay projected benefits of the participants and expenses of the plan. The 33 percent that may be invested in RSA as defined in the final rule will enable plans to grow SFA funds and increase the potential to pay benefits through 2051 while limiting the total risk exposure of taxpayer-funded assistance.

The final rule provides that the permissible allocation in RSA of SFA funds is no more than 33 percent measured each time RSA are purchased (other than through the reinvestment of

fund distributions) and at least once in any rolling period of 12 consecutive months. A purchase of RSA includes a fair market value exchange of investments between a plan's SFA and non-SFA segregated accounts. Portfolio allocations also naturally get out of balance due to cash flow and as prices of investments fluctuate over time, so the percentage of SFA funds in RSA could at times be greater than 33 percent. The rule provides clear guidance to plans on when the percentage allocation in RSA is determined, and that it does not mean, for example, no greater than 33 percent in RSA on each and every day.

Requiring the 33 percent cap on RSA to be met at purchase and at least one day during any rolling 12-month period reflects acceptable deviation from the basic restriction. While there may be some drift during a year above the 33 percent, it would be very limited, and the burden of frequent rebalancing or inopportune forced sales of assets is minimized. A plan will be required to attest in the plan's annual statement of compliance (under § 4262.16(i)) that the plan has met the allocation restriction on RSA at purchase and at least once in every rolling period of 12 consecutive months beginning from the date the plan receives SFA.

The final rule describes permissible RSA to include equity securities limited to common stock that is denominated in U.S. dollars and publicly traded (registered with the U.S. Securities and Exchange Commission (SEC) under the Securities Exchange Act of 1934); as well as in "permissible fund vehicles" described in § 4262.14(g), which include mutual funds and exchange-traded funds (ETFs) registered with the SEC under the Investment Company Act of 1940 (including ETFs organized as unit investment trusts), and collective trusts that operate under a statutory exemption from registration. Permissible fund vehicles abide by an investment policy that limits investment predominantly to publicly traded equity securities (and short-term U.S. Treasury securities, cash or cash equivalents, and investments in money market funds). The permissible RSA funds are intended to include equity funds that track broad-based U.S. indexes, such as the Standard & Poor's 500 Index (S&P 500).

Permissible RSA also includes certain debt instruments (*e.g.*, bonds) that are excluded from the definition of fixed income securities under the final rule. These include debt instruments that pay a fixed amount or fixed rate of interest, are denominated in U.S. dollars, are investment grade, and have been resold in an offering pursuant to 17 CFR

230.144A (SEC Rule 144A under the Securities Act of 1933). However, the final rule explicitly excludes such debt securities issued by a foreign issuer.<sup>27</sup> Permissible RSA also include high-yield ("junk") corporate bonds that were considered investment grade at the time of purchase by the SFA segregated account for the IGFI portfolio but are no longer of that credit quality. This list of permissible RSA facilitates some diversification and eliminates the potential for investment in aggressive or exotic investments that would clearly be at odds with section 4262(l) of ERISA.

PBGC considered suggestions for expanding permissible investments that are RSA to include real estate and infrastructure. Inclusion of these assets would allow for more diversified portfolios of return-seeking SFA funds with significant return potential, but most plans will achieve this diversification through their non-SFA assets. Also, the complexity of these investment categories and the lack of recognized passive index funds that invest directly in real estate and infrastructure make these assets less suitable as permissible investments. Real estate investment trusts (REITs) that issue publicly traded equity are included within the RSA that are allowed as permissible investments and exposure to infrastructure is also available through permissible equity investments.

PBGC also considered commenters' suggestions for expanding the types of fixed income allowable as permissible IGFI to include various fixed income securities that have higher yields. In general, investments that do not share the low risk and relatively high liquidity characteristics of IGFI are not considered appropriate to meet the 67 percent floor for that type of investment. Bonds that were rated investment grade at the time of purchase must be considered RSA if they no longer meet the criteria for being considered investment grade. As noted earlier, the final rule also allows for bonds resold in an offering pursuant to Rule 144A under the Securities Act of 1933 to be considered permissible RSA as long as they meet the investment grade criterion.

PBGC views investments such as leveraged loans, collateralized loan obligations, convertible bonds, preferred stock, and private credit as not

<sup>27</sup> The term "foreign issuer" is as defined in 17 CFR 240.3b-4(b) (Rule 3b-4(b) under the Securities Exchange Act of 1934), *i.e.*, any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

appropriate to include as IGFI because they tend to trade in relatively small, illiquid markets that generally require active management. Collateralized loan obligations, collateralized mortgage obligations and other collateralized debt obligations are complex instruments and are only permitted as RSA to the extent they pay a fixed rate of interest. Convertible bonds may have significant liquidity risk.

The final rule clarifies that permissible IGFI securities considered to meet the 67 percent floor must be a bond or other debt instrument that pays a fixed amount or fixed rate of interest, denominated in U.S. dollars, sold in an offering registered under the Securities Act of 1933, and investment grade, and includes such securities held in permissible fund vehicles (defined in § 4262.14(g)). These IGFI funds must abide by an investment policy that limits investment primarily to securities that are denominated in U.S. dollars and are investment grade. Permissible IGFI includes securities issued or guaranteed by the U.S. government or its designated agencies, such as U.S. Savings Bonds, Treasury Bonds, Treasury Bills, and GNMA (“Ginnie Mae”), and government-sponsored enterprise (GSE)-issued debt securities (e.g., by “Fannie Mae,” “Freddie Mac,” etc.), that are reported on line 1c(2) of the Form 5500 Schedule H. It also includes municipal bonds defined under the Securities Act of 1933 that are investment grade. Dollar-denominated emerging market bonds that are rated as investment grade are viewed as meeting the definition of IGFI.

The final rule clarifies that cash and cash equivalents required to be reported on the Form 5500 Schedule H are permissible investments within the 67 percent floor. These are noninterest-bearing cash on line 1a of Form 5500 Schedule H (total noninterest-bearing cash which includes, among other things, cash on hand or cash in a noninterest-bearing checking account), and interest-bearing cash equivalents on line 1c(1) of Form 5500 Schedule H (all assets that earn interest in a financial institution account such as interest-bearing checking accounts, passbook savings accounts, or in money market accounts). Also permissible are investments in money market funds regulated pursuant to rule 2a-7 under the Investment Company Act of 1940.

PBGC determined not to include as permissible investments insurance contracts, such as risk transfer buy-in contracts described by a commenter. There may be an inherent inequity with this type of investment unless it covers

all the benefits for all participants, as suggested by another commenter.

The substance of the definition of investment grade with respect to fixed income securities in the interim final rule is unchanged in the final rule except for removing the words “publicly traded” which is evident in the final rule requirement that fixed income securities are sold in an offering registered under the Securities Act of 1933. As described in the interim final rule preamble, investment grade means 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. Adequate capacity means that the risk of default by the issuer (or obligor) is low and the full and timely repayment of principal and interest on the security is expected. These definitions are consistent with other Federal agency regulations that refer to investment grade securities in compliance with Section 939A of the Dodd Frank Act of 2010. Further, the securities must be considered investment grade by a fiduciary who is, or seeks the advice of, an experienced investor.

Like the interim final rule, the final rule acknowledges that securities (IGFI or RSA) held in permissible fund vehicles (ETFs, mutual funds, or collective trusts), or directly through a portfolio of individual securities, often are supplemented by derivatives that replicate exposure to physical bonds or that implement hedging strategies to protect against downside risk. The final rule permits investment in vehicles allowing for such strategies so long as any derivative or leveraging strategy does not increase the risk of the investments beyond the risk in a similar portfolio of physical securities (i.e., non-derivative securities) with the same market value. Further, any notional derivative exposure on permissible investments that are held in separate accounts (i.e., not through permissible fund vehicles), must be supported by liquid assets that are cash or cash equivalents denominated in U.S. dollars. This will ensure that the plan or the investment manager will be able to cover the derivative exposure with little risk to SFA funds. This provision remains substantively unchanged from the interim final rule and applies to investments in permissible IGFI and RSA.

Lastly, the final rule clarifies that the requirement in section 4262(I) of ERISA and § 4262.13 that SFA funds “shall be segregated from other plan assets” means that SFA funds must be held in an account separate from the remaining

assets of the plan and invested consistent with the requirements in § 4262.14. PBGC expects that if there is any investment policy or investment management agreement governing such account, that it would be consistent with such investment requirements. Custody and accounting of SFA funds should be clearly separated to properly track and account for SFA funds.

#### *Reinstatement of Benefits Previously Suspended*

Section 4262(k) of ERISA imposes two conditions on a plan that receives SFA and had previously suspended benefits in accordance with section 305(e)(9) or 4245(a) of ERISA.<sup>28</sup> A plan must reinstate any benefits that were suspended and must provide payments to certain participants or beneficiaries to make up past amounts of benefits previously suspended.

As provided under section 4262(k) of ERISA, § 4262.15 of the interim final rule requires plans to reinstate these previously suspended benefits as of the month in which SFA is paid, and to provide make-up payments with respect to previously suspended benefits to participants or beneficiaries in pay status as of the date that SFA is paid, in accordance with guidance issued by the Secretary of the Treasury. Section 4262(k) and § 4262.15 give the plan sponsor flexibility to design payment of make-up amounts as a single lump sum, with no interest, within 3 months of the payment date of SFA, or in equal monthly installments over a period of 5 years, commencing within 3 months of the payment date, with no installment payment adjusted for interest. PBGC notes that IRS has advised that a late make-up payment should be adjusted to account for the delay, and that the correction method described in section 6.02(4)(d) of Revenue Procedure 2021–30, 2021–31 IRB 172 (which sets forth the current version of the IRS Employee Plans Compliance Resolution System (EPCRS)), with respect to correction of a late distribution from a defined benefit plan is a reasonable method for computing the adjustment.

Several commenters expressed views on the payment of make-up amounts to participants and beneficiaries in pay status. Some of those commenters

<sup>28</sup> Section 4262(k) of ERISA includes rules that are parallel to section 432(k) of the Code. Under section 9704(d)(3) of ARP, the Secretary of the Treasury has interpretive jurisdiction over the rules for determining the benefit reinstatement and make-up payments that must be made by a multiemployer plan receiving SFA, for purposes of ERISA as well as the Code. Under section 4262(k), the Secretary of Labor, in coordination with the Secretary of the Treasury, must ensure benefits are reinstated and previously suspended benefits are paid.

preferred that make-up payments be made in a lump sum, while others expressed concerns about the tax implications of lump sums and suggested that retirees and beneficiaries should be able to choose the form for their make-up payments. In addition, some commenters expressed concern that, if a participant who had received reduced benefits because of a suspension dies before the SFA is paid to the plan, then the participant's estate or beneficiary would not receive make-up payments for the benefits the participant lost because of suspension.

PBGC consulted with the IRS, which pursuant to section 432(k) of the Code and section 4262(k) of ERISA provided guidance in Notice 2021-38 on the make-up payments for benefits previously suspended and the tax treatment of those payments. With respect to the form of payment, the IRS advised PBGC that while section 432(k)(2)(A)(ii) of the Code (which governs the repayment obligation) expressly provides for the plan to determine whether make-up payments are paid as a lump sum or in equal monthly installment payments over 5 years, there is no requirement that the same form of payment must be used for all recipients. With respect to the payment of make-up payments to deceased participants, the IRS advised PBGC that section 432(k)(2)(A)(ii) of the Code requires that make-up payments be made to participants and beneficiaries who are in "pay status" on the effective date of the SFA. Because a participant who died before the SFA is paid is not in pay status as of the effective date of the SFA, no make-up payments are made for reductions that applied to that participant and, accordingly, make-up payments are limited to the total amount of benefits that would have been paid to the beneficiary in the absence of the suspension but that were not paid to the beneficiary because of the suspension. However, if a participant dies after the SFA is paid to the plan but before all of the make-up payments are paid to the participant, the unpaid portion of the make-up payments must be made to the participant's beneficiary.

Section 4262.15(c) of the interim final rule requires the plan sponsor of a plan with benefits that were suspended under section 305(e)(9) or 4245(a) of ERISA to furnish a notice of reinstatement to participants and beneficiaries whose benefits were previously suspended and then reinstated in accordance with section 4262(k) of ERISA. The requirements for the notice, including content requirements, are in the notice of

reinstatement instructions, in an addendum to the SFA instructions, available on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov). PBGC received no comment on the requirement to provide notice and did not make changes to § 4262.15(c) in the final rule.

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

#### *Conditions for Special Financial Assistance*

To ensure that SFA is used for the purpose of paying benefits and the expenses related to those benefit payments, PBGC used its authority under section 4262(m)(1) of ERISA, after consulting with the Secretary of the Treasury, to impose reasonable conditions on an eligible multiemployer plan that receives SFA. These conditions are described in § 4262.16 of the regulation and relate to increases in future accrual rates and retroactive benefit improvements; allocation of plan assets; reductions in employer contribution rates; diversion of contributions to, and allocation of expenses to, other benefit plans; and withdrawal liability.

Under certain circumstances, a plan sponsor may request approval from PBGC for an exception from the conditions relating to reductions in employer contribution rates, transfers or mergers, and settlement of withdrawal liability. PBGC solicited public comment on whether there are other circumstances relating to the conditions described under § 4262.16 where PBGC should consider providing approval for exceptions. Commenters suggested adding exceptions to conditions on retrospective benefit increases and

mergers, which are discussed under the sections on Benefit Increases and Transfers or Mergers.

#### (a) Benefit Increases

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

The condition in § 4262.16(b)(1) restricts retrospective benefit increases (also referred to in this preamble as retroactive benefit increases or retroactive benefit improvements) by providing that a benefit or benefit increase must not be adopted during the SFA coverage period (defined in § 4262.2) if it is in whole or in part attributable to service accrued or other events occurring before the adoption date of the amendment. PBGC said in the interim final rule that this condition is needed because retroactive increases in benefits harm the funded position of the plan without improving expected future plan income.

Commenters recommended that PBGC provide some flexibility for retroactive benefit increases if they are paid for by additional contributions without endangering the plan's ability to pay all benefits. Some commenters said that PBGC was wrong in its assertion that retroactive increases in benefits harm the funded position of the plan, and that the prohibition is likely to be counterproductive and reduce the likelihood of plans achieving their long-term contribution assumptions. The prospect of benefit restorations, they stated, could provide an incentive for active participants to remain in their plans and to seek increased contribution rates. The commenters made various suggestions, including permitting retroactive increases if the financial condition of the plan improves, permitting de minimis increases,

allowing an alternative pension arrangement for active workers, and providing a procedure under which a plan may apply for an exception from the condition restricting retrospective benefit increases.

PBGC considered whether to permit retroactive benefit increases, similar to its condition on prospective benefit increases, but remains concerned that retroactive benefit increases are more expensive and riskier than prospective benefit increases. A plan amendment that increases benefits for prior service has the effect of immediately increasing the plan's liability. Its cost is amortized over a future period of years and can significantly add to the employers' financial obligation with respect to funding the plan. In this situation, if the plan experiences actuarial losses in the future, the plan's funding costs could become unsustainable. In contrast, the cost of a prospective benefit increase, such as an increase in the benefit accrual rate, generally is paid for in the year the service is rendered and can be reduced or eliminated for future years if the plan's funding costs become excessive.

In consideration of the comments, however, PBGC is adding § 4262.16(b)(3) to provide a process by which a plan may request a determination from PBGC for an exception from the condition relating to retrospective benefit increases if future plan circumstances permit the plan to provide benefit increases without endangering the plan's ability to pay all benefits. This determination process will also apply to an exception from the condition relating to prospective benefit increases (discussed below). Under the new provision, beginning 10 years after the end of the plan year in which a plan receives payment of SFA, the plan may apply for an exception by demonstrating to the satisfaction of PBGC that, taking into account the value of any proposed benefit increase, the plan will avoid insolvency. PBGC considers the 10-year period necessary for the plan to demonstrate that its actuarial assumptions for a favorable long-term outlook, such as steadily solid projections of year-by-year contribution income, are being realized. Moreover, the agency believes that limiting the use of SFA initially to the protection of accrued benefits is essential to sound fiscal stewardship. The final rule specifies the information that a plan is required to file with its application for an exception.

The condition in § 4262.16(b)(2) of the regulation restricts prospective benefit increases by providing that a benefit or benefit increase must not be adopted

during the SFA coverage period unless the plan actuary certifies that employer contribution increases projected to be sufficient to pay for the benefit increase have been adopted or agreed to, provided that these increased contributions were not included in the determination of SFA. This condition is intended to guard against plans implementing significant benefit increases that may accelerate plan insolvencies and hasten an inability to pay plan-level benefits. However, plans still have the flexibility to offer active participants more attractive benefit accruals when the plans are able to afford them.

One commenter requested clarification of the conditions on benefit improvements stating that the interim final rule implies that prospective increases are possible during the SFA coverage period while the plan is deemed to be in critical status. The commenter stated that section 305(f)(1)(B) of ERISA includes a requirement that no benefit increase is permissible during a rehabilitation period unless the plan is on track to emerge from critical status by the end of the rehabilitation period, a date that may be decades earlier than the end of the SFA coverage period. The conditions on benefit increases provided under § 4262.16(b) are in addition to the limitations under section 305(f)(1)(B) of ERISA (and corresponding section 432(f)(1)(B) of the Code) applicable to plans in critical status. PBGC is unable to opine on the requirements of section 305(f)(1)(B) of ERISA as the funding rules are under the Treasury Department's interpretive jurisdiction.

#### (b) Allocation of Plan Assets

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

PBGC set the condition in § 4262.16(c) under the authority provided to it in sections 4262(j) and 4262(m) of ERISA, which PBGC interprets as intending to prevent excessive risk-taking by plans that receive SFA. PBGC views the gradual increase in the proportion of assets allocated to fixed income as a

plan approaches insolvency as a sensible and prudent approach to investing over a gradually shortening time horizon. Nonetheless, PBGC wanted feedback from the public on whether this condition is seen as preventing plans from achieving reasonable investment objectives. Accordingly, in the interim final rule, PBGC requested responses, with supporting data, to the following questions:

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

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

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

Several commenters offered answers to these questions and provided other comments about allocation of plan assets. Two commenters generally agreed with the condition stating that it would impact allocations only for a brief period of time and would not make a significant difference in the overall investment allocation. Another commenter recommended that PBGC base any restrictions on individual plans' net cash flow positions taking contributions into account, rather than just benefit payments. PBGC considered this comment but determined that factoring in contributions would introduce more administrative complexity. Other commenters disagreed with the condition stating that it would cause plans to become insolvent earlier than they would otherwise. After considering the comments, PBGC decided to retain the condition in the final rule to prevent excessive risk taking. PBGC concluded that the condition is unlikely to have a significant impact on plans, except in years when they are approaching insolvency.

Due to the expansion of permissible investments under § 4262.14 of the final rule, as described earlier in the

preamble under the subheading *Permissible Investments*, PBGC has made conforming changes to § 4262.16(c) to reflect that the condition is tied to fixed income. Accordingly, the final rule amends § 4262.16(c) to provide that during the SFA coverage period, plan assets, including SFA, must be invested in permissible investments that are fixed income as described in § 4262.14(d) sufficient to pay for at least 1 year (or until the date the plan is projected to become insolvent, if earlier) of projected benefit payments and administrative expenses. Additionally, the investments used to meet this condition are also subject to the limitations on derivatives and leverage described in § 4262.14(h).

