

**Field Assistance Bulletin No. 2023-01**

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Through:

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From: John J. Canary
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Subject: Annual Funding Notice Requirements for Multiemployer Pension Plans
that Received Special Financial Assistance

Background

President Biden signed the American Rescue Plan Act on March 11, 2021, which added section 4262 to Title IV of the Employee Retirement Income Security Act (ERISA).¹ Under section 4262 of ERISA, an eligible multiemployer plan may apply for special financial assistance (SFA) from the Pension Benefit Guaranty Corporation (PBGC). Receiving SFA has a material effect on a plan's assets and subjects a plan to certain restrictions and conditions that impact the annual funding notice disclosures required by section 101(f) of ERISA and regulations.

This memorandum provides guidance to the Employee Benefits Security Administration's national and regional offices on how multiemployer defined benefit plan administrators can comply with the annual funding notice requirements of section 101(f) of ERISA in the case of plans that received SFA from PBGC under the American Rescue Plan Act or are eligible to apply for SFA from PBGC. This memorandum also includes model language that plan administrators may use in the annual funding notice.

Compliance Pending Further Guidance

The Department acknowledges that this memorandum does not address all SFA-related issues that may arise with respect to annual funding notices. Plan administrators are required to make annual funding notice disclosures relating to SFA in accordance with section 101(f) and 29 CFR 2520.101-5. Pending further guidance, the Department will treat compliance with the guidance in this Field Assistance Bulletin as constituting a reasonable, good faith interpretation of the

¹ American Rescue Plan Act of 2021, Pub. L. 117-2, 135 Stat. 4.



annual funding notice disclosure requirements of section 101(f) of ERISA and 29 CFR 2520.101-5 with respect to the issues discussed in this Bulletin.

Many plans that received SFA in 2022 may have already prepared their 2022 annual funding notices and some may have already begun to furnish notices to plan participants. To the extent that the plan has already prepared the annual funding notice for the 2022 notice year, the Department expects the plan administrator to consider the guidance in this Field Assistance Bulletin in evaluating whether the annual funding notice disclosures relating to SFA were consistent with a reasonable, good faith interpretation of section 101(f) and 29 CFR 2520.101-5 and to take appropriate corrective action to the extent the administrator concludes that the annual funding notice disclosures did not meet that standard.

Q1. The annual funding notice requires a statement of the funded percentage under section 101(f)(2)(B)(i)(II) of ERISA and a statement of the actuarial value of plan assets under section 101(f)(2)(B)(ii)(II) of ERISA. Is SFA taken into account when determining those disclosures?

No. The funded percentage and value of assets disclosed in the annual funding notice are the funded percentage, as defined in section 305(j)(2) of ERISA, and the actuarial value of plan assets as determined under section 304(c)(2) of ERISA. Neither the funded percentage nor the actuarial value of assets include SFA.²

A plan that has received SFA in the notice year, however, may want to include information in the annual funding notice explaining why the funded percentage stated in the notice is lower than participants and beneficiaries might have expected given that the plan received SFA. Section 2520.101-5(b)(12) of the annual funding notice regulations permits a plan administrator to include additional information beyond what is legally required as long as it is necessary or helpful to understanding the mandated information. A plan administrator may reasonably conclude that plan participants and beneficiaries will find an explanation of the impact of SFA funds on the funded percentage and the value of the plan's assets helpful. Accordingly, a plan administrator may use the following language under the chart in the "How Well Funded Is Your Plan" section of the annual funding notice:

In accordance with Treasury Department guidance, the funded percentage and asset values in the chart above do not reflect the special financial assistance paid to the Plan by the Pension Benefit Guaranty Corporation under the American Rescue Plan Act. If the amount held in the special financial assistance account (which reflects the remaining portion of the special financial assistance) were to be reflected in the above chart, the funded percentage for the [insert plan year or

² Internal Revenue Code (Code) § 432(k)(2)(D)(i) states that SFA received by the plan "shall not be taken into account for determining contributions required under section 431" of the Code. Section 431 of the Code is the parallel provision of section 304 of ERISA. IRS Notice 2021-38 provides that the "exclusion of the special financial assistance account applies for all purposes under Code § 431, including ... the determination of the actuarial value of assets under Code § 431(c)(2) ..." The Treasury Department's guidance under Code § 432(k)(2)(D)(i) applies to section 304 of ERISA. See Section 101(a) of Reorganization Plan No. 4 of 1978, 5 U.S.C. App.



plan years] would be [*insert* percentage or percentages if more than one year includes SFA] and the value of assets would be [*insert* amount or amounts if more than one year includes SFA].

