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3 Changes In Final Multiemployer Pension Rescue Rule

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The American Rescue Plan Act of 2021 created a significant new special financial assistance program administered by the Pension Benefit Guaranty Corporation for certain troubled multiemployer pension plans. [i] Shortly after ARPA's passage, the PBGC issued an interim rule with additional details and procedures regarding the available assistance. [ii]

A number of plans submitted applications under the interim rule, some of which have already received their payments.

There was, however, significant concern in the multiemployer plan community about whether the interim rule produced a result that was inconsistent with the congressional intent for ARPA. That is, many plans that were eligible for relief would not receive enough assistance to be projected to maintain solvency through 2051, which many felt was at least the minimum intention.

Fortunately, the PBGC issued a final rule on July 8 and made some key changes in response to the comments that it received on the interim rule. [iii]

While some will still take issue with various aspects of the final rule, ultimately, the changes will result in higher amounts of financial assistance for many plans and should make it more likely that plans receiving assistance will stay solvent through at least 2051 as ARPA intended.

This article summarizes three of the more significant categories of changes.

Amount of Assistance

Under ARPA, an eligible plan is to receive 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, with no reduction in a participant's or beneficiary's accrued benefit as of [March 11, 2021].

While this language may appear clear on its face, it gave rise to various interpretations and questions, such as how, if at all, a plan's existing assets should be taken into account when calculating its financial assistance.

Investment Return Assumption

In the interim rule, the PBGC took a conservative approach that provided assistance in an amount equal to the present value of the difference between the plan's obligations through 2051 and the plan's projected resources during that period, including its existing assets. A crucial aspect of the projected resources is the assumed rate of return for a plan's assets.

The interim rule used a single investment return assumption for all of a plan's assets equal to the lesser of

1. The investment return assumption used by the plan for its last zone status certification before 2021 and
2. 200 basis points plus the IRS' third segment rate in any of the last four months prior to the filing of the application.

In recent years, many troubled plans used investment return assumptions that exceed 7%, so the floor rate tied to the third segment rate would be the investment return assumption used to calculate the amount of assistance for these plans.

However, as further discussed below, the interim rule also required plans to only invest their special assistance funds in investment-grade bonds, which generally yield far less than the investment return assumption used by the interim rule.

For many eligible plans, this meant that they would receive an amount of assistance necessary to maintain solvency through the plan year ending in 2051 based on an assumed rate of return that was higher than they could realistically achieve in light of the investment restriction. In some cases, this meant that the plans would become insolvent before 2051, which is contrary to the purpose, and arguably the explicit language of, ARPA. [iv]

In an effort to address this issue, the final rule requires plans to use two investment return assumptions: one for their special financial assistance funds and another for all other assets.

For the assistance funds, the assumption is 67 basis points plus the average of the three IRS segment rates for the month in which the average is the lowest among the four months prior to the filing of the application. This is intended to approximate the actual return achievable for the assistance funds, at least based on current market conditions.

For all other assets, the assumption is the same as before, except that the third segment rate for the floor is the lowest in the last four months prior to the filing of the plan's application.

Many plans will receive more assistance under the final rule than the interim rule due to this change, and the investment return assumptions under the final rule are more likely to match a plan's actual experience and allow it to remain solvent through 2051.

MPRA Conundrum

The interim rule created a conundrum for the trustees of plans that previously suspended benefits under the federal Multiemployer Pension Reform Act of 2014.

A plan could only suspend benefits under MPRA if doing so would allow the plan to avoid insolvency indefinitely, among other things. However, the interim ARPA rule only provided enough assistance for a plan to remain solvent until 2051, and in some cases, an eligible plan would not have even received enough to last until 2051, as noted above.

The trustees of these plans were placed in the difficult position of deciding whether to forego indefinite financial security in return for financial assistance that would allow them to undo their prior benefit suspensions and pay out the full value of accrued benefits for a finite period.

The final rule ameliorates this issue by allowing a plan that suspended benefits under MPRA as of March 11, 2021, to apply for the greatest of

1. The standard amount of assistance;
2. The amount sufficient to ensure that the plan will project increasing assets at the end of the 2051 plan year; and

3. The present value of reinstated benefits, including both make-up payments for previously suspended benefits, as well as payments of the reinstated portion of the benefits expected to be paid through 2051.

This addresses the dilemma because the second prong approximates the insolvent indefinitely standard in MPRA, providing more assistance to some plans and allowing them to accept relief without sacrificing their long-term funding prospects.

However, the final rule does not provide the same relief for any other plans, including plans that are eligible to suspend benefits under MPRA but did not do so as of March 11, 2021, whose trustees face the same conundrum. [v]

For these plans, the final rule includes a more modest change that replaces the present value calculation and instead provides that the amount of assistance is the lowest amount necessary to ensure that the plan's assistance and other funds are both zero or higher as of the end of each plan year through 2051 to address concerns that the interim's rule calculation method could be affected by the timing of certain cash flows for some plans.