#### (c) Contribution Decreases and Allocating Contributions

Section 4262.16(d) imposes reasonable conditions on a plan that receives SFA relating to contribution decreases to ensure that SFA is used for the exclusive purpose of paying benefits and reasonable administrative expenses and is not effectively transferred to contributing employers through decreased contribution obligations. During the SFA coverage period, the contributions required for each CBU must not be less than, and the definition of the CBUs must not be different from, those set forth in collective bargaining agreements or plan documents in effect on March 11, 2021 (including agreed to contribution rate increases through the expiration date of the collective bargaining agreements). PBGC received one comment strongly supporting the condition on contribution decreases, stating that employers must continue to pay for promised benefits under the terms that they have agreed to in their collective bargaining agreements. Another commenter requested clarification of the exception to this condition and the threshold for PBGC approval. The regulation provides an exception to this condition where the plan sponsor determines that the risk of loss to plan participants and beneficiaries is lessened by the reduction. PBGC clarifies in the final rule that the threshold for the requirement that PBGC (in addition to the plan sponsor) must determine that the changes lessen the risk of loss to participants and beneficiaries is where the proposed reduction affects over \$10 million of annual contributions and over 10 percent of all employer contributions. Except for this clarification in § 4262.16(d) and an addition in paragraph (d)(2)(ix) that PBGC may request additional information that it determines it needs

to review a request for approval of a proposed contribution change, the final rule does not make any changes to this condition.

Section 4262.16(e) of the regulation imposes reasonable conditions relating to allocation of contributions and expenses between a plan that received SFA and another employee benefit plan and other practices. The condition prohibits a decrease in the proportion of income (contributions, investment returns, etc.) or an increase in the proportion of expenses allocated to a plan that receives SFA. This prohibition applies to written or oral agreements or practices (other than a written agreement in existence on March 11, 2021, to the extent not subsequently amended or modified) under which income or expenses are divided or to be divided between a plan that receives SFA and one or more other employee benefit plans.

The Department of Labor brought to PBGC's attention that there may be circumstances arising after March 11, 2021, beyond the control of the plan sponsor and the bargaining parties (*e.g.*, health benefit cost increases due to legislative changes) that would justify a good faith reallocation of income or expenses between employee benefit plans. To address this narrow circumstance, PBGC is adding an exception to § 4262.16(e). Under the new provision, beginning 5 years after the end of the plan year in which a plan receives payment of SFA, a plan may apply for an exception by demonstrating to the satisfaction of PBGC that, taking into account the value of any proposed reallocation, the plan that received SFA will avoid insolvency and that the reallocation is needed due to a significant increase in health benefit costs due to a change in Federal law. The reallocation would be required to be no more than a 10 percent reduction in the amount of the contribution rate negotiated on or before March 11, 2021, going to the pension plan and would be required to be temporary (no more than 5 years for a reallocation request relating to any single change in Federal law and no more than 10 years cumulatively for all reallocation requests during the plan's SFA coverage period). For example, if the negotiated contribution rate was \$60 per CBU, with 50 percent (\$30) allocated to the pension plan and 50 percent (\$30) to the group health plan, the pension contribution rate could be reduced to \$27 ( $\$30 \times 10 \text{ percent} = \$3$ ) during the 5-year period. This temporary reallocation would give the bargaining parties time to negotiate contributions for the health plan under a collective bargaining agreement. For

example, consistent with the requirement in § 4262.16(e)(1)(iv), by the end of the 5-year period, the bargaining parties could negotiate, without the approval of PBGC, a new contribution rate of \$100 per CBU with an allocation of 30 percent to the pension plan and 70 percent to the group health plan, which would reinstate the \$30 contribution rate for the pension plan. The final rule specifies the information that a plan is required to file with its application for an exception.

Except with respect to a merged plan, discussed in the section on Transfers or Mergers, PBGC did not receive any comments on this condition and did not make any other changes to this condition in the final rule.

#### (d) Transfers or Mergers

Section 4262.16(f) provides that during the SFA coverage period, a plan must not engage in a transfer of assets or liabilities (including a spinoff) or merger except with PBGC's approval. Notwithstanding anything to the contrary in PBGC's regulation on mergers and transfers between multiemployer plans (29 CFR part 4231), the plans involved in the transaction must request approval from PBGC. A request for approval must contain information that would be required to be submitted under § 4231.10 and the additional actuarial and financial information described in § 4262.16(f)(2). PBGC will approve a proposed transfer or merger if: (1) the transaction complies with section 4231(a)–(d) of ERISA, (2) the transfer or merger, or the larger transaction of which the transfer or merger is a part, does not unreasonably increase PBGC's risk of loss respecting any plan involved in the transaction, and (3) the transfer or merger is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans involved in the transaction. An example of a larger transaction is where the trustees of a plan receiving SFA arrange a transfer of assets and liabilities from the plan and amend the plan to substantially or completely end benefit accruals in connection with the plan's active participants beginning to accrue benefits under another existing or newly formed plan. PBGC is unlikely to approve a transfer of assets and liabilities (that is not a merger) from a plan that receives SFA to another plan. If a transfer of assets and liabilities (that is not a merger) is approved, the application of the restrictions and conditions to the transferee plan will be determined as a condition of the approval. Also, generally, PBGC will not

approve a transfer from a single-employer plan to a plan that receives SFA, nor a merger of a single-employer plan with a plan that receives SFA.

Several commenters requested additional guidance on how the plan that received SFA before the merger (the "SFA plan") should be administered after the merger and whether the restrictions and conditions that applied to the SFA plan also will apply to the merged plan. One commenter suggested that the final rule should include a mechanism for PBGC to waive restrictions and conditions on the merger of an SFA plan into another plan and that such waivers could be considered as part of PBGC's review and approval of mergers.

In response to the commenters, PBGC is amending § 4262.16(f) to provide, as part of the reasonable conditions relating to plan mergers, rules on the restrictions and conditions that apply to the merged plan, the conditions that do not apply to the merged plan, the conditions that may be waived if certain criteria are met, and rules for the calculation of withdrawal liability. For purposes of § 4262.16(f), a merged plan means a plan that is the result of the merger of two or more multiemployer plans. These rules on the applicable restrictions and conditions apply even if, under the terms of the merger, the plan that did not receive SFA is designated as the merged plan.

Under section 4262(j) of ERISA and § 4262.13(b), SFA received by a plan and any earnings thereon must be segregated from other plan assets, may be used by the plan only to make benefit payments and pay administrative expenses, and must be invested in investment grade bonds or other permissible investments under § 4262.14. These statutory restrictions on the use of SFA and earnings continue to apply after the merger to the merged plan. Consistent with that requirement, the Treasury Department and the IRS have informed PBGC that the prohibition under section 432(k)(2)(D)(i) of the Code on taking SFA assets into account in determining minimum required contributions under section 431 of the Code continues to apply after the merger to the merged plan.

PBGC has determined that some of the regulatory conditions under § 4262.16 will continue to apply, as conditions of the merger, to the merged plan. If the merged plan engages in a future transfer or merger, the plan would be required to obtain PBGC's approval of the transaction under § 4262.16(f). The merged plan also would be subject to the condition on withdrawal liability requiring approval of certain settlements

of withdrawal liability under § 4262.16(h). In addition, the merged plan will be required to demonstrate continued compliance with the restrictions and conditions by filing an annual statement of compliance under § 4262.16(i) through the last day of the last plan year ending in 2051 and will be subject to periodic compliance audits under § 4262.16(j). PBGC believes these are reasonable conditions for a plan that receives SFA that should continue to apply to the merged plan and will not create a significant impediment to plan mergers.

PBGC agrees that some of the conditions under § 4262.16 either should not apply or should be waived for certain mergers so that the conditions do not unduly impede beneficial mergers.

After considering comments received, PBGC is clarifying in § 4262.16(f) that the conditions relating to prospective benefit increases under § 4262.16(b)(2), allocation of plan assets under § 4262.16(c), and allocating expenses under § 4262.16(e)<sup>29</sup> will not continue to apply after the merger to the merged plan. A few commenters suggested that a large plan could not operate efficiently if the condition with respect to prospective benefit increases applied and every merged plan was required to retain its own benefit design. Another commenter explained that there would be a reasonable expectation that two participants under the same plan working with the same or similar contribution rates would have the same or similar benefit accrual for service after the merger. With respect to allocating expenses, a commenter stated that an SFA plan that has merged is not legally separate from the merged plan for this purpose and should not be treated differently than any other portion of the merged plan.

In addition, PBGC is amending § 4262.16(f) in the final rule to provide that, as part of a request for approval of a merger between plans where one or more of the plans are SFA plans and one or more of the plans are non-SFA plans, PBGC will provide a waiver of the conditions relating to retroactive benefit increases under § 4262.16(b)(1), contribution decreases under § 4262.16(d), and allocating contributions and other income under § 4262.16(e) if three requirements are met. First, the total current value of

<sup>29</sup> Section 4262.16(e) prohibits a decrease in the proportion of income (contributions, investment returns, etc.) or an increase in the proportion of expenses allocated to a plan that receives SFA. Unless, waived, the prohibition on a decrease in the proportion of income will continue to apply to the merged plan.

assets of the SFA plans pre-merger must be 25 percent or less of the total current value of assets of the merged plan, calculated using the current value of assets most recently required to be reported by the plans before the merger on line 2a of Form 5500 Schedule MB.<sup>30</sup> Second, the total current liability of the SFA plans pre-merger must be 25 percent or less of the total current liability of the merged plan, calculated using the current liability most recently required to be reported by the plans before the merger on line 2b(4) column (2) of Form 5500 Schedule MB. Third, in the most recent certification of plan status for the non-SFA plan, the plan actuary must have certified that the plan is not in endangered or critical status (including critical and declining status) and is not projected to be in critical status within 5 years from the date of the plan's request for approval, and the plan must not be a plan described in section 432(b)(5) of the Code. If any of the plans involved in the merger engage in multiple transactions in any 1-year period, the transactions will be considered in the aggregate.

Some commenters suggested that if PBGC retains certain conditions after the merger, the conditions should apply to participants in (and employers contributing to) the SFA plan part of the merged plan only and not to all participants in (and employers contributing to) the merged plan. PBGC is adopting this suggestion for conditions relating to retrospective benefit increases under § 4262.16(b)(1), contribution decreases under § 4262.16(d), allocating contributions and other income under § 4262.16(e), and withdrawal liability under § 4262.16(g). The condition relating to retrospective benefit increases, absent a waiver, will continue to apply to participants in the SFA plan immediately before the merger and not to other participants after the merger in the merged plan. For the condition relating to contribution decreases, absent a waiver, the condition will apply only to the employers who had an obligation to contribute to the SFA plan immediately before the merger. For the condition relating to allocating contributions and other income, absent a waiver, the condition will apply to contributions or income relative to the SFA plan before the date of the merger. With respect to the conditions relating to the calculation of withdrawal liability under § 4262.16(g) (described in the next section of the preamble), PBGC is limiting the conditions to the

<sup>30</sup> All line references in this section are to the 2021 Form 5500 and schedules.

determination of unfunded vested benefits that arose under the SFA plan before the date of the merger for purposes of allocating unfunded vested benefits under subpart D of part 4211 and determining withdrawal liability.

PBGC agrees with a comment that this approach avoids the use of SFA assets to reduce the withdrawal liability of a withdrawing employer without unduly increasing the withdrawal liability of

other employers who were never contributing employers to the SFA plan.

The following table summarizes the application of the restrictions and conditions in the event of a merger:

APPLICATION OF RESTRICTIONS AND CONDITIONS AFTER A MERGER

Applies to merged plan	Does not apply to merged plan	Other
<ul style="list-style-type: none"> <li>• Restrictions (§ 4262.13(b)).</li> <li>• Transfer or merger (§ 4262.16(f)).</li> <li>• Withdrawal liability settlement (§ 4262.16(h)).</li> <li>• Annual compliance statement (§ 4262.16(i)).</li> <li>• Audit (§ 4262.16(j)) .....</li> </ul>	<ul style="list-style-type: none"> <li>• Prospective benefit increase (§ 4262.16(b)(2)).</li> <li>• Allocation of plan assets (§ 4262.16(c)).</li> <li>• Allocating expenses (§ 4262.16(e)).</li> </ul>	<ul style="list-style-type: none"> <li>• Retrospective benefit increase (§ 4262.16(b)(1)): plan may apply for a waiver, and, absent a waiver, continues to apply to participants in the SFA plan.</li> <li>• Contribution decreases (§ 4262.16(d)): plan may apply for a waiver, and, absent a waiver, continues to apply to employers who had an obligation to contribute to the SFA plan.</li> <li>• Allocating contributions and other income (§ 4262.16(e)): plan may apply for a waiver, and, absent a waiver, continues to apply to contributions or income relative to the SFA plan before the date of the merger.</li> <li>• Withdrawal liability calculation (§ 4262.16(g)): no waiver; conditions required to be applied to determine unfunded vested benefits (UVBs) that arose under the SFA plan before the date of the merger for purposes of allocating UVBs under subpart D of part 4211 and determining withdrawal liability.</li> </ul>

Commenters asked for clarification of whether the merged plan’s certification of plan status will be affected by merging with a plan that receives SFA. Under section 4262(m)(4) of ERISA, section 432(b)(7) of the Code, and § 4262.17(c), an eligible multiemployer plan that receives SFA is deemed to be in critical status within the meaning of section 305(b)(2) of ERISA until the last day of the last plan year ending in 2051. The rules for critical status plans under section 305 of ERISA are under the jurisdiction of the Treasury Department.

Commenters also asked for clarification of whether a merged plan would be able to apply for a suspension of benefits under MPRA in the future. Under section 432(k)(2)(E) of the Code, section 4262(m)(6) of ERISA, and § 4262.17(e) an eligible multiemployer plan that receives SFA is not eligible to apply for a new suspension of benefits under section 305(e)(9) of ERISA. This statutory condition would apply to the SFA plan. Eligibility of a merged plan to apply for a suspension of benefits is under the jurisdiction of the Treasury Department.

(e) Withdrawal Liability

Under sections 4201 through 4225 of ERISA, when a contributing employer withdraws from an underfunded multiemployer plan, the plan sponsor assesses withdrawal liability against the employer. Withdrawal liability represents a withdrawing employer’s proportionate share of the plan’s unfunded benefit obligations and is an important source of income for the plan. To assess withdrawal liability, the plan sponsor must determine the withdrawing employer’s (1) allocable

share of the plan’s unfunded vested benefits (the value of nonforfeitable benefits that exceeds the value of plan assets) as of the end of the plan year before the employer’s withdrawal, or as otherwise provided under section 4211, and (2) annual withdrawal liability payment and amortization period under section 4219.

Interest Assumptions for Determining UVBs

Under § 4262.16(g) of the interim final rule, for withdrawals that occur after the plan year in which the plan receives SFA, the interest assumptions used in determining unfunded vested benefits (UVBs) for purposes of determining withdrawal liability must be the “Interest Rates Used To Value Benefits” in appendix B to 29 CFR part 4044. The interim final rule provided that the prescribed interest assumptions must be used until the later of 10 years after the end of the plan year in which the plan receives payment of SFA or the last day of the plan year in which the plan no longer holds SFA or any earnings thereon in a segregated account. The minimum 10-year period is similar to the time period over which special statutory withdrawal liability rules apply to plans that suspend benefits or are partitioned under MPRA.

Several commenters recommended changes related to the condition requiring plans to use the prescribed interest assumptions. Two commenters suggested that PBGC provide only a fixed period for the requirement to use mass withdrawal interest assumptions to eliminate a plan’s ability to prolong application of the condition by keeping a small SFA balance. Other suggestions

to avoid plans prolonging the application of the condition were to require that SFA funds be used first and to eliminate the reference to earnings on SFA. Other commenters agreed that requiring the use of the mass withdrawal interest assumptions is a reasonable condition and recommended that PBGC extend the requirement through 2051.

PBGC is retaining the “later of” structure for the period to which the condition applies. However, in consideration of comments suggesting the condition apply for a fixed period to prevent plans from holding a de minimis amount of SFA to prolong application of the condition, PBGC is modifying the period so that it ends after the later of 10 years or the projected life of the SFA assets. Specifically, the prescribed interest assumptions must be used until the later of: (1) 10 years after the end of the plan year in which the plan first receives payment of SFA, and (2) the last day of the plan year by which the plan projects that it will exhaust any SFA assets as determined under § 4262.4(b) (under which benefits and expenses are assumed to be paid exclusively from SFA assets until exhausted), extended by the number of years, if any, that the first plan year of payment is after the plan year that includes the SFA measurement date. For example, if a calendar year plan’s SFA measurement date is in 2022, the plan receives payment of SFA in 2023, and had projected that it will exhaust SFA assets in 2051, the exhaustion year for the plan to use the prescribed interest assumptions would be 2052 (29 years + 1 year). Under this example, employers

withdrawing before 2054 would have UVBs determined using the prescribed interest rate under the final rule. Eliminating a plan's ability to prolong application of the condition requiring use of mass withdrawal interest assumptions beyond the specified period does not preclude the use of settlement rates thereafter to determine withdrawal liability, as otherwise permitted by ERISA.

In addition, the final rule clarifies that the beginning of the 10-year period is the last day of the plan year in which the plan receives payment of SFA, renumbers § 4262.16(g) as § 4262.16(g)(1), and clarifies that the condition in § 4262.16(g)(1) for determining the value of UVBs also applies for determining the amortization schedule under section 4219(c)(1)(A) of ERISA. Section 4219(c)(1)(A)(ii) provides that “[t]he determination of the amortization period described in clause [4219(c)(1)(A)](i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.” What is meant by “the most recent actuarial valuation of the plan” for amortization purposes is unclear. One reading would require that the amortization period be determined using the interest rate used for funding purposes, but that could have the odd result of, *e.g.*, valuing UVBs for withdrawal liability purposes as of 2020 calculated in 2023 using the interest rate used for the 2022 valuation as the “most recent” assumption used for the actuarial valuation. PBGC believes that a better reading would require that the amortization period be determined using the same assumptions that were used in the valuation of UVBs for withdrawal liability purposes. Providing in the final rule that the interest assumption required to be used for withdrawal liability purposes in § 4262.16(g)(1) is also to be used for amortization purposes, clarifies for plan actuaries what interest rate to use in determining the amortization period when this condition applies.

The final rule also clarifies that a plan cannot use SFA as a receivable as of the end of the plan year before the plan year in which the plan receives SFA.

#### Phased Recognition of SFA Assets

PBGC received a number of comment letters that discussed conditioning SFA on a disregard of SFA in a plan's withdrawal liability calculations. While one comment letter expressed opposition to excluding any amount of SFA from the calculation, other commenters requested that PBGC exercise its authority under section 4262(m) of ERISA to impose a condition requiring plans to exclude SFA from

plan assets in calculating withdrawal liability, either instead of or in addition to requiring the use of mass withdrawal interest assumptions. One commenter suggested that an administratively simple approach would be to require plans to exclude the remaining amount of SFA from each year's determination of UVBs. Another stated that the condition under the interim final rule to use mass withdrawal interest assumptions would not ensure for all plans that SFA is preserved for payment of benefits and expenses. The commenter recommended that PBGC impose three additional withdrawal liability conditions: that SFA be disregarded in calculating withdrawal liability, that conservative assumptions be used for a 5-year period after SFA is exhausted, and that, for a 15-year period, withdrawal liability be no less than it would have been as of the date a plan applied for SFA. Most of the commenters were concerned that not including a condition to exclude SFA from plan assets for purposes of calculating withdrawal liability will incentivize employers to withdraw after the plan receives SFA.