Q2. Should the annual funding notice’s statement of fair market value of assets as of the last day of the notice year and the two preceding years (as required by section 101(f)(2)(B) (ii)(II) of ERISA) reflect SFA received by the plan?

Yes. The annual funding notice must include a “statement of the fair market value of plan assets as of the last day of the notice year, and as of the last day of each of the two preceding plan years as reported in the annual report filed under section 104(a) of ERISA for each such preceding plan year.”³

If the year-end fair market value of the plan’s assets for any of the three disclosed years includes assets in the SFA account,⁴ the notice must include a statement explaining that the plan received SFA, and that the actuarial value of assets used to determine the funded percentage does not include the SFA account’s assets. A plan administrator may substitute the following for the Year-End Fair Market Value of Assets section of the multiemployer plan model notice in Appendix B of 29 CFR 2520.101-5:

Year-End Fair Market Value of Assets

The asset values in the chart above are measured as of the Valuation Date. They are “actuarial values.” Actuarial values differ from market values in that they do not fluctuate daily based on changes in the stock or other markets. Actuarial values smooth out those fluctuations and can allow for more predictable levels of future contributions. Additionally, the asset values in the chart above do not include the amount of the special financial assistance account, which reflects the remaining portion of the special financial assistance paid to the Plan by the Pension Benefit Guaranty Corporation under the American Rescue Plan Act.

Despite the fluctuations, market values tend to show a clearer picture of a plan’s funded status at a given point in time. The asset values in the chart below are year-end market values for the Plan Year and two preceding plan years. The asset values in the chart below include the amount of the Plan’s special financial assistance account. [*Instruction: If SFA is not reflected in the year-end market value for each year in the chart, revise the preceding sentence to read: The asset values in the chart below for [*insert year(s) that include SFA*] include the amount of the Plan’s special financial assistance account.*]

³ 29 CFR 2520.101-5(b)(3)(ii)(B).

⁴ The amount in the special financial assistance account (SFA account) is equal to the SFA paid by PBGC as adjusted by the investment return on the assets held in the SFA account and reduced by benefit payments and expenses paid from that account.



Q3. Does a plan’s receipt of SFA trigger the “material effect” explanation required under section 101(f)(2)(B)(vii) of ERISA?

Yes. The receipt of SFA, a government transfer payment, is an event that has a “material effect” on plan assets, regardless of the amount of SFA received.⁵

If a plan that suspended benefits under the Multiemployer Pension Reform Act of 2014 or by reason of insolvency under section 4245(a) of ERISA receives SFA, section 4262(k) of ERISA requires the plan to reinstate suspended benefits going forward and pay make-up payments (previously suspended benefit payments) to participants and beneficiaries who were in pay status on the SFA payment date. These reinstated benefits and make-up payments could have a material effect on plan liabilities.

However, because the amount of SFA attributable to the reinstatement of benefits is expected to offset the increase in liabilities through at least 2051, the plan administrator is not required to project the effect on the plan’s liabilities through the end of the current plan year.

Q4. For which plan year should the “material effect” explanation required by section 101(f)(2)(B)(vii) of ERISA be provided?

The material effect explanation must be included in the annual funding notice for the plan year in which the plan received SFA. For example, if a calendar year plan receives SFA in 2023, the explanation must be disclosed in the 2023 annual funding notice, which must be provided no later than the 120th day of 2024.

If a multiemployer plan receives additional SFA under a supplemented application in a different plan year than the plan year the plan received SFA under the initial application, the receipt of additional SFA is a material effect event for which an explanation is required.

Q5. When a plan’s receipt of SFA triggers the “material effect” explanation required under section 101(f)(2)(B)(vii) of ERISA, what information must the explanation include?

The explanation must include the amount of SFA and the date it was paid to the plan.⁶ If the plan received additional SFA under a supplemented application, the explanation must state the amount and date of the SFA received under the initial and supplemented applications separately along with a statement explaining why the plan is receiving supplemented SFA.