Permissible Investments

ARPA requires plans to invest their special financial assistance monies in investment-grade bonds or other investments permitted by the PBGC. Although the PBGC has explicit authority to permit investments in asset classes other than investment-grade bonds, it did not do so and instead made some very minor changes at the margins. This raised a host of concerns as to whether plans would be able to earn enough investment returns to remain solvent through 2051 as ARPA intended.

There were two potential solutions: One was to lower the investment return assumption on assistance assets all the way down to what could be achieved through investments solely in investment-grade bonds. The other was to expand the range of permissible investments.

Some thought the former would be more protective of the assistance assets, whereas others thought the latter struck a more appropriate balance between risk and return.

Consistent with the latter approach, the final rule loosens some restrictions by allowing plans to invest up to 33% of their financial assistance in return-seeking assets, e.g., publicly traded, U.S. dollar-denominated common stock; equity funds that invest primarily in public shares; and certain debt instruments of domestic issuers that are not investment-grade bonds. The remaining 67% of their financial assistance must still be invested in investment- grade fixed income instruments.

The PBGC stated that it landed on this rule in an effort to protect the security of the assistance provided to plans while providing some flexibility to allow plans to achieve the investment returns necessary to avoid insolvency through 2051.

Withdrawal Liability

Although ARPA did not directly address withdrawal liability for plans that receive assistance, it permitted the PBGC to establish conditions on the assistance related to withdrawal liability.

Under the interim rule, the full amount of assistance received by a plan was immediately treated as plan assets for withdrawal liability calculations. However, plans receiving assistance were also required to calculate withdrawal liability for all withdrawing employers using the conservative mass withdrawal interest rate assumptions established by the PBGC.

The actual impact of this rule would vary greatly from plan to plan and employer to employer, but some commenters felt that recognizing the full amount of the assistance upfront as a plan asset could incentivize some employers to withdraw as soon as possible.

In response to this point, the final rule phases in the recognition of the assistance as a plan asset over time, beginning from the first plan year that a plan receives assistance through the end of the plan year that the plan is projected to exhaust its assistance monies. The PBGC is seeking public comments on this aspect of the final rule, which suggests that it may be modified again in the future.

The final rule also modifies the duration of the period during which the mass withdrawal assumptions must be used in order to avoid any manipulation.

Under the interim rule, they had to be used until the assistance monies, and interest on them, were exhausted, with a minimum of 10 years from the end of the plan year in which the assistance is paid to the plan. Under the final rule, the assumptions only have to be used until the assistance monies are projected to be exhausted, assuming they are used before other plan assets, with the same 10-year minimum. That period is adjusted if the assistance is paid in a plan year after the measuring date used in the projections.

Importantly, however, neither the interim rule nor the final rule affect how an employer's withdrawal liability installment payment amount is calculated and the general 20-year cap on payments continues to apply. As a result, for some employers that would be subject to the 20-year cap regardless, the foregoing changes may have no practical impact other than mitigating the risk of a true mass withdrawal, which would remove the 20-year cap for certain employers.

Takeaways

The finalized version of the rule addressed a number of other open questions and concerns related to the timing of applications and the priority or metering process for accepting them, as well as the various conditions applicable to plans that receive assistance. With respect to those issues and the ones mentioned above, practitioners, the authors included, have identified some imperfections in the final rule.

However, one thing is clear: the PBGC took the comments on its interim rule quite seriously and its final rule went a long way to address many of the bigger picture — even existential — shortcomings of the interim rule with respect to the ultimate goals of ARPA.

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[i] 29 U.S.C. § 1432.

[ii] 86 Fed. Reg. 36,598 (July 12, 2021).

[iii] 87 Reg. 40,968 (July 8, 2022). The final rule is effective August 8, 2022, and will generally apply to both new applications and previously submitted applications if the plan submits a supplemental application.

[iv] Specifically, as noted above, ARPA states that "[t]he amount of financial assistance provided to a multiemployer plan eligible for financial assistance ... shall be such amount required for the plan to pay all benefits due during the period beginning on the date of payment of the special financial assistance payment under this section and ending on the last day of the plan year ending in 2051, with no reduction in a participant's or beneficiary's accrued benefit as of March 11, 2021 " 29 S.C. § 1432(j)(1). Further, in describing the reason for assistance, the Report of the Committee on the Budget House of Representatives to Accompany H.R. 1319, states that "The Committee believes that implementing a special financial assistance program for the most financially troubled plans ... will..... permit these plans to restore their solvency." H.R. Rep. No. 117-7, p.850.

[v] The Department of Labor provided some comfort from a fiduciary perspective, stating informally that it believes ARPA "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" and that additional guidance is forthcoming. U.S. Department of Labor Statement on PBGC "Special Financial Assistance" Interim Final Rule for Eligible Multiemployer Plans, available at https://dol.gov/agencies/ebsa/laws-and- regulations/laws/arp/dol-statement-on-pbgc-special-financial-assistance-interim-final-rule.

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