As discussed in the preamble of the interim final rule, PBGC considered a condition requiring exclusion of SFA from plan assets in calculating withdrawal liability, but did not include such a condition in the interim final rule. However, PBGC has given further consideration to the impact of SFA on an employer's incentive to withdraw based on commenters' concerns about the effectiveness of the prescribed-interest-assumptions condition alone in disincentivizing employer withdrawals after a plan's receipt of SFA. Since publication of the interim final rule, rising interest rates, and corresponding increases in the prescribed interest assumptions, have further highlighted the limitation of the effectiveness of the condition in the interim final rule to achieve its purpose.

If a plan immediately recognizes the entire amount of SFA as a plan asset upon receipt, the plan's UVBs for purposes of determining withdrawal liability—and thus employers prospective withdrawal liability—will likely decline. Section 4262(J) of ERISA, which Congress titled “Restrictions on the Use of Special Financial Assistance,” and which sets forth such restrictions, requires that “[SFA] received under this section and any earnings thereon may be used by an eligible multiemployer plan to make benefit payments and pay plan expenses.” Section 4262(m)(1) also expressly grants PBGC authority, in consultation with the Secretary of the

Treasury, to “impose . . . reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to . . . withdrawal liability.” To ensure that SFA is not used to subsidize employer withdrawals rather than to make benefit payments and pay plan expenses, a condition relating to the recognition of SFA as an asset in calculating UVBs is needed in addition to the condition prescribing the interest assumptions to be used in valuing plan liabilities.

After consideration of comments and analysis of the effectiveness of the interim final rule's withdrawal liability condition, PBGC declined to adopt the approach of fully disregarding SFA that was discussed in the interim final rule and suggested by some commenters. Instead, PBGC has concluded that a better approach to addressing commenters' concerns would be to phase in the recognition of SFA for purposes of withdrawal liability in a manner that is a more accurate and reasonable reflection of the period over which SFA is likely to be spent down by plans. Thus, under § 4262.16(g)(2) of the final rule, pursuant to PBGC's authority under section 4262(m) of ERISA, PBGC imposes an additional condition relating to withdrawal liability on a plan that receives SFA. This condition requires plans to recognize over time the amount of SFA received by the plan for the purpose of determining the plan's UVBs for calculating withdrawal liability.

Section 4262.16(g)(2) provides the procedures for determining the amount of SFA that is phased in for withdrawal liability purposes each year over the projected life of the SFA assets (determined as if SFA assets, *i.e.*, SFA and earnings thereon, are exhausted before other plan assets are used to pay benefits and expenses). The applicable phase-in period is from the first plan year in which the plan receives payment of SFA through the end of the plan year by which, according to the plan's projections, it will exhaust any SFA assets. For a plan that received payment of SFA under the terms of the interim final rule and files a supplemented application, the first plan year of payment is the year in which it received SFA under the terms of the interim final rule. Where a plan's first plan year of payment is not the plan year that includes the plan's SFA measurement date, the exhaustion year is deferred by the number of years the first plan year of payment is after the plan year that includes the SFA measurement date.

To calculate the amount of SFA assets excluded for each plan year during the phase-in period, the plan must take the

total amount of SFA paid to the plan and multiply that by a fraction, the numerator of which is the number of years remaining in the phase-in period as of the date that the UVBs are being determined, and the denominator is the total number of years in the phase-in period. For a plan that receives payment of SFA under the interim final rule and receives a supplemental payment under the final rule, the total amount (payment under the interim final rule and supplemental payment) will be included in the phased recognition of SFA assets in determining UVBs for withdrawals occurring in plan years after the plan year the supplemental payment is received by the plan. For withdrawals that occur after the date the supplemented application is filed and before the plan year after the plan year in which the supplemental payment is made, only the payment of SFA under the interim final rule is included in the phased recognition of SFA assets.

As provided in § 4262.16(g)(2)(xv), this condition is applicable to a plan in determining withdrawal liability for withdrawals occurring after the plan year in which the plan receives payment of SFA. However, for a plan that received SFA under the terms of the interim final rule, this condition will not apply unless the plan files a supplemented application under the final rule. If the plan files a supplemented application, this condition applies to the plan in determining withdrawal liability for withdrawals occurring on or after the date the plan files the supplemented application. A plan may choose to file a supplemented application if it has already received SFA.

Three examples are included in § 4262.16(g)(2) to illustrate the procedures for the phased recognition of SFA assets.

Requiring phased recognition of SFA as a plan asset is a reasonable condition because SFA does not result from employer contributions, but is a transfer of taxpayer funds to eligible financially distressed plans for the purpose of enabling these plans to pay benefits and expenses. That purpose is reflected in sections 4262(j)(1) and 4262(l) of ERISA. Without the condition, the payment of SFA could instead result in indirect transfers of SFA to withdrawing employers from plans by reducing their withdrawal liability. For a majority of plans that receive SFA, all SFA will be recognized as a plan asset for withdrawal liability purposes within 10 years, and because additional SFA will be incorporated into the determination of withdrawal liability each year, the

effect of the condition will lessen over time.

The phased recognition of SFA as a plan asset is consistent with ERISA, the Code, and actuarial practice. It is conceptually similar to the smoothed recognition of plan assets for purposes of calculating a plan's minimum funding requirements. The Treasury regulation at 26 CFR 1.412(c)(2)–1(b) permits multiemployer plans to “smooth” plan asset values when determining minimum funding by averaging the value of plan assets over up to five years rather than using the current fair market value of plan assets. It is also roughly comparable to the gradual recognition of SFA in determining minimum funding. Section 432(k)(2)(D) of the Code requires that SFA be disregarded in determining required contributions. IRS Notice 2021–38 provides that SFA is recognized in the plan's funding standard account over time, in that any benefit or plan expense paid from the SFA account generates an actuarial gain that is amortized over 15 years.

In listening sessions with interested parties before the issuance of the interim final rule, some interested parties representing employers argued that PBGC does not have authority to require that SFA be disregarded for purposes of calculating withdrawal liability and that, if Congress had intended for SFA to be disregarded, it would have expressly required that it be disregarded. For example, they cited provisions in MPRA for special withdrawal liability disregard rules in section 4233(d)(3) of ERISA regarding partitions and in section 305(g)(1) regarding benefit suspensions. PBGC does not agree that the absence of a statutory requirement that SFA be disregarded in determining withdrawal liability proves Congressional intent that SFA be immediately recognized in its entirety as a plan asset. Here, in contrast to MPRA, Congress chose to expressly delegate authority in section 4262(m) of ERISA to PBGC to impose reasonable conditions on a plan that receives SFA relating to withdrawal liability. This grant by Congress expands PBGC's authority beyond its existing authority under section 4002(b)(3) and sections 4201 through 4225 of ERISA to regulate withdrawal liability and authorizes PBGC to provide rules that define how SFA should be treated in the calculation of withdrawal liability. The final rule reflects the authority Congress delegated to PBGC to oversee the SFA program and ensure that SFA is preserved for the payment of benefits and expenses.

#### Settlement of Withdrawal Liability

An additional condition related to withdrawal liability is under § 4262.16(h) and requires that any settlement of withdrawal liability during the SFA coverage period must be made only with PBGC approval if the present value of the liability settled is greater than \$50 million (calculated as described under § 4262.16(h)(1)). Approval ensures that any negotiated settlements of material size are in the best interests of the participants in the plan and do not create an unreasonable risk of loss to PBGC. One commenter stated that requiring approval of transactions over \$50 million is a reasonable application of PBGC's oversight authority. PBGC did not make any changes to this provision in the final rule.

#### (f) Reporting and Audit

In order to monitor compliance with the conditions imposed on plans that receive SFA, the final rule requires under § 4262.16(i) that plan sponsors file with PBGC an annual statement of compliance with the terms and conditions of SFA for plan years through the last plan year ending in 2051. Under the interim final rule, each annual statement of compliance was required to be filed with PBGC no later than 90 days after the end of the plan year and in accordance with the statement of compliance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov). Except for questions related to mergers discussed earlier, PBGC did not receive comments on the statement of compliance.

Under the final rule, PBGC clarifies that the first annual statement of compliance must be filed with PBGC no later than 90 days after the end of the plan year in which a plan received payment of SFA and in accordance with the statement of compliance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov). However, based on PBGC's experience in processing applications, the final rule provides that a plan would defer reporting to the next plan year if six months or fewer remain in its plan year after the month in which the plan first received SFA. The first statement of compliance in this case must cover the period from the date the plan received payment of SFA through the last day of the plan year following the plan year in which the plan received payment of SFA. The statement must be filed no later than 90 days after the end of such plan year. For example, if a calendar year plan received payment of SFA on November 15, 2023, the plan's first statement of compliance would be

due by March 31, 2025, covering the period from November 15, 2023, through December 31, 2024. This would be less administratively burdensome to the plan and provide a more meaningful statement of compliance after receipt of SFA.

As described in the interim final rule, PBGC may conduct periodic audits of plans that have received SFA to review compliance with the terms and conditions of the SFA program.

#### *Other Provisions*

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

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

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

participants and beneficiaries under section 305(e)(9).

Finally, § 4262.17(g) includes a severability provision that provides that if any of the provisions of this final rule are found to be invalid or stayed pending further agency action, the remaining portions of the rule would remain operative. Although PBGC received no comments that directly addressed severability, in the final rule, PBGC makes a non-substantive clarifying change to delete the phrase “and will not affect the remainder thereof” from the provision in the interim final rule. PBGC does not intend the severability provision to be read to suggest that provisions of the regulation are only severable if the remainder of the rule is not affected by the severed provision. To the contrary, PBGC intends the regulation to operate either with or without the severed provision. The severability clause applies in the same way whether a provision is invalidated “facially” or “as applied.” The modified severability clause reads as follows: “If any provision in this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding will be one of utter invalidity or unenforceability, in which event the provision will be severable from this part and the remaining provisions given effect without regard to the severed provision.”

PBGC received no comments on § 4262.17 and made no changes in the final rule except, as described, to § 4262.17(g).

#### **Compliance With Rulemaking Guidelines**

##### *Administrative Procedure Act*

As described in the interim final rule, under new section 4262(c) of ERISA, PBGC was required to issue regulations or guidance setting forth the requirements for eligible plans to apply for special financial assistance (SFA) within 120 days of the date of enactment of ARP (March 11, 2021). Congress authorized PBGC to prioritize the filing of applications for eligible plans with the greatest need, during the first two years after March 11, 2021, and PBGC provided for such a process. Moreover, PBGC must review applications within only 120 days of filing and plans must apply by the statutory cutoff date of December 31, 2025 (December 31, 2026, for revised applications). The compressed timeline

for issuing rules, applying for assistance, and processing applications, particularly for prioritized plans, expressed a clear urgency to get appropriate assistance to eligible plans as quickly as possible.

In light of the compressed timeline, PBGC issued an interim final rule without prior notice and comment. The Administrative Procedure Act provides at 5 U.S.C. 553(b) that notice and comment requirements do not apply when an agency, for good cause, finds that they are impracticable, unnecessary, or contrary to the public interest. An exception is also provided at 5 U.S.C. 553(d)(3) to the requirement of a 30-day delay before the effective date of a rule “for good cause found and published with the rule.” Section 9704 of the American Rescue Plan (ARP) Act of 2021 set up a “Special Financial Assistance Program for Financially Troubled Multiemployer Plans.” PBGC promulgated an interim final rule effective on publication, with a request for public comment, to allow for immediate implementation of this program and because of the need to get financial assistance to eligible plans as quickly as possible. Any delay in the effective date of the interim final rule would have been contrary to the public interest. See the “Compliance With Rulemaking Guidelines” section of the July 12, 2021, interim final rule for the applicability of the requirements of 5 U.S.C. 553.

In this final rule, after consideration of the comments received, PBGC is adopting changes to provisions of the interim final rule on the methodology to determine the amount of a plan’s SFA, permissible investments of SFA funds, and the application of conditions on a plan that receives SFA. As discussed earlier in the preamble, PBGC in the interim final rule considered fully disregarding SFA for withdrawal liability purposes, and explained why it did not adopt that alternative. Interested persons submitted comments on that issue, and PBGC is now adopting a condition requiring a phased recognition of SFA in a plan’s determination of withdrawal liability in § 4262.16(g)(2) in response to those comments. The withdrawal liability condition adopted is consistent with PBGC’s statutory authority to impose reasonable conditions on plans that receive SFA under section 4262(m) of ERISA. It is also more effective, along with the other conditions, for achieving the intended purpose of that statutory authority—to help enable plans that receive SFA to pay benefits due through 2051 and to preclude or disincentivize plans and employers from taking actions

that have the potential to accelerate plan insolvencies.

PBGC is also providing for a comment period of 30 days, solely on this withdrawal liability condition in § 4262.16(g)(2), because it is an area of complexity that may benefit from additional public comment. This will provide an opportunity for additional public comment on the condition, and will allow PBGC to assess the effectiveness of this withdrawal liability condition, consider adjustments or changes, and determine whether more clarification is needed regarding the condition or the mechanics of implementation. To the extent PBGC determines that adjustments or changes to this withdrawal liability condition are appropriate and authorized, or that further clarification is needed, PBGC may revise the condition accordingly.

PBGC is making this rule effective on August 8, 2022.

#### *Congressional Review Act*

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

Because of the urgent need for the SFA program and to get appropriate financial assistance to eligible plans quickly, PBGC has determined that this final rule must take effect August 8, 2022. This effective date allows eligible plans to apply for and receive SFA under the terms of the final rule without unnecessary delay. Plans that already applied for, or received, SFA before the effective date of the final rule will be able to apply for any greater amount of SFA under the final rule. Plans that have not yet applied will be able to submit applications using the methodology provided under the final rule. Under the circumstances, PBGC has determined that public interest is best served by making this final rule effective on August 8, 2022. PBGC does

not want to unduly delay providing financial assistance to plans.

#### **Regulatory Impact Analysis**

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

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

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

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

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

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

As discussed earlier in the preamble, PBGC published an interim final rule adding to its regulations a new part 4262 to implement the requirements under section 9704 of the American Rescue Plan (ARP) Act of 2021, “Special Financial Assistance Program for Financially Troubled Multiemployer Plans.” It is through this program that PBGC is providing special financial assistance (SFA) to eligible

multiemployer pension plans from a fund established by ARP for SFA purposes and credited with transfers from the general fund of the Treasury Department.<sup>31</sup>

In the *Regulatory Impact Analysis* of the interim final rule, PBGC provided estimates of the transfer amounts of the SFA program using the Multiemployer-Pension Insurance Modeling System (ME-PIMS), PBGC’s stochastic modeling tool. The aggregate SFA was estimated to be approximately \$94 billion in assistance payments paid to more than 200 plans and \$150 million to PBGC to administer the SFA program. PBGC further estimated that plans that received financial assistance from PBGC under section 4261 of ERISA in the form of loans will repay PBGC in aggregate approximately \$200 million.

Following consideration of comments on the interim final rule’s methodology for determining the amount of SFA, this final rule makes changes to the regulation that impact that methodology. As a result, the aggregate SFA paid out under the program is expected to differ from the \$94 billion estimated under the interim final rule. Additionally, since publication of the interim final rule PBGC has made updates to the ME-PIMS stochastic model, including incorporating more recent plan and economic data. PBGC now estimates that if the final rule had not included any changes to the provisions of the interim final rule, the aggregate SFA would have been \$76.7 billion. The decrease of \$17.3 billion is primarily attributed to incorporating more recent plan data, which reflects subsequent asset returns that were more favorable than expected in the prior estimate.<sup>32</sup> In general, an increase in the initial value of existing plan assets reduces the calculated amount of SFA. Under the final rule, when reflecting the changes to the determination of the amount of SFA, the aggregate SFA is expected to be approximately \$82.3 billion. The expected cost to administer the SFA program remains unchanged from the \$150 million estimate under the interim final rule, and total loan repayments under section 4261 of ERISA are estimated to be \$385 million (an increase of \$185 million compared to the previous estimate). The estimate of aggregate SFA under the program continues to be subject to significant uncertainty, and the actual aggregate

<sup>31</sup> Specifically, section 9704 of ARP establishes an eighth fund under section 4005 of ERISA.

<sup>32</sup> The latest version of the ME-PIMS model reflects asset return information through December 31, 2021. Actual SFA amounts will depend on plan asset performance through an application’s SFA measurement date.

SFA will depend on plan experience prior to applying for SFA, particularly for asset returns. As such, the estimate is highly sensitive to the date of estimation. While the current estimate of SFA is based on investment returns through the end of 2021, capital market experience in early 2022 was characterized by equity losses and rising interest rates. As a result, plans are likely to have incurred asset losses, and it is expected that SFA amounts for many plans will increase from the current estimates. However, a rise in the SFA and non-SFA interest rates may cause SFA amounts for many plans to decrease from the current estimates. Future experience is uncertain and further changes to capital markets and interest rates prior to the time many plans submit their SFA applications will impact the final payment amounts. Based on PBGC's stochastic modeling, a range of projected outcomes spans from \$74.3 billion at the 15th percentile to \$90.8 billion at the 85th percentile.<sup>33</sup>

The final rule also makes changes to permissible investments under § 4262.14. Section 4262(l) of ERISA provides PBGC with specific regulatory authority to permit plans to invest SFA assets in investments other than investment grade bonds. The interim final rule did not permit a wide range of investments for SFA assets, and PBGC sought public feedback on whether to permit investment of SFA assets in investment vehicles with different characteristics from investment grade bonds. The investment portfolio of SFA assets can have a significant impact on a plan's future solvency projections, particularly for plans with a high proportion of SFA assets relative to non-SFA plan assets. The SFA asset allocation also impacts a plan's investment risk exposure. Use of the regulatory authority under section 4262(l) to expand permissible investments strikes a balance between the risk and potential reward of allowing plans to use taxpayer-funded SFA assets to purchase return-seeking investments.

Section 4262(m) of ERISA provides PBGC with regulatory authority (in consultation with the Secretary of the Treasury) to impose reasonable conditions on eligible multiemployer plans that receive SFA (see *Conditions for special financial assistance* earlier in the preamble). The final rule includes certain changes to the regulatory conditions in the interim final rule, based on consideration of public comments. The conditions in the final

rule are more effective at achieving the intended purpose of not enabling plans that receive SFA to take actions that have the potential to accelerate plan insolvencies, which would bring about participant benefit cuts and increased future claims on PBGC's multiemployer insurance program.

### (3) Regulatory Action

PBGC considered the public comments received in response to its interim final rule. The regulatory changes made in the final rule reflect feedback provided in these comments and align with key objectives described in the interim final rule: (1) to transfer to a plan the amount required under section 4262 of ERISA as soon as practicable; (2) to prioritize the applications of plans in imminent need of financial support and where participants' suspended benefits are to be restored; (3) to establish an efficient system for processing applications; (4) stewardship of taxpayer-funded appropriations for SFA; (5) maintaining the security of pension benefits (current accrued benefits and future accruals) of participants in plans that receive SFA; and (6) preservation of the solvency of the PBGC multiemployer insurance program. A detailed description of the rationale for each regulatory change made is included earlier in the preamble to this final rule, including applicable public comments.