The explanation for the plan year in which the plan first receives SFA also must include a brief description of the conditions specified in 29 CFR 4262.16. A plan administrator may use the

⁵ See Section 4262(j) of ERISA. SFA is an amount equal to the “amount required for the plan to pay all benefits due during the period beginning on the date of payment of the [SFA] ... and ending on the last day of the plan year ending in 2051 ... and taking into account the reinstatement of benefits required under subsection (k) [of ERISA section 4262].”

⁶ Section 101(f)(2)(B)(vii) of ERISA and 29 CFR 2520.101-5(b)(7).



following insert to the “Events Having a Material Effect on Assets or Liabilities” section of the model annual funding notice to satisfy this requirement:

Because the Plan received special financial assistance from PBGC under the American Rescue Plan Act, the Plan is required to be administered in accordance with conditions described in PBGC regulations. These conditions relate to benefit increases; allocation of plan assets; reductions in employer contribution rates; diversion of contributions to, and allocation of expenses to, other benefit plans; transfers or mergers; and withdrawal liability. Under certain circumstances, a plan may request approval from PBGC for an exception from the conditions relating to benefit increases, reductions in employer contribution rates, transfers or mergers, and withdrawal liability.

In addition, if the plan is required by section 4262(k) of ERISA to reinstate previously suspended benefits, the explanation for the first plan year the plan receives SFA must also include a statement substantially similar to the following:

If the Plan reduced your benefits [*insert whichever applies: “under the Multiemployer Pension Reform Act (MPRA)” or “because the Plan was insolvent (not enough money to pay all benefits)”*], the Plan must reinstate your benefits going forward. If you were in pay status on [*insert SFA payment date*], the Plan must also pay you a make-up payment equal to the total of the benefits that you did not receive because of the reduction. You should have already received a notice of reinstatement describing your reinstated benefits. If you did not receive a notice of reinstatement, contact [*enter name, telephone number, and email address of contact person*].

If a plan receives additional SFA under a supplemented application in a year following the year it receives SFA under the initial application, the plan administrator does not need to include a description of the conditions specified in 29 CFR 4262.16 or an explanation describing the reinstatement of benefits under section 4262(k) of ERISA.

Q6. How does a plan’s receipt of SFA affect the plan administrator’s obligation with respect to the statement required by 29 CFR 2520.101-5(b)(6), relating to plans in endangered, critical, or critical and declining status?

Under Code § 432(b)(7), a plan that has received SFA is deemed to be in critical status beginning with the plan year in which the plan first received SFA and ending with the plan year ending in 2051.⁷ Such plans may use the model insert below in lieu of the model language in 29 CFR 2520.101-5, Appendix B (Endangered, Critical or Critical and Declining Status | option two).

Under federal pension law, the Plan is considered to be in critical status in the Plan Year ending [*insert last day of Plan Year*] because the Plan received special

⁷ See also Section 4262(m)(4) of ERISA.



financial assistance from the Pension Benefit Guaranty Corporation under the American Rescue Plan Act. The trustees of a plan in critical status must adopt a rehabilitation plan. A rehabilitation plan establishes steps and benchmarks for pension plans to improve their funding status over a period of time.

[Insert a summary of the rehabilitation plan and a description of any modification or update to the plan adopted during the plan year to which the notice relates.] You may obtain a copy of the Plan’s rehabilitation plan and the actuarial and financial data that demonstrate any action taken by the Plan toward fiscal improvement by contacting the Plan administrator. *[If applicable, insert: “Or you may obtain this information at [insert website of plan sponsor (or plan administrator on behalf of the plan sponsor)]”].*

If a plan that received SFA merges with a second multiemployer defined benefit pension plan that has not received SFA and the second plan is designated as the ongoing plan after the merger, the ongoing plan is not deemed to be in critical status even if the merger occurs prior to 2051.⁸ The actual zone status of the ongoing plan determines which option it uses in the model.

Q7. Does a plan’s receipt of SFA affect the general description of the plan’s investment policy required by 29 CFR 2520.101-5(b)(5)(iii)?

Yes. For plans that have received SFA, the description of the plan’s investment policy must reflect the restrictions and limitations on investments applicable to the separate account required by section 4262(l) of ERISA and 29 CFR 4262.14. It must also reflect the condition of 29 CFR 4262.16(c) requiring one year of projected benefit payments and administrative expenses to be invested in investment grade fixed income.

Q8. Does the plan administrator have to separately identify the assets in the SFA account to satisfy the requirements of 29 CFR 2520.101-5(b)(5)(ii)?