A summary of the regulatory changes under the final rule and related economic considerations for each change are described as follows.

#### *Expansion of SFA Permissible Investments*

The final rule amends § 4262.14 to allow plans to invest up to 33 percent of SFA assets in return-seeking assets, e.g., U.S. equities. Comments on the interim final rule were received in 2021 at a time when high quality fixed income provided yields below two percent. While fixed income yields have risen significantly in early 2022, prices on U.S. equities have dropped at the same time (which would increase their potential for higher future returns after the markets level off), thereby maintaining the expected advantage of allowing some investment in return-seeking assets. As a result, SFA assets generally are expected to achieve higher investment returns than under the provisions of the interim final rule and thus better enable plans to project to pay benefits through 2051. The impact of this change on plans' projected future solvency is greater for plans that are expected to have a large proportion of SFA assets to non-SFA plan assets, such

as plans that are insolvent or nearly insolvent at the time of application for SFA.

Allowing plans to invest a portion of SFA in return-seeking assets increases expected investment returns, but also increases the risk of loss. Under adverse market scenarios, plans could incur losses in their SFA assets that would accelerate the future date of plan insolvency. The outcome may be particularly adverse if there is a severe, protracted market downturn shortly after plans receive SFA. The increased investment risk due to the allowance of return-seeking investments in SFA assets may be mitigated by the longer-term investment horizon for total plan assets following receipt of SFA.

#### *Determination of the Amount of SFA: Use of a Separate Interest Rate Applied for the Projection of SFA Assets*

The final rule amends § 4262.4 to include a separate interest rate assumption applicable for the projected SFA assets in the calculation used to determine a plan's SFA amount. The SFA interest rate is a more appropriate assumed rate of return for SFA assets that reflects the investment restrictions for these assets under § 4262.14, including allowing plans to invest up to 33 percent of the segregated SFA assets in return-seeking assets. The SFA interest rate also comports with the statutory requirements that the amount of SFA be the amount projected for plans to pay all benefits due through 2051. The deterministic projection used to determine the amount of SFA under § 4262.4 was also changed to assume that the SFA assets would be spent down by the plan before non-SFA plan assets are used. Although the final rule does not require SFA assets to be used before other plan assets to pay benefits and expenses, this assumption in the final rule reflects plans' expected behavior to minimize the impact of investment restrictions on SFA assets and applies even if a plan does not follow that behavior.

Use of a separate, lower interest rate in the deterministic projection increases the amount of SFA. For plans with a low proportion of SFA assets to non-SFA plan assets, the increase is minor because the SFA assets will not earn significant returns before they are projected to be spent down within a few years. For plans with a large proportion of SFA assets to non-SFA plan assets, such as plans that are insolvent or nearly insolvent at the time of application for SFA, the increase in the final SFA amount attributable to the separate lower interest rate is more significant.

<sup>33</sup> Actual experience could deviate outside this projected range.

*Determination of the Amount of SFA: Calculation Methodology for Plans With an Approved MPRA Benefit Suspension as of March 11, 2021*

The final rule amends § 4262.4 to specify a revised methodology for the calculation of SFA for plans with an approved suspension of benefits under MPRA as of March 11, 2021. This change provides that the amount of SFA is the greatest of: (1) the amount of SFA calculated for a plan that is not a MPRA plan; (2) the lowest amount of SFA that is sufficient to ensure that the plan will project rising assets at the end of the 2051 plan year; and (3) an amount of SFA equal to the present value of reinstated benefits (accounting for both make-up payments needed, as well as payments of the reinstated portion of benefits through 2051, and any restoration of benefits under 26 CFR 1.432(e)(9)–1(e)(3)). These additional SFA calculations in (2) and (3), set forth in the final rule, accord with requirements and considerations that are unique to MPRA plans.

The calculation will increase the amount of SFA for plans that had an approved suspension of benefits under MPRA as of March 11, 2021, and thereby increase the total amount of SFA distributed under the program. There are 18 plans expected to benefit from this change in the final rule.

*Conditions Relating to Benefit Improvements*

The final rule amends § 4262.16(b) to add a process by which a plan may request a determination from PBGC for an exception from the conditions prohibiting prospective and retrospective benefit increases if future plan circumstances permit the benefit increases without endangering the plan's ability to pay all benefits. Under the new provision, beginning 10 years after the end of the plan year in which a plan receives payment of SFA, the plan may apply for an exception by demonstrating to the satisfaction of PBGC, taking into account the proposed benefit increase, that the plan will avoid insolvency.

This provision is intended to provide plans with very limited flexibility to improve benefits in the future while preventing certain benefit increases that could imperil a plan's ability to remain solvent in the future. Because plans will have to demonstrate to PBGC that any proposed benefit increases will not lead to a projected date of insolvency, PBGC expects there to be little to no impact on projected future financial assistance under section 4261 of ERISA.

*Conditions Relating to Allocation of Contributions and Other Income*

The final rule amends § 4262.16(e) to add a process by which a plan may request a determination from PBGC for a limited exception from the condition prohibiting a decrease in the proportion of contributions allocated to a plan that receives SFA if future plan circumstances permit the reallocation of contributions without endangering the plan's ability to pay all benefits. Under the new provision, beginning 5 years after the end of the plan year in which a plan receives payment of SFA, the plan may apply for an exception by demonstrating to the satisfaction of PBGC, taking into account the proposed reallocation of contributions, that the plan will avoid insolvency and that the reallocation is needed due to a significant increase in health benefit costs due to a change in Federal law. The reallocation would be required to be no more than a 10 percent reduction in the amount of the contribution rate negotiated on or before March 11, 2021, going to the pension plan and would be required to be temporary (no more than 5 years for a reallocation request relating to any single change in Federal law and no more than 10 years cumulatively for all reallocation requests during the plan's SFA coverage period).

This provision is intended to provide plan sponsors with very limited flexibility to reallocate contributions temporarily to use for unexpected changes in Federal law. This temporary reallocation would give the bargaining parties time to negotiate contributions for the health plan under a collective bargaining agreement. Because plans will have to demonstrate to PBGC that any proposed reallocation of contributions will not lead to projected plan insolvency and because the reallocation will be temporary, PBGC expects there to be no impact on projected future financial assistance under section 4261 of ERISA.

*Condition Related to Withdrawal Liability*

The final rule amends § 4262.16(g) to modify the period of time for which a plan must use the interest assumptions in appendix B to 29 CFR part 4044 of PBGC's regulations in determining the UVBs of the plan under section 4213(c) of ERISA for purposes of determining an employer's withdrawal liability. Under § 4262.16(g) of the interim final rule, the interest assumptions in appendix B to part 4044 are applicable until the later of 10 years and the last day of the plan year in which the plan no longer holds any SFA assets. The final rule revises

the latter date to the last day of the plan year in which the plan projects that it will exhaust any SFA assets (extended by the number of years, if any, that the first plan year of payment is after the plan year that includes the SFA measurement date).

The final rule under § 4262.16(g)(2) adds a condition relating to withdrawal liability for a plan that receives SFA. This condition requires plans to recognize over time the amount of SFA received by the plan for the purpose of determining the plan's UVBs for calculating withdrawal liability. The amount of SFA is phased in for withdrawal liability purposes each year over the projected life of SFA assets (determined as if SFA assets and earnings thereon are exhausted before other plan assets are used to pay benefits and expenses).

As stated in the *Regulatory Impact Analysis* of the interim final rule, conditions on withdrawal liability are intended to prevent SFA payments from leading to significant decreases in withdrawal liability assessments that would incentivize employers to withdraw from these plans. The purpose of SFA is to help plans pay for benefits and plan expenses and not to indirectly subsidize employers and encourage them to exit these plans. As discussed in the interim final rule, PBGC considered a condition requiring exclusion of SFA from plan assets in calculating withdrawal liability, but did not include such a condition in the interim final rule. However, PBGC has given further consideration to the impact of SFA on incentives to withdraw based on commenters' concerns about the effectiveness of the prescribed-interest-assumptions condition alone in disincentivizing employer withdrawals after a plan's receipt of SFA. Since publication of the interim final rule, rising interest rates, and corresponding increases in the prescribed interest assumptions, have further highlighted the limitation of the effectiveness of the condition in the interim final rule to achieve its purpose. To ensure that SFA is not used for a purpose other than to make benefit payments and pay plan expenses, a condition relating to the phased recognition of SFA assets for purposes of calculating withdrawal liability is needed in addition to the interest rate condition on the measurement of liabilities.

*Conditions Applicable to Merged Plans*

The final rule amends § 4262.16(f) to provide that the conditions relating to prospective benefit increases under § 4262.16(b)(2), allocation of plan assets

under § 4262.16(c), and allocating expenses under § 4262.16(e) will not apply after the merger to the merged plan. In addition, as part of a request for approval of a merger between plans where one or more plans are SFA plans, PBGC will provide a waiver of the conditions on retroactive benefit increases and contribution decreases in § 4262.16(b)(1) and (d) if prescribed requirements are met. If the requirements for a waiver are not met, the final rule provides that these two conditions will apply, as applicable, to participants in, or employers that have an obligation to contribute to, the SFA plan immediately before the merger. The withdrawal liability conditions in

§ 4262.16(g) will not be waived. Those conditions, however, are limited to the determination of UVBs that arose under the SFA plan before the date of the merger for purposes of allocating UVBs under subpart D of part 4211 and determining withdrawal liability for employers that participated in the SFA plan. Finally, the restrictions on SFA in § 4262.13(b), conditions in § 4262.16(f) (merger or transfer), § 4262.16(h) (withdrawal liability settlement), § 4262.16(i) (statement of compliance), and § 4262.16(j) (audit) continue to apply to the merged plan.

The clarifications in the final rule on the application of conditions after a merger are intended to prevent the conditions that are not required by

statute from creating an impediment to the consideration of a merger that would otherwise be beneficial to the plan and plan participants. The extent to which the final rule does not create an impediment to mergers is uncertain, but PBGC expects these clarifications on conditions applicable to merged plans to have no material impact on projected future financial assistance under section 4261 of ERISA.

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

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

	PV amount (3% rate)	PV amount (7% rate)	2021	2022	2023	2024	2025	2026	2027–2051 (total) <sup>34</sup>
<b>Annual Transfer Amounts</b>									
Total transfer amounts based on Interim Final Rule ( <i>total nominal value of \$93.98 billion</i> ).	\$86.16 billion	\$77.14 billion	\$1.26 billion	\$43.68 billion	\$23.03 billion	\$13.32 billion	\$8.89 billion	\$3.33 billion	\$0.47 billion.
Change based on updated model data (plan & economic data) ( <i>total nominal value of \$17.30 billion</i> ).	(15.91) billion	(14.28) billion	(1.26) billion	(7.13) billion ..	(4.19) billion ..	(2.42) billion ..	(1.61) billion	(0.60) billion	(0.08) billion.
Change based on updated provisions of Final Rule ( <i>total nominal value of \$5.64 billion</i> ).	5.17 billion ....	4.63 billion ....	0.00 billion ..	2.71 billion ....	1.38 billion ....	0.80 billion ....	0.53 billion ..	0.19 billion ..	0.03 billion.
Total transfer amounts based on Final Rule ( <i>total nominal value of \$82.32 billion</i> ).	75.42 billion ..	67.49 billion ..	0.00 billion ..	39.26 billion ..	20.22 billion ..	11.70 billion ..	7.81 billion ..	2.92 billion ..	0.42 billion.
<b>Annual Cost Amounts</b>									
Anticipated PBGC administrative expenses ( <i>total nominal value of \$150 million</i> ).	129.57 million	108.41 million	20.50 million	17.50 million	15.75 million	15.00 million	14.75 million	14.00 million	52.50 million.
SFA applications ...	8,693,400 .....	7,781,400 .....	922,500 .....	3,075,000 .....	2,152,500 .....	1,998,800 .....	1,260,800 ...	78,800 .....	0.
Lock-in applications.	54,800 .....	48,400 .....	0 .....	0 .....	43,750 .....	16,625 .....	0 .....	0 .....	0.
Benefit reinstatement participant notices.	68,900 .....	63,800 .....	0 .....	73,100 .....	0 .....	0 .....	0 .....	0 .....	0.
Annual compliance filings.	12,473,400 ....	7,211,100 .....	0 .....	76,500 .....	275,400 .....	456,500 .....	622,200 .....	726,800 .....	18,168,750.
Condition exemption filings.	354,000 .....	209,900 .....	0 .....	0 .....	19,600 .....	19,600 .....	19,600 .....	19,600 .....	489,250.
Total cost amounts.	151.21 million	123.72 million	21.42 million	20.72 million	18.24 million	17.49 million	16.65 million	14.83 million	71.16 million.

<sup>34</sup> SFA payments to plans are expected to be \$416 million in 2027 and \$0 thereafter. PBGC administrative expenses are expected to be \$14 million per year from 2027 through 2029 and \$10.5

million in 2030. Additional PBGC expenses are expected to be incurred from 2031 through 2051 but would not be funded through general appropriations. The costs relating to annual

compliance filings are expected to be \$726,800 per year from 2027 through 2051. The costs relating to condition exemption filings are expected to be \$19,600 per year from 2027 through 2051.

### *Change to the Estimated Amount of SFA*

In support of the development of the final rule, PBGC conducted modeling of the impact of changes to the calculation procedures for SFA under § 4262.4 and changes to permissible investments under § 4262.14. These provisions directly impact both the total estimated cost of the SFA program as well as the projected solvency of plans after receipt of SFA. The modeling is subject to significant limitations, including limited available data, uncertainty regarding the number of plans ultimately eligible to apply, uncertainty regarding future asset returns, and other factors. However, despite the future uncertainty, the modeling shows that under the final rule, eligible plans are significantly more likely to meet the statutory direction in section 4262(j)(1) of ERISA to project to be able to pay benefits due through plan year 2051, without incurring excessive investment risk exposure. The cost estimates in the table above also reflect general updates made to PBGC's ME-PIMS model to reflect more recent plan and economic data. These updates decreased the total nominal SFA estimate by \$17.3 billion, primarily due to the incorporation of more recent plan asset return information that was more favorable than expected.<sup>35</sup>

### *Filing and Issuance Requirements*

As discussed in this final rule, to request SFA for a multiemployer plan, a plan sponsor must, under section 4262 of ERISA and part 4262, file an application with PBGC. The applications for SFA must include information about the plan, plan documentation, and actuarial information. The information is necessary for PBGC to verify a plan's eligibility for SFA, amount of requested SFA, and if applicable, inclusion in a priority group. Also, under the final rule, a plan sponsor may, but is not required to, file a lock-in application as a plan's initial application. The lock-in application contains basic information about the plan and a statement of intent to lock-in base data. In addition, under part 4262, a plan that receives SFA is required to file a compliance notice with PBGC once every year through the plan year ending in 2051. As discussed further in the *Paperwork Reduction Act* section, the estimated average cost (dollar equivalent of the in-house hour burden + contractor costs) to prepare the

one-time application to PBGC is \$30,750, the estimated average cost to prepare the lock-in application is \$875, and the estimated average cost to prepare the annual statement of compliance is \$2,550. PBGC estimates that over the next 3 years (2022–2024) it will receive annually an average of 78 applications for SFA at an aggregate average annual cost of \$2,398,500, 23 lock-in applications at an aggregate average annual cost of \$20,125, and 106 annual statements of compliance at an aggregate average annual cost of \$270,300.

In addition, certain plan sponsors that receive SFA are subject to participant disclosure and reporting requirements. A plan sponsor of a plan with benefits that were suspended under section 305(e)(9) or 4245(a) of ERISA must issue a notice of reinstatement to participants and beneficiaries whose benefits were previously suspended and then reinstated. The estimated average cost (dollar equivalent of the in-house hour burden + contractor costs) to prepare the notice of reinstatement is \$2,150. PBGC estimates that over the next 3 years (2022–2024) an average of 11.33 plans annually (34 total plans) will issue the notice of reinstatement to an average of 3,050 participants and beneficiaries at an aggregate average annual cost of \$24,367.

A plan sponsor that receives SFA also is required to administer the plan in accordance with conditions prescribed by PBGC in § 4262.16. A plan sponsor may request approval from PBGC for an exception under certain circumstances for conditions relating to benefit increases, reductions in contributions, transfers or mergers, and settlement of withdrawal liability, prospective and retrospective benefit increases beginning 10 years after the date a plan receives SFA, and allocation of contributions beginning 5 years after the date a plan receives SFA. PBGC expects these determination requests to be infrequent. PBGC estimates that it will receive an average of 2.2 requests per year in 2023 and 2024 at a cost of \$19,570 per year (averaged over 2022–2024 = \$13,047).

The total average annual cost for the information collection is \$2,724,614 (\$2,398,500 + \$18,400 + \$270,300 + \$24,367 + \$13,047).

### *Conditions for Plans That Receive SFA*

As discussed above, the changes made to § 4262.16 in the final rule are not expected to have a significant impact on future plan solvency experience. To the extent that the provisions in § 4262.16(f) setting forth which conditions continue to apply to a merged plan encourage

mergers between healthier “green zone” plans and plans that receive SFA, there may be a decrease in projected future financial assistance under section 4261 of ERISA. The actual impact will depend on plan behavior and future experience, particularly future investment returns. Overall, PBGC does not expect a material impact as a result of the changes made in the final rule to the conditions.

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

#### *Expansion of SFA Permissible Investments*

PBGC considered the implications of making no change to permissible investments under § 4262.14 in the final rule. In one alternative, if the regulation for permissible investments and for the applicable interest rate (§ 4262.4) both remained unchanged from the interim final rule, many plans would not be projected to pay all benefits due through 2051. Because of the investment restrictions, it would be unlikely that the SFA portion of assets would achieve a rate of return as high as the interest rate used to determine SFA. This issue, described in many public comment letters, is more pronounced for plans with a large proportion of SFA assets to existing plan assets, such as plans that are insolvent or nearly insolvent at the time of application for SFA.

In another alternative, if no change were made to expand permissible investments but the final rule allowed for a separate interest rate based exclusively on the expected return of investment grade bonds to be applied to the SFA portion of plan assets, plans would receive higher SFA payments enabling them to pay all benefits due through 2051 on a projected basis. However, this alternative would require using a lower interest rate for SFA assets under § 4262.4 than provided in the final rule, which would further increase the aggregate cost of the SFA program. PBGC projects that this alternative could have increased the total amount of SFA by a range of approximately \$5 billion to \$10 billion over the interim final rule.

PBGC also considered the implications of an even less restrictive definition of permissible investments than under the final rule, including an option to allow plans to invest all (not just a portion) of SFA funds in return-seeking assets and/or in other investments not included in the final rule's definition of permissible investments. Although an average projection scenario shows favorable outcomes that could allow plans to realize even greater investment returns to support being sufficiently funded to

<sup>35</sup> The latest version of the ME-PIMS model reflects asset return information through December 31, 2021. Actual SFA amounts will depend on plan asset performance through an application's SFA measurement date.

be able to pay plan benefits through 2051, and in fact, effectively extending plan solvencies beyond 2051, there is an overall increase in investment risk that adverse market conditions could put plans in greater jeopardy of becoming insolvent well before the last day of the 2051 plan year and undermine their potential to pay all benefits due through 2051. The final rule is more protective of the taxpayer assets used to fund SFA and PBGC's title IV insurance program and also protects plans from exposure to excessive investment risk and potential losses that may be difficult to recover.

*Determination of the Amount of SFA: Use of a Separate Interest Rate Applied for the Projection of SFA Assets*

PBGC considered making no changes to the SFA calculation under § 4262.4 of the interim final rule related to interest rate assumptions. Although this would have had a less significant impact on the transfer cost of the SFA program, PBGC's modeling shows that under the interim final rule, the vast majority of plans, including many plans with a large proportion of SFA assets to existing plan assets, would not be projected to be able to pay benefits due through plan year 2051 as set forth in section 4262(j)(1) of ERISA. Further, though PBGC found that loosening the investment restrictions for SFA assets under § 4262.14 would provide some assistance in this respect, this would introduce greater overall investment risk for SFA and could undermine the ability of plans to remain solvent through the end of plan year 2051 should particularly adverse market conditions occur.

*Determination of SFA: Calculation Methodology for Plans With Approved MPRA Benefit Suspensions as of March 11, 2021*

PBGC considered making no changes to the SFA calculation under § 4262.4 of the interim final rule for plans with approved suspensions of benefits under MPRA as of March 11, 2021. Although this would have kept the transfer cost of the SFA program unchanged, it would have allowed for a potential dilemma for these plans. Some commenters raised a concern that some plans with approved benefit suspensions under MPRA would receive less in SFA under the provisions of the interim final rule than would be necessary for the plan to pay for future benefit reinstatements (including those payable after the year 2051). Under the interim final rule, the plan's projected insolvency would be accelerated by choosing to receive SFA. A plan that is projected to avoid insolvency indefinitely—which is the

standard these plans met in order to be approved for MPRA benefit suspensions—by reinstating the benefits suspended under MPRA might now be expected to run out of money in 2051. In this case, plans would have to consider the varying interests of its participants (*i.e.*, the positive impact of benefit reinstatements for participants receiving benefits in the near-term versus the negative impact of potential insolvency to participants receiving benefits in the long-term) in deciding whether to apply for SFA. The calculation procedures for MPRA plans under § 4262.4 under the final rule enable these plans to retain a strong projected funded position through 2051.

PBGC considered a variation of the SFA calculation such that plan assets must be projected to increase during each of the final 5 years of the SFA coverage period. This variation would be consistent with the required period for which available resources must be projected to increase in an application for a proposed MPRA benefit suspension. While this approach would help to further improve the expected future funded position for these plans, PBGC estimated that it could increase the total transfer cost of the SFA program by an additional \$0.5 billion.

*Conditions Related to Benefit Improvements and Allocation of Contributions and Other Income*

PBGC considered making no changes to the conditions related to benefit improvements under § 4262.16(b) and allocation of contributions and other income under § 4262.16(e). However, PBGC recognizes that some plans may enjoy favorable experience after receiving SFA and outperform the projected experience in the deterministic projection included in the SFA application. Some plans may achieve a relatively strong financial position and be projected to remain solvent well beyond 2051. Under limited circumstances, it may be beneficial to plan participants to provide some plan sponsors with limited flexibility to improve benefits or to reallocate contributions temporarily to another plan while not jeopardizing the security of future benefit promises under the pension plan.

*Conditions Related to Withdrawal Liability*

PBGC considered making no changes to the withdrawal liability condition under § 4262.16(g). However, PBGC has given further consideration to the impact of SFA on incentives to withdraw based on commenters' concerns about the effectiveness of the

prescribed-interest-assumptions condition alone in disincentivizing employer withdrawals after a plan receives SFA. Since publication of the interim final rule, rising interest rates, and corresponding increases in the prescribed interest assumptions, have further highlighted the limits to the effectiveness of the condition in the interim final rule to achieve its purpose. PBGC seeks to ensure that SFA is not used other than for its intended purpose of paying plan benefits and administrative expenses.

PBGC considered an alternative condition under which the reduction in plan assets taken into account for purposes of determining UVBs under section 4213(c) of ERISA is the projected amount of SFA determined under § 4262.4(b), but without any ratable decrease in the years following receipt of SFA. This alternative would also have prevented a sharp decrease in withdrawal liability in the year following the year of receipt of SFA, but would result in a sharp decrease in withdrawal liability in the year following the year the condition no longer applies. In place of that condition, PBGC has added a condition requiring phased recognition of SFA as a plan asset for withdrawal liability purposes. It is conceptually similar to the smoothed recognition of plan assets for purposes of calculating a plan's minimum funding requirements and is roughly comparable to the gradual recognition of SFA in determining minimum funding. For a majority of plans that receive SFA, all SFA will be recognized as a plan asset for withdrawal liability purposes within 10 years, and because an additional portion of the SFA will be reflected in the determination of withdrawal liability each year, the effect of the condition will lessen over time. PBGC determined that a phased recognition of SFA for withdrawal liability purposes is a reasonable condition in addition to the condition prescribing the interest assumptions to be used in valuing liabilities.

*Conditions on Merged Plans*

PBGC considered requiring all restrictions and conditions to apply to a merged plan for the conditions related to mergers under § 4262.16(f), in response to questions in public comment letters, whether or which conditions would continue to apply to a merged plan. Requiring a merged plan to comply with all § 4262.16 conditions would ensure that the plan does not subsequently take any actions that may jeopardize the SFA received by one or more of the plans involved in the

merger and therefore, the merged plan’s future solvency. However, this could discourage plans from entering into transactions that would be beneficial to the plan and plan participants, such as a small plan that received SFA merging with a large “green zone” plan. PBGC believes that mergers can often be an effective tool to lower costs and streamline plan administration and does not want to inadvertently discourage transactions that are in the best interest of plan participants.

*Regulatory Flexibility Act*

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

*Paperwork Reduction Act*

With the final rule, PBGC is submitting changes to the collection of information, previously approved under control number 1212–0074, to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act. OMB’s decision regarding this information collection request will be available at [www.Reginfo.gov](http://www.Reginfo.gov). Changes to the collection of information include changes to the application for SFA, annual statement of compliance, and determination requests. A new lock-in application form with corresponding instructions is added. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC estimates that in the next 3 years an annual average of 78 applications for SFA (initial and revised) will be filed (100 in 2022, 70 in 2023, and 65 in 2024). PBGC needs the information in the application to review a plan’s eligibility for SFA, priority group status, and amount of requested SFA, and to make payment of SFA. PBGC estimates that each application requires \$30,000 in contractor cost and 10 hours of in-house fund time. Thus, the application imposes estimated annual burdens of

\$2,340,000 (78 × \$30,000) and 780 (78 × 10) hours.

An annual average of 23 plan sponsors are expected to file lock-in applications as initial applications for SFA (0 in 2022, 50 in 2023, and 19 in 2024). PBGC needs the information in the lock-in application to ensure that a plan sponsor intends to lock-in the plan’s data. PBGC estimates that each application requires \$800 in contractor cost and 1 hour of in-house fund time. Thus, the lock-in application imposes estimated annual burdens of \$18,400 (23 × \$800) and 23 (23 × 1) hours.

PBGC estimates that an annual average of 106 plan sponsors will file Annual Statements of Compliance (30 in 2022, 108 in 2023, and 179 in 2024). PBGC needs the information in this statement to ensure that a plan is compliant with the conditions imposed upon its receiving SFA. PBGC estimates that each annual statement of compliance requires \$2,400 in contractor cost and 2 hours of in-house fund time. The annual statement of compliance imposes estimated annual burdens of \$254,400 (106 × \$2,400) and 212 (106 × 2) hours.

An average of 11.33 plans per year (34 plans in 2022, 0 in 2023, and 0 in 2024) will be required to send notices to participants with suspended benefits. This notice is intended to ensure participants understand the calculation and dates of their reinstated benefits and, if applicable, make-up payments. PBGC estimates that the burden for each plan to prepare required notices is \$2,000 in contractor cost and 2 hours of in-house fund time. Thus, these notices impose estimated annual burdens of \$22,667 (11.33 × \$2,000) and 22.66 (11.33 × 2) hours.

Also, PBGC estimates that in 2023 and 2024, PBGC will receive an average of 2.2 requests per year for determinations concerning a transfer of assets or liabilities (including a spinoff) or merger (1 per year); a withdrawal liability settlement greater than \$50 million (1 per year); a contribution decrease (.2 (1 every 5 years)); (0 requests in 2022, 2.2 requests in 2023, and 2.2 requests in 2024). There will be no requests for determinations concerning prospective

and retrospective benefit increases until at least 2032 and no requests for determinations concerning reallocation of contributions until at least 2027. The annual average for all requests for 2022–2024 is 1.47 requests per year. PBGC needs the information requested to make a determination on the proposed transaction, withdrawal liability settlement, contribution decrease, or benefit increase. PBGC estimates an average annual hour burden (employer and fund office hours) and average annual cost burden (contractor costs) per request of:

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

PBGC estimates that, beginning in 2023, for 2.2 determination requests, the aggregated average annual hour burden will be 7.6 hours (1.6+4+2 employer and fund office hours) and the aggregated average annual cost burden will be \$19,000 (\$5,000 + \$12,000 + \$2,000 in contractor costs). For 2022–2024, PBGC estimates an average annual hour burden of 5.07 hours ((7.6+7.6)/3) and an average annual cost burden of \$12,667 ((\$19,000 + \$19,000)/3).

The estimated aggregate average annual hour burden for 2022–2024 for the information collection in part 4262 is 1,042.73 hours (780 +23+ 212 + 22.66 + 5.07), which means a cost equivalent of \$78,205 assuming a blended hourly rate of \$75 for employer and fund office administrative, clerical, and supervisory time. The estimated aggregate average annual cost burden for 2022–2024 for the information collection in part 4262 is \$2,648,134 (\$2,340,000 + \$18,400 + \$254,400 + \$22,667 + \$12,667), which means approximately 6,620 contract hours assuming an average hourly rate of \$400 for work done by outside actuaries and attorneys. The actual hour burden and cost burden per plan will vary depending on plan size and other factors.

The estimated average annual burden figures for 2022–2024 are shown in the following table.

Information collection	Average # of respondents	Hour burden (hours)	Hour burden—equivalent cost	Cost burden
Applications for SFA .....	78	780	\$58,500	\$2,340,000
Lock-in application .....	23	23	1,725	18,400
Annual compliance statement .....	106	212	15,900	254,400
Notice of reinstatement .....	11(11.33)	22.66	1,700	22,667
Requests for determination .....	1(1.47)	5.07	380	12,667
Totals: .....	219	1,042.73	78,205	2,648,134

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

#### List of Subjects in 29 CFR Part 4262

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

■ For the reasons given above, PBGC adopts as final the portion of the interim final rule adding 29 CFR part 4262, which was published at 86 FR 36598 on July 12, 2021, and further amends 29 CFR part 4262 by revising the part to read as follows:

### PART 4262—SPECIAL FINANCIAL ASSISTANCE BY PBGC

Sec.	
4262.1	Purpose.
4262.2	Definitions.
4262.3	Eligibility for special financial assistance.
4262.4	Amount of special financial assistance.
4262.5	PBGC review of plan assumptions.
4262.6	Information to be filed.
4262.7	Plan information.
4262.8	Actuarial and financial information.
4262.9	Application for a plan with a partition.
4262.10	Processing applications.
4262.11	PBGC action on applications.
4262.12	Payment of special financial assistance.
4262.13	Restrictions on special financial assistance.
4262.14	Permissible investments of special financial assistance.
4262.15	Reinstatement of benefits previously suspended.
4262.16	Conditions for special financial assistance.
4262.17	Other provisions.

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

#### § 4262.1 Purpose.

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

#### § 4262.2 Definitions.

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

*Form 5500* means the Annual Return/Form of Employee Benefit Plan required to be filed for employee benefit plans under sections 104 and 4065 of

ERISA and sections 6058(a) and 6059(b) of the Code.

*Merged plan* means merged plan as defined in § 4231.2 of this chapter.

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

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

*SFA measurement date* for a plan other than a plan described in § 4262.4(g) means the last day of the third calendar month immediately preceding the date the plan's initial application for special financial assistance was filed.

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

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

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

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

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

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

(3) *Critical status plans.* The plan: (i) Is certified to be in critical status within the meaning of section 305(b)(2) of ERISA for a specified year; and (ii) The percentage calculated under paragraph (c)(2) of this section was less than 40 percent; and

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

participants and beneficiaries receiving payment and terminated vested participants) required to be entered on such Form 5500 Schedule MB was less than 2 to 3.

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

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

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

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

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

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

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

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

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

(2) *Certifications completed after December 31, 2020.* For certifications of plan status completed after December 31, 2020, the determination of whether a plan is in critical status or critical and declining status for purposes of eligibility for special financial

assistance must be made using the assumptions that the plan used in its most recently completed certification of plan status before January 1, 2021, unless such assumptions (excluding the plan's interest rate assumption) are unreasonable.

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

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

(a) *In general*—(1) *Plans other than MPRA plans.* Subject to paragraph (f) of this section and to the adjustment for the date of payment as described in § 4262.12, the amount of special financial assistance for a plan that is not a MPRA plan is the lowest whole dollar amount (not less than \$0) for which, as of the last day of each plan year during the SFA coverage period, projected SFA assets and projected non-SFA assets are both greater than or equal to zero.

(2) *MPRA plans.* Subject to paragraph (f) of this section and to the adjustment for the date of payment as described in § 4262.12, the amount of special financial assistance for a MPRA plan is the greatest of the amount determined under paragraph (a)(1) of this section, the amount determined under paragraph (a)(2)(i) of this section, and the amount determined under paragraph (a)(2)(ii) of this section.

(i) The amount determined under this paragraph (a)(2)(i) is the lowest whole dollar amount (not less than \$0) for which, as of the last day of each plan year during the SFA coverage period, projected SFA assets and projected non-SFA assets are both greater than or equal to zero, and, as of the last day of the SFA coverage period, the sum of projected SFA assets and projected non-SFA assets is greater than the amount of such sum as of the last day of the immediately preceding plan year.

(ii) The amount determined under this paragraph (a)(2)(ii) is the present value of benefits paid and expected to be paid by the plan during the SFA coverage period attributable to the reinstatement of benefits under § 4262.15(a)(1), payment of previously suspended benefits under § 4262.15(a)(2), and any restoration of benefits under 26 CFR 1.432(e)(9)–1(e)(3), calculated using the SFA interest rate under paragraph (e)(2) of this section.

(3) *MPRA plan definition.* For purposes of this section, *MPRA plan*

means a plan that is eligible for special financial assistance under § 4262.3(a)(2).

(b) *Projected SFA assets.* The amount of projected SFA assets for a plan is determined by projecting special financial assistance forward annually until the projected SFA assets are exhausted, using the following annual cash flows:

(1) Benefits paid and expected to be paid by the plan during the SFA coverage period, including any reinstatement of benefits attributable to the elimination of reductions in a participant's or beneficiary's benefit due to a suspension of benefits under sections 305(e)(9) or 4245(a) of ERISA as required under § 4262.15(a)(1), payment of previously suspended benefits under § 4262.15(a)(2), and any restoration of benefits under 26 CFR 1.432(e)(9)–1(e)(3), assuming such reinstated benefits are paid beginning as of the SFA measurement date and excluding any benefit increases resulting from contribution increases agreed to on or after July 9, 2021, as demonstrated by the execution of a document described in paragraph (c)(3) of this section;

(2) Administrative expenses paid and expected to be paid by the plan during the SFA coverage period, excluding the amount owed to PBGC under section 4261 of ERISA (which is added to the amount of special financial assistance in § 4262.12 determined as of the date special financial assistance is paid); and

(3) Investment returns expected to be earned by amounts attributable to special financial assistance calculated using the SFA interest rate described in paragraph (e)(2) of this section, excluding investment returns for the plan year in which the sum of annual projected benefit payments and administrative expenses for the year exceeds the beginning-of-year projected SFA assets.

(c) *Projected non-SFA assets.* The amount of projected non-SFA assets for a plan is determined by projecting the fair market value of plan assets on the SFA measurement date forward annually, using the following annual cash flows:

(1) Benefits paid and expected to be paid by the plan during the SFA coverage period after the projected SFA assets described in paragraph (b) of this section are fully exhausted, including any reinstatement of benefits attributable to the elimination of reductions in a participant's or beneficiary's benefit due to a suspension of benefits under sections 305(e)(9) or 4245(a) of ERISA as required under § 4262.15(a)(1), payment of previously suspended benefits under § 4262.15(a)(2), and any restoration of

benefits under 26 CFR 1.432(e)(9)–1(e)(3), assuming such reinstated benefits are paid beginning as of the SFA measurement date and excluding any benefit increases resulting from contribution increases agreed to on or after July 9, 2021, as demonstrated by the execution of a document described in paragraph (c)(3) of this section;

(2) Administrative expenses paid and expected to be paid by the plan during the SFA coverage period after the projected SFA assets described in paragraph (b) of this section are fully exhausted, excluding the amount owed to PBGC under section 4261 of ERISA (which is added to the amount of special financial assistance in § 4262.12 determined as of the date special financial assistance is paid);

(3) Employer contributions paid and expected to be paid to the plan during the SFA coverage period, excluding contribution rate increases agreed to on or after July 9, 2021, as demonstrated by the execution of a document increasing a plan's contribution rate. The document referred to in this paragraph (c)(3) is either—

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

(ii) A document reallocating contribution rates;

(4) Withdrawal liability payments made and expected to be made to the plan during the SFA coverage period taking into account a reasonable allowance for amounts considered uncollectible;

(5) Other payments made and expected to be made to the plan (excluding the amount of financial assistance under section 4261 of ERISA and special financial assistance to be received by the plan) during the SFA coverage period; and

(6) Investment returns expected to be earned by assets not attributable to special financial assistance calculated using the non-SFA interest rate described in paragraph (e)(1) of this section.

(d) *Deterministic basis.* The projections in paragraphs (b) and (c) of this section must be performed on a deterministic basis using assumptions as described in paragraph (e) of this section. For a plan other than a plan described in § 4262.4(g), the projections must be based on the participant census data used to prepare the plan's actuarial valuation report, either—

(1) For the plan year in which occurs the plan's SFA measurement date; or

(2) If there is no such report for that plan year, for the preceding plan year.

(e) *Actuarial assumptions.* The amount of special financial assistance must be determined in accordance with

generally accepted actuarial principles and practices and the provisions in this paragraph (e).

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

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

(ii) The interest rate in this paragraph (e)(1)(ii) is the interest rate that is 200 basis points higher than the rate specified in section 303(h)(2)(C)(iii) of ERISA (disregarding modifications made under section 303(h)(2)(C)(iv)) for the month in which such rate is the lowest among the 4 calendar months ending with the month in which the plan's initial application for special financial assistance is filed, taking into account only rates that have been issued by the IRS as of the day that is the day before the date the plan's initial application is filed.

(2) The SFA interest rate is the lesser of the rate in paragraph (e)(2)(i) or (ii) of this section.