No. The regulation requires a statement setting forth the asset allocation of investments under the plan (expressed as percentages of total assets) as of the end of the notice year. The percentage allocation is based on total plan assets, including the assets that make up the SFA account. However, to avoid confusion, a plan administrator should include an explanation that SFA is included in the allocations. A plan administrator may use the following language if there are funds in the SFA account at the end of the year:

Under the Plan’s investment policy, the Plan’s assets were allocated among the following categories of investments as of the end of the Plan Year. The allocations are percentages of the Plan’s total assets, which include special financial assistance paid to the Plan and earnings thereon.

⁸ See Rev. Rul. 2022-13, 2022-30 I.R.B. 99.



Q9. If the plan received SFA, does the annual funding notice have to include a summary of the rules governing insolvency, including the limitations on benefit payments as required by 29 CFR 2520.101-5(b)(8)(ii)?

Yes. Section 4262(m)(5) of ERISA expressly states that if a plan receiving special financial assistance subsequently becomes insolvent, the plan “will be subject to the current rules and guarantee for insolvent plans.” Therefore, a plan receiving SFA should include the same summary of the rules governing insolvency as a plan that does not receive SFA.⁹

Q10. May an insolvent plan that is eligible for but has not applied for SFA modify the model language in Appendix B of 29 CFR 2520.101-5 summarizing the rules governing insolvent plans to inform participants that the plan is eligible for SFA?

Yes. As stated above, 29 CFR 2520.101-5(b)(12) permits a plan administrator to include any additional information beyond what is legally required in an annual funding notice as long as it is necessary or helpful to understanding the mandated information. The plan administrator of an insolvent plan eligible for SFA under section 4262(b)(1)(D) of ERISA and 29 CFR 4262.3(a)(4) that has not been approved for SFA or does not have an application for SFA under review by the PBGC on the last day of the notice year may (but is not required to) add the following model language to the end of the Summary of Rules Governing Insolvency section of the model annual funding notice for multiemployer plans:

A new federal law allows severely underfunded multiemployer pension plans that meet the law’s eligibility requirements to apply for special financial assistance from the PBGC in an amount required for the plan to pay all benefits due through the last day of the plan year ending in 2051. An eligible plan must submit an initial application for special financial assistance by December 31, 2025, and any revised application by December 31, 2026. If an eligible insolvent plan timely applies for and receives special financial assistance, the plan must reinstate reduced benefits going forward from the date the plan receives special financial assistance and pay make-up payments equal to the amount of previously reduced benefits to participants and beneficiaries who were in pay status on such date.

If an eligible insolvent plan fails to submit an initial application for SFA by the end of the last plan year ending on before December 31, 2025, PBGC may not pay SFA to the plan. Accordingly, the disclosure described here would not be appropriate for years after that date.

Q11. Section 4262(m)(6) of ERISA provides that a plan receiving SFA may not subsequently apply to suspend benefits under section 305(e)(9) of ERISA in the future even if the plan is in critical and declining status and otherwise meets the requirements for suspension. May the annual funding notice of a plan that received SFA include a statement describing the prohibition against such future suspensions?

⁹ See model language in 29 CFR 2520.101-5, Appendix B (Summary of Rules Governing Insolvent Plans).



Yes. As stated above, 29 CFR 2520.101-5(b)(12) permits a plan administrator to include any additional information beyond what is legally required in an annual funding notice as long as it is necessary or helpful to understanding the mandated information. A plan administrator may insert the following as a separate section immediately preceding “Where to Get More Information” in the multiemployer pension plan model notice:

Prohibition Against Future MPRA Suspensions

Because the Plan received special financial assistance, the Plan may not submit an application to the Secretary of the Treasury to suspend or reduce your benefits in the future under the Multiemployer Pension Reform Act, also known as MPRA.

Paperwork Reduction Act (PRA)

This memorandum relies on the collection of information approved under OMB Control Number 1210-0126, which is scheduled to expire on August 31, 2023.

The Department notes that a federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA and displays a currently valid OMB control number. The public is not required to respond to a collection of information unless it displays a currently valid OMB control number.¹⁰ Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.¹¹

For Further Information

Questions concerning this memorandum may be directed to the Employee Benefits Security Administration’s Office of Regulations and Interpretations at (202) 693-8500.

¹⁰ See 44 U.S.C. 3507.

¹¹ See 44 U.S.C. 3512.