(i) The interest rate in this paragraph (e)(2)(i) is the interest rate in paragraph (e)(1)(i) of this section.

(ii) The interest rate in this paragraph (e)(2)(ii) is the interest rate that is 67 basis points higher than the average of the rates specified in section 303(h)(2)(C)(i), (ii), and (iii) of ERISA (disregarding modifications made under section 303(h)(2)(C)(iv)) for the month in which such average is the lowest among the 4 calendar months ending with the month in which the plan's initial application for special financial assistance is filed, taking into account only rates that have been issued by the IRS as of the day that is the day before the date the plan's initial application is filed.

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

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

(f) *Certain events*—(1) *General rules.*

(i) The special financial assistance of a plan that experiences one or more of the events described in paragraph (f)(2), (3), or (4) of this section during the period

beginning on July 9, 2021, and ending on the SFA measurement date is limited to the amount of special financial assistance that would have applied to the plan on the SFA measurement date if the events had not occurred, as determined in a reasonable manner.

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

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

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

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

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

(ii) A document reallocating contribution rates.

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

then the amount of special financial assistance is deemed to be \$0 (zero).

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

(i) *Example 1.* Plan A applies for special financial assistance. If the limitation in paragraph (f)(1)(i) of this section did not apply, Plan A would be entitled to special financial assistance in the amount of \$20X. Before the SFA measurement date, but on or after July 9, 2021, Plan A transferred a portion of its assets and liabilities to Plan B. If the transfer had not occurred, Plan A would, as of the SFA measurement date, be entitled to special financial assistance in the amount of \$40X. Although an event described in paragraph (f)(2) of this section occurred with respect to Plan A, Plan A's special financial assistance is unaffected by the limitation in paragraph (f)(1)(i) of this section and is \$20X. Plan B also applies for special financial assistance. If the limitation in paragraph (f)(1)(i) of this section did not apply, Plan B would be entitled to special financial assistance in the amount of \$30X. If the transfer from Plan A had not occurred, Plan B would, as of the SFA measurement date, be ineligible for special financial assistance. As a result of the event described in paragraph (f)(2) of this section, the limitation in paragraph (f)(1)(i) of this section reduces Plan B's special financial assistance from \$30X to \$0.

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

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

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

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

(g) *Filers under the interim provisions of this part.* If a plan's application for special financial assistance under the terms of this part as in effect before August 8, 2022 was filed before that date, the plan may choose to proceed in accordance with paragraph (g)(1), (2), (3), or (4) of this section (whichever applies).

(1) *Approved application.* If the plan's application for special financial assistance was approved as of August 8, 2022, the plan may—

(i) Supplement the plan's application as described in paragraphs (g)(6) and (8) of this section after special financial assistance is paid to or for the plan under the terms of this part as in effect before August 8, 2022; or

(ii) Not supplement the plan's application.

(2) *Pending application.* If the plan's application for special financial assistance was not approved, withdrawn, or denied, and was pending, as of August 8, 2022, the plan may—

(i) Withdraw the plan's application in accordance with § 4262.11(d) and file a revised application as described in paragraph (g)(5) of this section; or

(ii) Not withdraw the plan's application and have the application reviewed under the terms of this part as in effect before August 8, 2022 as described in paragraph (g)(7) of this section.

(3) *Withdrawn application.* If the plan's application for special financial assistance was not pending as of August 8, 2022, because the application was withdrawn, the plan may file a revised application as described in paragraph (g)(5) of this section.

(4) *Denied application.* If the plan's application for special financial assistance was not pending as of August 8, 2022, because the application was denied, the plan may file a revised application as described in paragraph (g)(5) of this section. Any revised application must address the reasons cited by PBGC for the denial.

(5) *Revised application.* Any revised application for special financial assistance filed by a plan under this paragraph (g) is processed in the same way as an initial application, and must demonstrate eligibility and the amount of the plan's special financial assistance determined under the provisions of this part as in effect on August 8, 2022, subject to adjustment as described in § 4262.12(a), and use the following base data:

(i) The plan's SFA measurement date determined as the last day of the calendar quarter immediately preceding the date the plan's initial application for special financial assistance was filed;

(ii) The plan's participant census data determined under this part as in effect before August 8, 2022; and

(iii) The plan's non-SFA interest rate and SFA interest rate as determined under paragraphs (e)(1) and (2) of this section.

(6) *Supplemented application.* Any supplemented application filed by a plan under this paragraph (g) must be filed in accordance with paragraph (g)(8) of this section and must be limited to the changes and information specified in the supplemented special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov), about the determination of the amount of special financial assistance under this part as of August 8, 2022 (including the interest rates in paragraph (e) of this section), and the filer must agree to be bound by the provisions of this part governing such a determination, in which case, special financial assistance is subject to adjustment as described in § 4262.12(c).

(7) *No supplement or withdrawal.* If special financial assistance has not been paid to or for the plan under the terms of this part as in effect before August 8, 2022, and the plan has not filed a supplemented application as described in paragraphs (g)(6) and (8) of this section, or withdrawn the plan's application in accordance with § 4262.11(d), the application will be reviewed under the terms of this part as in effect before August 8, 2022. The amount of special financial assistance for the plan will be determined under the terms of this part as in effect before August 8, 2022 and be subject to adjustment as described in § 4262.12(b).

(i) A plan that receives special financial assistance as described under this paragraph (g)(7) may subsequently file a supplemented application in accordance with paragraphs (g)(6) and (8) of this section.

(ii) If the plan's application is denied, the plan may file a revised application as described in paragraph (g)(5) of this section.

(8) *Supplemented application special rules.* (i) Except as provided in this paragraph (g)(8), the rules in §§ 4262.10 and 4262.11(a) and (b) and (f) and (g) for a revised application apply to a supplemented application.

(ii) A supplemented application must not change the plan's SFA measurement date, fair market value of assets, or participant census data, or include a proposed change in assumptions, except to propose a change to the plan's employer contribution assumption to exclude contribution rate increases agreed to on or after July 9, 2021, as permitted under paragraph (c)(3) of this section (in which case, the plan must exclude any benefit increases resulting from such contribution increases as required under paragraphs (b)(1) and (c)(1) of this section).

(iii) A supplemented application may be withdrawn and resubmitted at any time before PBGC denies or approves the supplemented application. Any withdrawal of a plan's supplemented application must be by written notice to PBGC submitted by any person authorized to submit an application for the plan and in accordance with the supplemented special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

(iv) If PBGC denies a plan's supplemented application, any new supplemented application filed by the plan must address the reasons cited by PBGC for the denial.

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

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

(2) PBGC will accept the assumptions used by a plan to determine eligibility for special financial assistance under § 4262.3(d)(2) or to determine the amount of special financial assistance under § 4262.4(e)(3) unless PBGC determines that an assumption is unreasonable.

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

(b) *Reasonableness of assumptions.* (1) Each of the actuarial assumptions and methods used for the actuarial projections (excluding the interest rate assumptions under § 4262.4(e)(1) and (2)) must be reasonable in accordance with generally accepted actuarial principles and practices, taking into account the experience of the plan and reasonable expectations. The actuary's selection of assumptions about future covered employment and contribution levels (including contribution base units and contribution rates) may be based on information provided by the plan sponsor, which must act in good faith in providing the information.

(2) If a plan has a change in assumptions under paragraph (c) of this section, each of the actuarial assumptions and methods (other than the interest rate assumptions under § 4262.4(e)(1) and (2)) must be reasonable and the combination of those actuarial assumptions and methods (excluding the interest rate assumptions under § 4262.4(e)(1) and (2)) must also be reasonable.

(c) *Changes in assumptions.* If a plan determines that use of an assumption described in § 4262.3(d)(2) or § 4262.4(e)(3) is unreasonable, the plan's application may include a proposed change in the assumptions (excluding the plan's interest rate assumptions under § 4262.4(e)(1) and (2)).

(1) The application for special financial assistance must—

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

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

**§ 4262.6 Information to be filed.**

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

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

(1) Be signed and dated by an authorized trustee, who is a current member of the board of trustees and who is authorized to sign on behalf of the board of trustees, or by another authorized representative of the plan sponsor, with such signature accompanied by the printed name and title of the signer; and

(2) Include the following statements signed by an authorized trustee who is a current member of the board of trustees, with such signature accompanied by the printed name and title of the signer: "Under penalty of perjury under the laws of the United States of America, I declare that I am an authorized trustee who is a current member of the board of trustees of the [insert plan name] and that I have examined this application, including accompanying documents, and, to the best of my knowledge and belief, the application contains all the relevant facts relating to the application; all statements of fact contained in the application are true, correct, and not misleading because of omission of any material fact; and all accompanying documents are what they purport to be."

(c) *Actuarial calculations.* All calculations that are required in an application for special financial

assistance under this part must include a certification by the plan's enrolled actuary.

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

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

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

(2) If the plan suspended benefits under section 305(e)(9) or 4245(a) of ERISA, amend the plan to include provisions substantially similar to the following to, in accordance with guidance issued by the Secretary of the Treasury under section 432(k) of the Code, {I} reinstate benefits, as required by § 4262.15(a)(1), and {II} make payments of previously suspended benefits, as required by § 4262.15(a)(2): "Effective as of the first month in which special financial assistance is paid to the plan, the plan shall reinstate all benefits that were suspended under section 305(e)(9) or 4245(a) of ERISA. The plan shall pay each participant and beneficiary that is in pay status as of the date special financial assistance is paid to the plan the aggregate amount of the participant's or beneficiary's benefits that were not paid because of the suspension, with no actuarial adjustment or interest. Such payment shall be made [choose whichever applies: 'in a lump sum no later than 3 months after the date the special financial assistance is paid to the plan, irrespective of whether the participant or beneficiary dies after the date special financial assistance is paid' or 'in equal monthly installments over a period of 5 years, commencing no later than 3 months after the date the special financial assistance is paid to the plan, with all installments to be paid irrespective of whether the participant

or beneficiary survives to the end of the 5-year period].”

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

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

#### § 4262.7 Plan information.

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

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

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

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

(4) The total amount of special financial assistance requested under § 4262.4(a)(1) or (2).

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

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

or is listed on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) as a plan in priority group 6, as defined under § 4262.10(d)(2)(vi).

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

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

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

(2) If the plan suspended benefits under section 305(e)(9) or 4245(a) of ERISA, a copy of the proposed plan amendment(s) required under § 4262.6(e)(2) and a certification by the plan sponsor that the plan amendment(s) will be timely adopted. Such certification must be signed either by all members of the plan's board of trustees or by one or more trustees duly authorized to sign the certification on behalf of the entire board and to commit the board to timely adopting the amendment after the plan's application for special financial assistance is approved, with each signature accompanied by the printed name and title of the signer.

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

(4) Most recent IRS determination letter.

(5) Actuarial valuation reports completed for the 2018 plan year and each subsequent actuarial valuation report completed before the date the plan's initial application for special financial assistance is filed.

(6) Most recent rehabilitation plan (or funding improvement plan, if applicable), including all subsequent amendments and updates, and the percentage of total contributions received under each schedule of the rehabilitation plan for the most recent plan year available. If the most recent rehabilitation plan does not include historical documentation of rehabilitation plan changes (if any) that occurred in calendar year 2020 and later, these details must be provided in a clearly identified supplemental document.

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

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

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

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

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

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

#### § 4262.8 Actuarial and financial information.

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

(1) For each plan year from the 2018 plan year until the most recent plan year for which the Form 5500 is required to be filed by the date the plan's initial application for special financial assistance is filed, the projection of expected benefit payments as required to be attached to the Form 5500 Schedule MB if the response to the question at line 8b(1) of the Form 5500 Schedule MB is “Yes”.

(2) For a plan that has 10,000 or more participants required to be entered on line 6f of the plan's most recently filed Form 5500 (as of the date the plan's initial application for special financial assistance is filed), a listing of the 15

largest contributing employers and the contribution amounts for each such contributing employer for the most recently completed plan year (before the date the plan's initial application for special financial assistance is filed).

(3) Historical plan financial information for the 2010 plan year through the plan year immediately preceding the date the plan's initial application was filed that separately identifies: Total contributions; total contribution base units; average contribution rates; number of active participants at the beginning of each plan year; and other sources of non-investment income, including, if applicable, withdrawal liability payments collected, contributions from reciprocity agreements, and other sources of contributions or income not already identified.

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

(i) Non-SFA interest rate required under § 4262.4(e)(1), including supporting details on how it was determined, and SFA interest rate required under § 4262.4(e)(2), including supporting details on how it was determined.

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

(iii) For the calculation method used to determine the requested amount of special financial assistance, the plan year in which the sum of annual projected benefit payments and administrative expenses for the year exceeds the beginning-of-year projected SFA assets.

(5) The amount of special financial assistance calculated under § 4262.4(a)(1) and information used to determine such amount, based on a deterministic projection, including all of the following information—

(i) Special financial assistance calculated under § 4262.4(a)(1) determined as a lump sum as of the SFA measurement date.

(ii) For each plan year in the SFA coverage period: The projected amount of contributions, projected withdrawal liability payments reflecting a reasonable allowance for amounts considered uncollectible, and other payments expected to be made to the plan.

(iii) For each plan year in the SFA coverage period: Payments described in § 4262.4(b)(1) attributable to the reinstatement of benefits under § 4262.15 that were previously suspended through the SFA measurement date.

(iv) For each plan year in the SFA coverage period: Benefit payments described in § 4262.4(b)(1) (including any benefits restored under 26 CFR 1.432(e)(9)–1(e)(3) and excluding the previously suspended benefits described in paragraph (a)(5)(iii) of this section), separately for current retirees and beneficiaries in pay status, current terminated participants not yet in pay status, current active participants, and new entrants; and total benefit payments paid and expected to be paid from projected SFA assets separately from total benefit payments paid and expected to be paid from non-SFA assets after the projected SFA assets are fully exhausted.

(v) For each plan year in the SFA coverage period: Administrative expenses paid and expected to be paid (excluding the amount owed PBGC under section 4261 of ERISA), separately for PBGC premiums and all other administrative expenses; and total administrative expenses paid and expected to be paid from projected SFA assets separately from total administrative expenses paid and expected to be paid from non-SFA assets after the projected SFA assets are fully exhausted.

(vi) For each plan year in the SFA coverage period: The projected total participant count at the beginning of the year.

(vii) For each plan year in the SFA coverage period: The projected investment income earned by assets not attributable to special financial assistance based on the interest rate required under § 4262.4(e)(1) and the projected fair market value of non-SFA assets at the end of each plan year.

(viii) For each plan year in the SFA coverage period: The projected investment income earned by amounts attributable to special financial assistance based on the interest rate required under § 4262.4(e)(2) (excluding investment returns for the plan year in which the sum of the annual projected benefit payments and administrative expenses for the year exceeds the

beginning-of-year projected SFA assets) and the projected fair market value of SFA assets at the end of each plan year.

(6) For MPRA plans, the amount of special financial assistance calculated under § 4262.4(a)(2)(i) and information used to determine such amount, based on a deterministic projection, including all of the following information—

(i) Special financial assistance calculated under § 4262.4(a)(2)(i) determined as a lump sum as of the SFA measurement date.

(ii) All items identified in paragraphs (a)(5)(i) through (viii) of this section that support the amount described in paragraph (a)(6)(i) of this section.

(7) For MPRA plans, if the amount calculated under § 4262.4(a)(2)(ii) is the greatest amount calculated under § 4262.4(a)(2), the amount of special financial assistance calculated under § 4262.4(a)(2)(ii) and information used to determine the amount under § 4262.4(a)(2)(ii), based on a deterministic projection, including all of the following information—

(i) Special financial assistance calculated under § 4262.4(a)(2)(ii) determined as a lump sum as of the SFA measurement date.

(ii) For each plan year in the SFA coverage period: Benefit payments described in § 4262.4(b)(1) (excluding the previously suspended benefits described in paragraph (a)(5)(iii) of this section), separately for current retirees and beneficiaries in pay status, current terminated participants not yet in pay status, current active participants, and new entrants; and total benefit payments paid or expected to be paid. For each participant group except new entrants: benefit payments after reinstatement (excluding the previously suspended benefits described in paragraph (a)(5)(iii) of this section), the reduced benefit payments under the approved benefit suspension, and the difference due to the reinstatement of benefits.

(iii) The present value, as of the SFA measurement date using the SFA interest rate required under § 4262.4(e)(2), of the amounts described in paragraph (a)(5)(iii) of this section.

(iv) The present value, as of the SFA measurement date using the SFA interest rate required under § 4262.4(e)(2), of the difference in benefit amounts due to the reinstatement of benefits, as described in paragraph (a)(7)(ii) of this section.

(8) Projected contributions and withdrawal liability payments, reflecting a reasonable allowance for amounts considered uncollectible, used to calculate the requested special financial assistance amount in § 4262.4,

including total contributions, contribution base units, average contribution rate(s), reciprocal contributions (if applicable), additional contributions from the rehabilitation plan, and any other contributions, and number of active participants at the beginning of each plan year. For withdrawal liability, separate projections for withdrawn employers and for future assumed withdrawals.

(9) A description of the development of the assumed future contributions (including assumed contribution rates) and future withdrawal liability payments described in paragraph (a)(8) of this section.

(10) For a plan that has 350,000 or more participants reported on line 6f of its most recently filed Form 5500 (as of the date the plan's initial application for special financial assistance is filed), the participant census data utilized by the plan actuary in developing the cash flow projections included in the application.

(11) Documentation of a death audit to identify deceased participants that was completed no earlier than 1 year before the plan's SFA measurement date, including identification of the service provider conducting the audit and a copy of the results of the audit provided to the plan administrator by the service provider.

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

(1) A table identifying which assumptions used in demonstrating the plan's eligibility for special financial assistance or in calculating the amount of special financial assistance differ from those assumptions used in the plan's most recently completed certification of plan status before January 1, 2021, and detailed narrative explanations (with supporting rationale and information) as described in the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) as to why any assumption used in the certification is no longer reasonable and why the changed assumption is reasonable.

(2) Deterministic cash flow projection ("Baseline") in accordance with the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) that shows the amount of special financial assistance that would be determined if all underlying assumptions used in the projection were the same as those used in the actuarial certification of plan

status last completed before January 1, 2021 (excluding the plan's non-SFA and SFA interest rates, which must be the same as the interest rates required under § 4262.4(e)(1) and (2)). For purposes of this paragraph (b)(2), certain changes in assumptions as described in the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov) should be reflected in the Baseline projection.

(3) In accordance with the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov), a reconciliation of the change in the requested special financial assistance due to each changed assumption from the Baseline to the requested special financial assistance amount in § 4262.4, showing, for each assumption change from the Baseline, a deterministic projection calculated in the same manner as the requested amount in § 4262.4.

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

(d) *Information required for changed assumptions in supplemented applications.* Any supplemented application filed for a plan described in § 4262.4(g) must include the information specified in the supplemented special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

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

(a) *In general.* This section applies to a plan partitioned under section 4233 of ERISA that is eligible for special financial assistance under § 4262.3(a)(2). A partitioned plan is in priority group 2 for purposes of § 4262.10(d)(2).

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

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

(2) Include in the application—

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

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

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

(3) If a plan sponsor has already filed with PBGC any of the required information described in paragraph

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

(c) *Rescission of partition order.*

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

(1) PBGC will rescind the partition order; and

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

#### § 4262.10 Processing applications.

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

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

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

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

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

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

(i) The number of applications accepted for filing will be limited in such manner that, in PBGC's estimation,

each application can be processed within 120 days.

(ii) Plans specified in paragraph (d)(2) of this section will be given priority to file an application before plans not specified in paragraph (d)(2) of this section. Plans not specified in paragraph (d)(2) of this section may not file an application before March 11, 2023.

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

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

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

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

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

(iv) *Priority group 4.* A plan is in priority group 4 if the plan is projected to become insolvent under section 4245 of ERISA by March 11, 2023. A plan in priority group 4 may file an application beginning on July 1, 2022, or such

earlier date specified on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

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

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

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

(e) *Filing date.* An application will be considered filed on the date it is submitted to PBGC if it is signed in accordance with § 4262.6(b) and meets the applicable requirements in paragraph (d) of this section, including that it can be accommodated in accordance with the processing system described in paragraph (d)(1) of this section or the emergency filing process described in paragraph (f) of this section. Otherwise, the application will not be considered filed and PBGC will notify the applicant that the application was not properly filed, and that the application must be filed in accordance with the processing system and instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov). References in this part to a plan's initial application are to the plan's first application that is considered filed.

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

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

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

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

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

(g) *Lock-in applications.* (1) A lock-in application described in this paragraph (g), clearly and prominently identified as such, may be filed for a plan as its initial application (thus establishing the plan's base data as provided under § 4262.11(c)).

(2) A lock-in application must—

(i) Except as provided in paragraph (g)(2)(ii) of this section, be filed after March 11, 2023, and on or before December 31, 2025; or

(ii) Be filed by a plan described in paragraphs (d)(2)(v) through (vii) of this section in accordance with the processing system described in paragraphs (d)(1)(ii) and (iii) and (d)(2) of this section at a time when PBGC is not accepting applications for filing under paragraph (d)(1)(i) of this section.

(3) The lock-in application must—

(i) Provide the information in § 4262.7(a)(1) through (3) and in the instructions for lock-in applications on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov);

(ii) Be signed in accordance with § 4262.6(b); and

(iii) Be filed in accordance with paragraphs (a) through (c) of this section and the instructions for lock-in applications on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

(4) A lock-in application for a plan that satisfies the requirements of this paragraph (g) is considered filed as the plan's initial application and denied for incompleteness under § 4262.11(a)(2)(i).

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

#### § 4262.11 PBGC action on applications.

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

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

(2) Deny the application because—

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

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

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

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

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

(c) *Application base data.* For an eligible plan other than a plan described in § 4262.4(g)—

(1) A plan's base data are—

(i) The plan's SFA measurement date as defined under § 4262.2;

(ii) The plan's participant census data as required to be used under § 4262.4(d); and

(iii) The plan's non-SFA interest rate and SFA interest rate as determined under § 4262.4(e)(1) and (2).

(2) A plan's base data are fixed by the date the eligible plan's initial application for special financial assistance is filed and must be used for any revised application for the plan. If the plan was not eligible for special financial assistance on such date, the plan's base data will be fixed by the date the plan files a revised application and demonstrates eligibility for special financial assistance.

(d) *Withdrawn applications.* (1) A plan's application for special financial assistance may be withdrawn at any time before PBGC denies or approves the application.

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

(3) An application submitted for a plan after the withdrawal of an application is a revised application.

(e) *Denied applications.* If PBGC denies a plan's application, an application submitted for a plan after the denial is a revised application. Any revised application must address the reasons cited by PBGC for the denial.

(f) *Revised applications.* A plan's revised application is processed in the same way as an initial application and must comply with the requirements in this part for an initial application except that it must use the base data required in paragraph (c) of this section for the initial application.

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

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

(a) *Amount of special financial assistance under this part.* The amount of special financial assistance to be paid by PBGC to or for a plan for which either an initial or a revised application for special financial assistance is filed on or after August 8, 2022, will be the total of—

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

(2) Interest on the amount in paragraph (a)(1) of this section from the SFA measurement date to the SFA payment date at a rate equal to the interest rate required under § 4262.4(e)(2); plus

(3) The amount owed to PBGC under section 4261 of ERISA determined as of the SFA payment date; minus

(4) Financial assistance payments under section 4261 of ERISA received by the plan between the SFA measurement date and the SFA payment date, with interest on each such financial assistance payment from the date thereof to the SFA payment date calculated at a rate equal to the interest rate required under § 4262.4(e)(2).

(b) *Amount of special financial assistance under the interim provisions of this part.* The amount of special financial assistance to be paid by PBGC to or for a plan for which neither an initial nor a revised application for special financial assistance is filed on or after August 8, 2022 and there has not been any previous payment of special financial assistance, and where a plan's application has not been supplemented, will be the total of—

(1) The amount required as demonstrated by the plan sponsor on the application for such special financial assistance, determined under § 4262.4 (under the terms of this part as in effect before August 8, 2022) as of the SFA measurement date; plus

(2) Interest on the amount in paragraph (b)(1) of this section from the SFA measurement date to the SFA payment date at a rate equal to the interest rate required under § 4262.4(e)(1); plus

(3) The amount owed to PBGC under section 4261 of ERISA determined as of the SFA payment date; minus

(4) Financial assistance payments under section 4261 of ERISA received by the plan between the SFA measurement date and the SFA payment date, with interest on each such financial assistance payment from the date thereof to the SFA payment date calculated at a rate equal to the interest rate required under § 4262.4(e)(1).

(c) *Amount of additional special financial assistance under supplemented application.* The amount of additional special financial assistance to be paid by PBGC to or for a plan where the plan has received a prior payment of special financial assistance under the terms of this part as in effect before August 8, 2022 will be the total of—

(1) The amount required as demonstrated by the plan sponsor on the application for such special financial assistance (including any supplemented application filed after the prior payment of special financial assistance), determined under § 4262.4 as of the SFA measurement date; minus

(2) The amount required as demonstrated by the plan sponsor on the application for such special financial assistance, determined under § 4262.4 (under the terms of this part as in effect before August 8, 2022) as of the SFA measurement date; plus

(3) Interest on the excess of the amount in paragraph (c)(1) of this section over the amount in paragraph (c)(2) of this section from the SFA measurement date to the payment date of the additional special financial assistance at a rate equal to the interest rate required under § 4262.4(e)(2).

(d) *Payment instructions.* The plan must include in its application payment instructions in accordance with the special financial assistance instructions on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov). PBGC may request additional information from the plan related to PBGC's payment of special financial assistance. Payment will be considered made by PBGC when, in accordance with the payment instructions in the

application, PBGC no longer has ownership of the amount being paid. Any adjustment for delay will be borne by PBGC only to the extent that it arises while PBGC has ownership of the funds.

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

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

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

(f) *Date of payment of special financial assistance.* (1) Special financial assistance issued by PBGC will be paid as soon as practicable upon approval of the plan's special financial assistance application but not later than the earlier of—

(i) Ninety days after a plan's special financial assistance application is approved by PBGC or deemed approved under § 4262.11(a)(3); or

(ii) September 30, 2030.

(2) References in this section to the SFA payment date are to the date PBGC sends payment of special financial assistance, not the bank settlement date.

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

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

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

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

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

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

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

(2) Must be segregated from other plan assets as described in § 4262.14(a);

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

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

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

(a) A plan that receives special financial assistance must segregate special financial assistance assets and earnings thereon ("amounts attributable to special financial assistance") in an account that is separate from the plan's non-special financial assistance assets and that is invested consistent with the investment requirements of this section.

(b) Permissible investments for amounts attributable to special financial assistance are—

(1) Investments in return-seeking assets as described under paragraph (c) of this section, not to exceed 33 percent of amounts attributable to special financial assistance measured using fair market value as of—

(i) Each day the plan purchases return-seeking assets, other than through the automatic re-purchase of capital gains and reinvestment of dividends; and

(ii) At least one day during every rolling period of 12 consecutive months beginning from the date the plan receives special financial assistance.

(2) Investments in investment grade fixed income securities and cash as described in paragraph (d) of this section for all other amounts attributable to special financial assistance.

(c) For purposes of this section, *investments in return-seeking assets* are investments in—

(1) Common stock that is denominated in U.S. dollars and registered under section 12(b) of the Securities Exchange Act of 1934.

(2) Shares held in a permissible fund vehicle described in paragraph (g) of this section that abides by an investment policy that restricts

investment predominantly to equity securities registered under section 12(b) of the Securities Exchange Act of 1934, U.S. Treasury securities with less than one year to maturity date, cash and cash equivalents described in paragraph (d)(5) of this section, and money market funds described in paragraph (d)(6) of this section.

(3) A debt security that has been resold in an offering pursuant to 17 CFR 230.144A (Rule 144A under the Securities Act of 1933), is investment grade as described under paragraph (f) of this section, and has not been issued by a foreign issuer as defined under 17 CFR 240.3b-4(b).

(4) A debt instrument, as described under paragraph (d) of this section, that is no longer investment grade if it was investment grade as described under paragraph (f) of this section when purchased by the plan for the portion of special financial assistance invested in investment grade fixed income securities.

(d) For purposes of this section, *investments in investment grade fixed income securities and cash* are investments in—

(1) A bond or other debt security that pays a fixed amount or fixed rate of interest, is denominated in U.S. dollars, sold in an offering registered under the Securities Act of 1933, and is investment grade as described under paragraph (f) of this section.

(2) Shares held in a permissible fund vehicle described under paragraph (g) of this section that abides by an investment policy that restricts investment predominantly to securities described in this paragraph (d) that are denominated in U.S. dollars and are investment grade as defined under paragraph (f) of this section.

(3) Securities issued, guaranteed or sponsored by the U.S. Government or its designated agencies as required to be entered as government securities on the Form 5500 Schedule H.

(4) Municipal securities defined in section 3(a)(29) of the Securities Exchange Act of 1934 that are investment grade as defined under paragraph (f) of this section.

(5) Noninterest-bearing cash and interest-bearing cash equivalents as required to be entered on the Form 5500 Schedule H.

(6) Money market funds regulated pursuant to 17 CFR 270.2a-7 (Rule 2a-7 under the Investment Company Act of 1940).

(e) Fixed income securities described under paragraph (d) of this section must be considered investment grade (as described under paragraph (f) of this section) by a fiduciary, within the

meaning of section 3(21) of ERISA, who is or seeks the advice of an experienced investor (such as an Investment Adviser registered under section 203 of the Investment Advisers Act of 1940).

(f) *Investment grade* means 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. For purposes of this paragraph (f), *adequate capacity to meet financial commitments* means that the risk of default by the issuer (or obligor) is low and the full and timely repayment of principal and interest on the security is expected.

(g) *Permissible fund vehicle* means an investment company or collective trust, that is—

(1) An open-end investment company registered on Form N-1A under section 8 of the Investment Company Act of 1940; or

(2) A unit investment trust (as defined in section 4(2) of the Investment Company Act of 1940 and registered under section 8 of such Act) the shares of which are listed and traded on a national securities exchange, and that has been formed and operates under an exemptive order granted by the U.S. Securities and Exchange Commission; or

(3) A collective trust fund that is maintained by a bank or trust company and that has been formed and operates pursuant to an exemption under section 3(c)(11) of the Investment Company Act of 1940.

(h) Permissible investments must not be supplemented by, and permissible fund vehicles cannot include, derivatives or otherwise be leveraged in a way that could increase the risk of the permissible investment beyond the risk associated with the market value of the un-leveraged permissible investment. Any notional derivative exposure, other than exposure gained through a permissible fund vehicle described under paragraph (g) of this section, must be supported by liquid assets that are cash or cash equivalents denominated in U.S. dollars.

(i) This section is applicable to a plan that applies or has applied for special financial assistance under this part. Notwithstanding the preceding sentence, for a plan that received special financial assistance under this part in effect before August 8, 2022, this section will not apply unless and until the plan files a supplemented application under this part. Before the date that the plan files a supplemented application under this part, the rules under this section in effect before August 8, 2022 apply.

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

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

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

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

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

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

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

(c) The plan sponsor of a plan with benefits that were suspended under section 305(e)(9) or 4245(a) of ERISA must issue a notice of reinstatement to participants and beneficiaries whose benefits were previously suspended and then reinstated in accordance with section 4262(k) of ERISA and section 432(k) of the Code. The requirements for the notice are in notice of reinstatement instructions available on PBGC's website at [www.pbgc.gov](http://www.pbgc.gov).

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

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

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

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

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

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

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

(3) *Request for exception.* No earlier than 10 years after the end of the plan year in which the plan receives payment of special financial assistance under § 4262.12, the plan sponsor may request approval from PBGC for an exception from the conditions under paragraphs (b)(1) and (2) of this section by demonstrating to the satisfaction of PBGC that, taking into account the value of the proposed benefit or benefit increase, the plan will avoid insolvency. A request for PBGC approval of a proposed benefit or benefit increase must be submitted by the plan sponsor or its duly authorized representative and must contain all of the following identifying, actuarial, and financial information:

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

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

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

(iv) The EIN assigned to the plan sponsor by the IRS and the PN assigned to the plan by the plan sponsor of the plan that applied for special financial assistance, if not the same as the EIN and PN in paragraph (b)(3)(ii) of this section.

(v) A copy of the proposed benefit or benefit increase amendment.

(vi) Most recent plan document or restatement of the plan document and all subsequent amendments adopted (if any).

(vii) A copy of the most recent actuarial valuation performed for the plan before the date of the plan's submission of a request for approval under this paragraph (b)(3), and the actuarial valuation performed for each of the 2 plan years immediately

preceding the most recent actuarial valuation.

(viii) A copy of the plan actuary's most recent certification under section 305(b)(3) of ERISA, including a detailed description of the assumptions used in the certification, and the basis under which they were determined. The description must include information about the assumptions used for the projection of future contributions, withdrawal liability payments, and investment returns, and any other assumption that may have a material effect on projections.

(ix) A statement certified by an enrolled actuary of the effect of the proposed benefit or benefit increase on the plan's existing benefit formula and benefit amount, and a demonstration that the expected contributions equal or exceed the estimated amount necessary, taking into account the proposed benefit or benefit increase, to satisfy the minimum funding requirement of section 431 of the Code.

(x) A detailed statement certified by an enrolled actuary that the plan is projected to avoid insolvency, taking into account the value of the proposed benefit or benefit increase. The statement must include the basis for the conclusion, supporting data, calculations, assumptions, a description of the methodology, the basis for assumptions used, and the present value of the proposed benefit or benefit increase. The statement must also specify the amount of the change in the minimum required contribution under section 431 of the Code attributable to the proposed benefit or benefit increase for the first full plan year in which it is in effect, including the change in normal cost, the change in actuarial accrued liability and the annual amortization amount associated with the change in actuarial accrued liability.

(xi) The statement in paragraph (b)(3)(x) of this section must include an exhibit showing the annual cash flow projection for the plan for 30 years beginning on or after the proposed adoption date of the amendment. The cash flow projection should use an open group valuation. Annual cash flow projections must reflect the following information:

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

(B) Contributions and withdrawal liability payments made and expected to be made to the plan taking into account a reasonable allowance for amounts considered uncollectible.

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

(D) Administrative expenses for the projection period.

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

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

(ii) The present value of accrued benefits.

(xiii) Any additional information PBGC determines it needs to review a request for approval of a proposed amendment, including any adjustments to assumptions required by PBGC in its review of whether the plan is projected to avoid insolvency.

(c) *Allocation of plan assets.* During the SFA coverage period, plan assets, including special financial assistance, must be invested in investment grade fixed income as described in § 4262.14(d) sufficient to pay for at least 1 year (or until the date the plan is projected to become insolvent, if earlier) of projected benefit payments and administrative expenses, taking into account the limitations on derivatives and leverage in § 4262.14(h).

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

(2) A request for PBGC approval of a proposed contribution change that affects over \$10 million of annual contributions and over 10 percent of all employer contributions must be submitted by the plan sponsor or its duly authorized representative and must contain all of the following information:

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

(ii) The nine-digit employer identification number (EIN) assigned to

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

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

(iv) Names and addresses of each controlled group member of the contributing employer identified in paragraph (d)(2)(ii) of this section, along with a chart depicting the structure of the controlled group by entity and its ownership with ownership percentage.

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

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

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

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

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

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

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

assumptions. The projections must include:

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

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

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

(D) Any other relevant information.

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

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

(ix) Any additional information PBGC determines it needs to review a request for approval of a proposed contribution change.

(e) *Allocating contributions and other practices*—(1) *In general.* During the SFA coverage period, a decrease in the proportion of income or an increase in the proportion of expenses allocated to a plan that receives special financial assistance pursuant to a written or oral agreement or practice (other than a written agreement in existence on March 11, 2021, to the extent not subsequently amended or modified) under which the income or expenses are divided or to be divided between a plan that receives special financial assistance and one or more other employee benefit plans is prohibited. The prohibition in the preceding sentence does not apply to a good faith allocation of:

(i) Contributions pursuant to a reciprocity agreement;

(ii) Costs of securing shared space, goods, or services, where such allocation does not constitute a prohibited transaction under ERISA or is exempt from such prohibited transaction provisions pursuant to section 408(b)(2) or 408(c)(2) of ERISA, or pursuant to a specific prohibited transaction exemption issued by the Department of Labor under section 408(a) of ERISA;

(iii) The actual cost of services provided to the plan by an unrelated third party; or

(iv) Contributions where the contributions to a plan that receives special financial assistance required for each base unit are not reduced, except as otherwise permitted by paragraph (d) of this section.

(2) *Request for exception.* No earlier than 5 years after the end of the plan year in which the plan receives payment of special financial assistance under § 4262.12, the plan sponsor may request approval from PBGC for an exception from the conditions under paragraph (e) of this section by demonstrating to the satisfaction of PBGC that, taking into account the value of any proposed reallocation of contributions, the plan will avoid insolvency, that the reallocation is needed due to a significant increase in health benefit costs due to a change in Federal law which goes into effect after March 11, 2021, that the reallocation is no more than a 10 percent reduction in the amount of the contribution rate negotiated on or before March 11, 2021, that is allocable to the pension plan, and that the reallocation relating to any change in Federal law is for no more than 5 years. A continuation of the reallocation of contributions relating to any change in Federal law after the initial reallocation beyond 5 years must satisfy the requirement for a contribution decrease under paragraph (d) of this section. A subsequent change in Federal law causing a significant increase in health benefit costs is a separate event for purposes of applying this exception, except that a plan may reallocate contributions under this exception from the conditions under paragraph (e) of this section for no more than 10 years cumulatively for all reallocation requests during the SFA coverage period. A request for PBGC approval of a proposed reallocation of contributions must be submitted by the plan sponsor or its duly authorized representative and must contain all of the following identifying, actuarial, and financial information:

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

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

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

(iv) The EIN assigned to the plan sponsor by the IRS and the PN assigned to the plan by the plan sponsor of the plan that applied for special financial assistance, if not the same as the EIN and PN in paragraph (e)(2)(ii) of this section.

(v) A copy of the proposed reallocation of contributions amendment.

(vi) Most recent plan document or restatement of the plan document and all subsequent amendments adopted (if any).

(vii) A copy of the most recent actuarial valuation performed for the plan before the date of the plan's submission of a request for approval under this paragraph (e)(2), and the actuarial valuation performed for each of the 2 plan years immediately preceding the most recent actuarial valuation.

(viii) A copy of the plan actuary's most recent certification under section 305(b)(3) of ERISA, including a detailed description of the assumptions used in the certification, and the basis under which they were determined. The description must include information about the assumptions used for the projection of future contributions, withdrawal liability payments, and investment returns, and any other assumption that may have a material effect on projections.

(ix) A statement certified by an enrolled actuary of the effect of the proposed reallocation of contributions on the plan's existing contributions, and a demonstration that the expected contributions equal or exceed the estimated amount necessary, taking into account the proposed reallocation of contributions, to satisfy the minimum funding requirement of section 431 of the Code.

(x) A detailed statement certified by an enrolled actuary that the plan is projected to avoid insolvency, taking into account the value of the proposed reallocation of contributions. The statement must include the basis for the conclusion, supporting data, calculations, assumptions, a description of the methodology, the basis for assumptions used, and the present value of the proposed reallocation of contributions.

(xi) The statement in paragraph (e)(2)(x) of this section must include an exhibit showing the annual cash flow projection for the plan for 30 years

beginning on or after the proposed adoption date of the amendment. The cash flow projection should use an open group valuation. Annual cash flow projections must reflect the following information:

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

(B) Contributions and withdrawal liability payments expected to be made to the plan taking into account a reasonable allowance for amounts considered uncollectible.

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

(D) Administrative expenses for the projection period.

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

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

(xii) The present value of accrued benefits.

(xiii) A demonstration that the reallocation is needed due to a significant increase in health benefit costs due to a change in Federal law, that the reallocation is no more than a 10 percent reduction in the amount of the contribution rate negotiated on or before March 11, 2021, going to the pension plan, and that the reallocation is for no more than 5 years for a reallocation request relating to any single change in Federal law and no more than 10 years cumulatively for all reallocation requests during the plan's SFA coverage period.

(xiv) Any additional information PBGC determines it needs to review a request for approval of a proposed amendment, including any adjustments to assumptions required by PBGC in its review of whether the plan is projected to avoid insolvency.

(f) *Transfer or merger.* During the SFA coverage period, a plan must not engage in a transfer of assets or liabilities (including a spinoff) or merger except with PBGC's approval. Notwithstanding anything to the contrary in 29 CFR part 4231, the plans involved in the transaction must request approval from PBGC.

(1) *In general.* PBGC will approve a proposed transfer of assets or liabilities (including a spinoff) or merger if PBGC determines that the transaction complies with section 4231(a)–(d) of ERISA and that the transaction, or the larger transaction of which the transfer or merger is a part, does not

unreasonably increase PBGC's risk of loss with respect to any plan involved in the transaction, and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans involved in the transaction.

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

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

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

(iii) A copy of the plan actuary's most recent certification under section 305(b)(3) of ERISA, including a detailed description of the assumptions used in the certification, and the basis under which they were determined. The description must include information about the assumptions used for the projection of future contributions, withdrawal liability payments, and investment returns, and any other assumption that may have a material effect on projections.

(iv) A detailed narrative description demonstrating that the transaction does not unreasonably increase PBGC's risk of loss with respect to any plan involved in the transaction. The narrative must be supported by a detailed determination certified by the enrolled actuary of the present value of financial assistance under section 4261 of ERISA which is calculated using the guaranteed benefits and administrative expenses presented in the cash flow projections under paragraph (f)(2)(v) of this section, discounted using interest rates published under section 4044 of ERISA. The certification must include supporting data, calculations, assumptions, a description of the methodology, the basis for assumptions used, and the projected date of insolvency.

(v) The statement in paragraph (f)(2)(iv) of this section must include an exhibit showing the annual cash flow projections for each plan before and

after the transaction, through the year that each plan pays its last dollar of benefit (but not to exceed 100 years). The cash flow projection should use an open group valuation until the plan reaches insolvency. Annual cash flow projections must reflect the following information:

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

(B) Contributions and withdrawal liability payments taking into account a reasonable allowance for amounts considered uncollectible.

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

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

(E) Administrative expenses for the projection period.

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

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

(vi) If the plan requests that PBGC approve that a waiver of the conditions in paragraph (b)(1) of this section (retrospective benefits), paragraph (d) of this section (contribution decreases), and the condition in paragraph (e) of this section relating to allocating contributions and other income applies to the merged plan, a demonstration that the requirements for a waiver in paragraph (f)(4) of this section are met.

(vii) A detailed narrative description with supporting documentation demonstrating that the transaction 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. The narrative description and supporting documentation must consider the projected month and year of plan insolvency for each of the plans before and after the transaction.

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

(3) *Application of conditions with respect to an approved transfer or merger.* If PBGC approves a transfer of assets and liabilities (that is not a merger) from a plan that receives special financial assistance to another plan (the transferee plan) under this paragraph (f), the restrictions and conditions that apply to the plan that receives special

financial assistance will also apply to the transferee plan as determined by PBGC as a condition of the approval. If PBGC approves a merger under this paragraph (f), the restrictions and conditions that apply to a plan that receives special financial assistance will apply after the merger as follows:

(i) The restrictions in §§ 4262.13(b) and 4262.14 and the conditions in this paragraph (f) (transfer or merger), paragraph (h) of this section (withdrawal liability settlement), paragraph (i) of this section (annual compliance statement), and paragraph (j) of this section (audit) apply to the merged plan.

(ii) The conditions in paragraph (b)(2) of this section (prospective benefit increase), paragraph (c) of this section (allocation of plan assets), and paragraph (e) of this section relating to allocating expenses do not apply to the merged plan.

(iii) In the absence of a waiver described in paragraph (f)(4) of this section, the condition in paragraph (b)(1) of this section (retrospective benefit increase) continues to apply to participants in the plan that received special financial assistance before the merger, the condition in paragraph (d) of this section (contribution decreases) continues to apply to employers who had an obligation to contribute to the plan that received special financial assistance before the merger, and the condition in paragraph (e) of this section relating to allocating contributions and other income continues to apply to contributions or income relative to the plan that received special financial assistance before the date of the merger.

(iv) For the condition described in paragraph (g)(1) of this section (withdrawal liability interest assumption), the merged plan must use the interest assumptions in appendix B to part 4044 of this chapter to determine the unfunded vested benefits that arose under the plan that received special financial assistance before the date of the merger for purposes of allocating unfunded vested benefits under subpart D of part 4211 of this chapter and determining withdrawal liability for employers that participated in that plan.

(v) For the condition described in paragraph (g)(2) of this section (withdrawal liability amount of special financial assistance required to be phased in), the merged plan must apply the special financial assistance phase-in condition to determine the unfunded vested benefits that arose under the plan that received special financial assistance before the date of the merger for purposes of allocating unfunded vested

benefits under subpart D of part 4211 of this chapter and determining withdrawal liability for employers that participated in that plan.

(4) *Waiver of conditions with respect to an approved merger.* A plan may request a waiver of the condition in paragraph (b)(1) of this section (retrospective benefit increase), paragraph (d) of this section (contribution decreases), and the condition in paragraph (e) of this section relating to allocating contributions and other income for the merged plan in the plan's request for PBGC's approval of a merger pursuant to paragraph (f)(1) of this section. If any of the plans involved in the merger engage in multiple transactions in any 1-year period, the transactions will be considered in the aggregate. The plan's application must demonstrate the following requirements for a waiver—

(i) The total current value of assets of the plans that received special financial assistance before the merger must be 25 percent or less of the total current value of assets of the merged plan, calculated using the current value of assets most recently required before the merger to be entered by the plans on the Form 5500 Schedule MB.

(ii) The total current liability of the plans that received special financial assistance before the merger must be 25 percent or less of the total current liability of the merged plan, calculated using the current liability most recently required before the merger to be entered by the plans on the Form 5500 Schedule MB.

(iii) In the most recent certification of plan status for any plan that did not receive special financial assistance before the merger, the plan actuary must have certified that the plan is not in endangered or critical status (including critical and declining status) and is not projected to be in critical status within 5 years from the date of the plan's request for approval, and the plan must not be described in section 432(b)(5) of the Code.

(g) *Withdrawal liability determination—(1) Interest assumptions.* A plan must use the interest assumptions in appendix B to part 4044 of this chapter in determining the unfunded vested benefits of the plan under section 4213(c) of ERISA (for the purpose of determining withdrawal liability), and in determining the amortization schedule under section 4219(c)(1)(A) of ERISA, beginning with the first plan year in which the plan receives payment of special financial assistance under § 4262.12 and until the later of—

(i) The end of the tenth plan year after the first plan year in which the plan receives payment of special financial assistance under § 4262.12; or

(ii) The end of the plan year described in paragraph (g)(1)(iii) of this section (if the special financial assistance most recently paid to the plan as of the end of that plan year is calculated under this part as in effect before August 8, 2022); otherwise the end of the plan year described in paragraph (g)(1)(iv) of this section.

(iii) The plan year described in this paragraph (g)(1)(iii) is the plan year by which the plan is projected to exhaust any SFA assets as determined under the methodology of § 4262.4(b), applying the interest rate under § 4262.4(e)(2) to the special financial assistance as determined as of the SFA measurement date as determined under this part as in effect before August 8, 2022. However, if the first plan year in which the plan receives payment of special financial assistance is after the plan year that includes the plan's SFA measurement date, the plan year by which the plan is projected to exhaust any SFA assets is deferred by the number of years by which the first plan year in which the plan receives payment is after the plan year that includes the plan's SFA measurement date.

(iv) The end of the plan year by which, according to the plan's projection, the plan is projected to exhaust any SFA assets, as determined under § 4262.4(b). However, if the first plan year in which the plan receives payment of special financial assistance is after the plan year that includes the plan's SFA measurement date, the plan year by which the plan is projected to exhaust any SFA assets is deferred by the number of years by which the first plan year in which the plan receives payment of special financial assistance is after the plan year that includes the plan's SFA measurement date.

(2) *Phase-in of SFA—(i) In general.* In determining unfunded vested benefits under section 4213(c) of ERISA (for the purpose of determining withdrawal liability), the procedures in this paragraph (g)(2) must be followed.

(ii) *Phase-in period.* The procedures in this paragraph (g)(2) apply to the determination of unfunded vested benefits as of the end of any determination year that is not earlier than the payment year or later than the exhaustion year.

(iii) *Determination year.* For purposes of this paragraph (g)(2), the determination year is the plan year as of the end of which unfunded vested benefits are being valued.

(iv) *Payment year.* For purposes of this paragraph (g)(2), the payment year is the first plan year in which the plan receives special financial assistance.

(v) *Determination of exhaustion year.* For purposes of this paragraph (g)(2), if the special financial assistance most recently paid to the plan as of the last day of the determination year is calculated under this part as amended effective August 8, 2022, then the exhaustion year is the plan year described in paragraph (g)(2)(vi) of this section; otherwise, the exhaustion year is the plan year described in paragraph (g)(2)(vii) of this section.

(vi) *Exhaustion year.* The plan year described in this paragraph (g)(2)(vi) is the plan year by which, according to the plan's projection, the plan is projected to exhaust any SFA assets, as determined under § 4262.4(b). However, if the first plan year in which the plan receives payment of SFA is after the plan year that includes the plan's SFA measurement date, the exhaustion year is deferred by the number of years by which the payment year is after the plan year that includes the plan's SFA measurement date.

(vii) *Exhaustion year before any SFA paid under this part.* The plan year described in this paragraph (g)(2)(vii) is the plan year by which the plan is projected to exhaust any SFA assets, determined under the methodology of § 4262.4(b), applying the interest rate under § 4262.4(e)(2) to the special financial assistance as determined as of the SFA measurement date as determined under this part as in effect before August 8, 2022. However, if the first plan year in which the plan receives payment of SFA is after the plan year that includes the plan's SFA measurement date, the exhaustion year is deferred by the number of years by which the payment year is after the plan year that includes the plan's SFA measurement date.

(viii) *SFA assets excluded.* The value of the plan assets taken into account as of the end of each determination year is the value of the assets that would otherwise be taken into account in the absence of this provision reduced by the amount described in paragraph (g)(2)(ix) of this section.

(ix) *Calculation of SFA assets excluded.* The amount described in this paragraph (g)(2)(ix) is the total amount of special financial assistance paid to the plan under § 4262.12 (as determined under § 4262.12(a) or (b), or under § 4262.12(b) and (c) for plans paid under a supplemented application, as applicable) as of the end of the determination year multiplied by a fraction, the numerator of which is the

number of years determined under paragraph (g)(2)(x) of this section as of the end of the determination year and the denominator of which is the number of years determined under paragraph (g)(2)(xi) of this section as of the end of the determination year.

(x) *Numerator.* The number of years determined under this paragraph (g)(2)(x) is the number of plan years in the period beginning with the determination year and ending with the exhaustion year.

(xi) *Denominator.* The number of years determined under this paragraph (g)(2)(xi) is the number of plan years in the period beginning with the payment year and ending with the exhaustion year.

(xii) *Plan year.* For purposes of this paragraph (g)(2), any reference to a plan year means a complete plan year.

(xiii) *No receivable.* Special financial assistance assets must be excluded from the determination of unfunded vested benefits until the date that special financial assistance is paid to the plan under § 4262.12, and no receivable shall be set up as of any earlier date in anticipation of the plan receiving such payment.

(xiv) *Reporting.* For any withdrawal liability assessed during the phase-in period, the amount described under paragraph (g)(2)(ix) of this section must be reported in the plan's annual statement of compliance (as required under paragraph (i) of this section) for the plan year in which the liability is assessed.

(xv) *Applicability.* This paragraph (g)(2) applies to a plan in determining withdrawal liability for withdrawals occurring after the plan year in which the plan receives payment of special financial assistance under this part. Notwithstanding the preceding sentence, for a plan that received special financial assistance under this part in effect before August 8, 2022, this paragraph (g)(2) will not apply unless the plan files a supplemented application under this part. If the plan files a supplemented application, this paragraph (g)(2) applies to the plan in determining withdrawal liability for withdrawals occurring on or after the date the plan files the supplemented application.

(xvi) *Examples.* The following examples illustrate the provisions of paragraph (g)(2) of this section.

(A) *Example 1.* Plan A, a calendar-year plan, filed an application for special financial assistance under this part with an SFA measurement date in plan year 2023 and received a special financial assistance payment of \$1,000,000 in 2024. In the plan's

application, Plan A is projected to exhaust its special financial assistance assets during plan year 2028.

Accordingly, the payment year is 2024 and the exhaustion year is 2029 (the projected SFA exhaustion year in the application plus 1 year for the difference between the plan year that includes the SFA measurement date and the payment year). Employer P withdraws from Plan A in 2028. For Employer P: {1} the determination year is 2027; {2} the numerator of the phase-in fraction is 3 (2027 to 2029); {3} the denominator of the phase-in fraction is 6 (2024 to 2029); and {4} the phased in amount is \$500,000 ( $\$1,000,000 \times \frac{3}{6}$ ). If total assets (assuming no phased recognition of SFA) are \$100,000,000, unfunded vested benefits are based on assets of \$99,500,000.

(B) *Example 2.* Plan B, a calendar-year plan, filed an application for special financial assistance under the terms of the interim provisions of this part with an SFA measurement date in plan year 2022 and received a special financial assistance payment of \$1,000,000 in 2022. According to the methodology under paragraph (g)(2) of this section and the information submitted in the plan's application under the interim provisions of this part, Plan B is projected to exhaust its special financial assistance assets during plan year 2028. However, Plan B files a supplemented application under this part in 2023 and receives an additional special financial assistance payment of \$100,000 in 2024. In Plan B's supplemented application, the plan is projected to exhaust its special financial assistance assets during plan year 2030. Employer R withdraws from Plan B in 2024, which is after Plan B filed a supplemented application. For Employer R: {1} the payment year is 2022; {2} the determination year is 2023; {3} the exhaustion year is 2028; {4} the numerator of the phase-in fraction is 6 (2023 to 2028); {5} the denominator of the phase-in fraction is 7 (2022 to 2028); and {6} the phased in amount is \$857,143 ( $\$1,000,000 \times \frac{6}{7}$ ). If total assets (assuming no phased recognition of SFA) are \$100,000,000, unfunded vested benefits are based on assets of \$99,142,857. Employer S withdraws from Plan B in 2028. For Employer S: {1} the payment year is 2022; {2} the determination year is 2027; {3} the exhaustion year is 2030; {4} the numerator of the phase-in fraction is 4 (2027 to 2030); {5} the denominator of the phase-in fraction is 9 (2022 to 2030); and {6} the phased in amount is \$488,889 ( $\$1,000,000 \times \frac{4}{9}$ ). If total assets (assuming no phased recognition

of SFA) are \$100,000,000, unfunded vested benefits are based on assets of \$99,511,111. If, instead of withdrawing in 2024, Employer R withdrew from Plan B in 2023 before Plan B filed its supplemented application, the phase-in condition would not apply and unfunded vested benefits would be based on total assets of \$100,000,000.

(C) *Example 3.* Plan C, a calendar-year plan, filed an application for special financial assistance under this part with an SFA measurement date in plan year 2024 and received a special financial assistance payment of \$1,000,000 in 2025. According to the plan's application, Plan C is projected to exhaust its SFA assets during plan year 2024. Accordingly, the payment year is 2025 and the exhaustion year is 2025 (the projected SFA exhaustion year in the application plus 1 year for the difference between the plan year that includes the SFA measurement date and the payment year). Employer T withdraws from Plan C in 2026. For Employer T: {1} the determination year is 2025; {2} the numerator of the phase-in fraction is 1 (2025 to 2025); {3} the denominator of the phase-in fraction is 1 (2025 to 2025); and {4} the phased-in amount is \$1,000,000 ( $\$1,000,000 \times \frac{1}{1}$ ). If total assets (assuming no phased recognition of SFA) are \$100,000,000, unfunded vested benefits are based on assets of \$99,000,000.

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

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

(ii) The present value of withdrawal liability payments assessed for the employer discounted using the interest assumptions in appendix B to part 4044 of this chapter.

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

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

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

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

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

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

(iii) A copy of the proposed settlement agreement.

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

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

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

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

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

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

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

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

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

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

(1) Except as provided in paragraph (i)(2) of this section, a plan's statement of compliance for each plan year must be filed no later than 90 days after the end of the plan year.

(2) If six months or fewer remain in the plan year after the month that includes the date the plan first received payment of special financial assistance, the first statement of compliance must cover the period from the date the plan received payment of special financial

assistance through the last day of the plan year following the plan year in which the plan received payment of special financial assistance, and must be filed no later than 90 days after the end of such plan year.

(3) Each statement of compliance must be signed and dated by a trustee who is a current member of the board of trustees and authorized to sign on behalf of the board of trustees, or by another authorized representative of the plan sponsor.

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

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

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

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

#### § 4262.17 Other provisions.

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

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

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

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

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

(f) A plan that receives special financial assistance and meets the eligibility requirements for partition of

the plan under section 4233(b) of ERISA may apply for partition.

(g) If any provision in this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision will be

construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding will be one of utter invalidity or unenforceability, in which event the provision will be severable from this part.

Issued in Washington, DC, by:

**Gordon Hartogensis,**  
*Director, Pension Benefit Guaranty Corporation.*

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