



# The PBGC Interim Final Rule on Special Financial Assistance: What it Means for Multiemployer Plans and Participating Employers

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**Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).





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# Joining You Today

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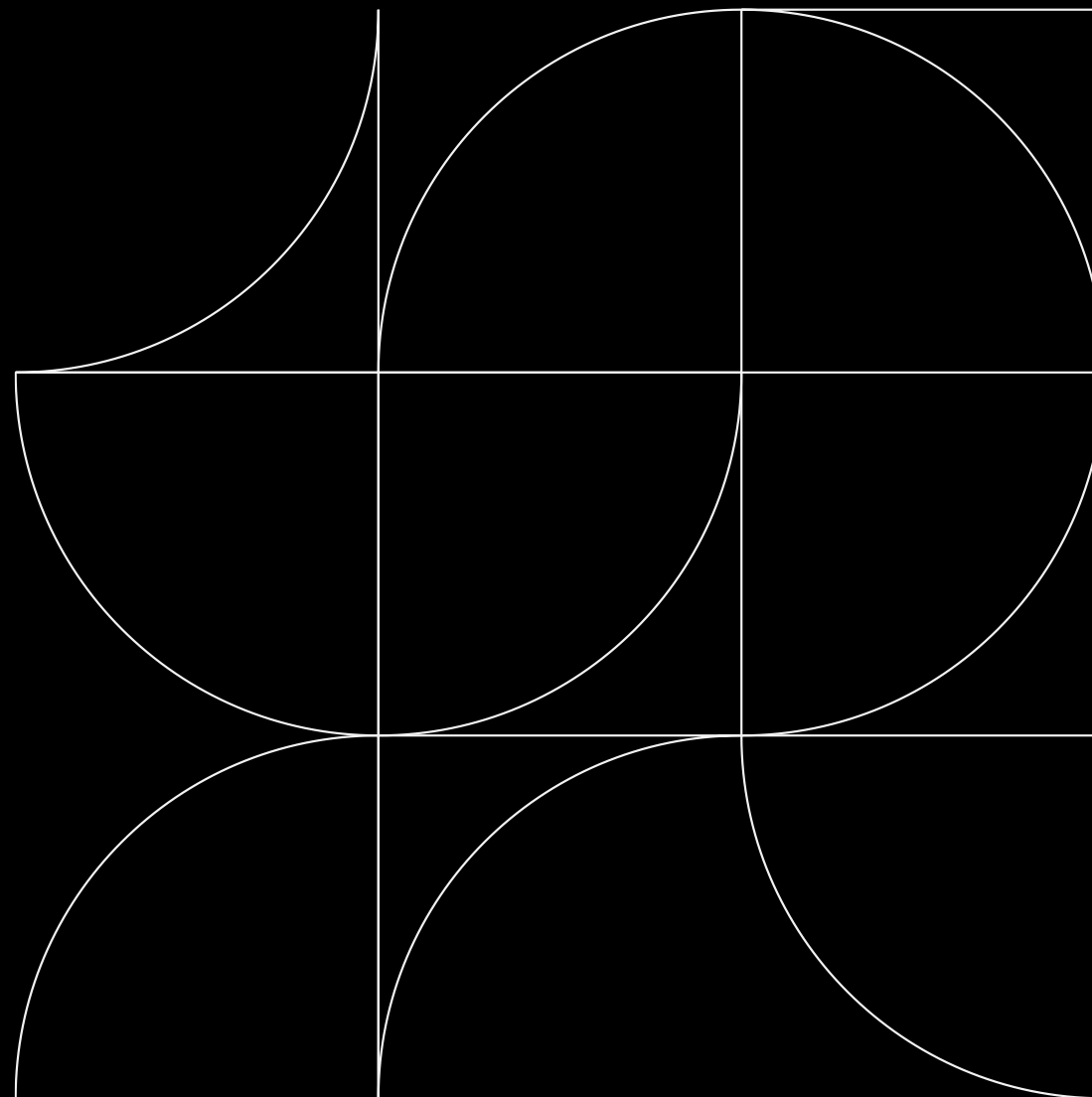


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# Agenda

01	Overview
02	Eligible Plans
03	Amount and Calculation of SFA
04	Application Process
05	SFA Restrictions and Conditions
06	Withdrawal Liability
07	Additional Regulations
08	Discussion
09	Questions

# Overview



# Multiemployer Pension Reform in American Rescue Plan Act

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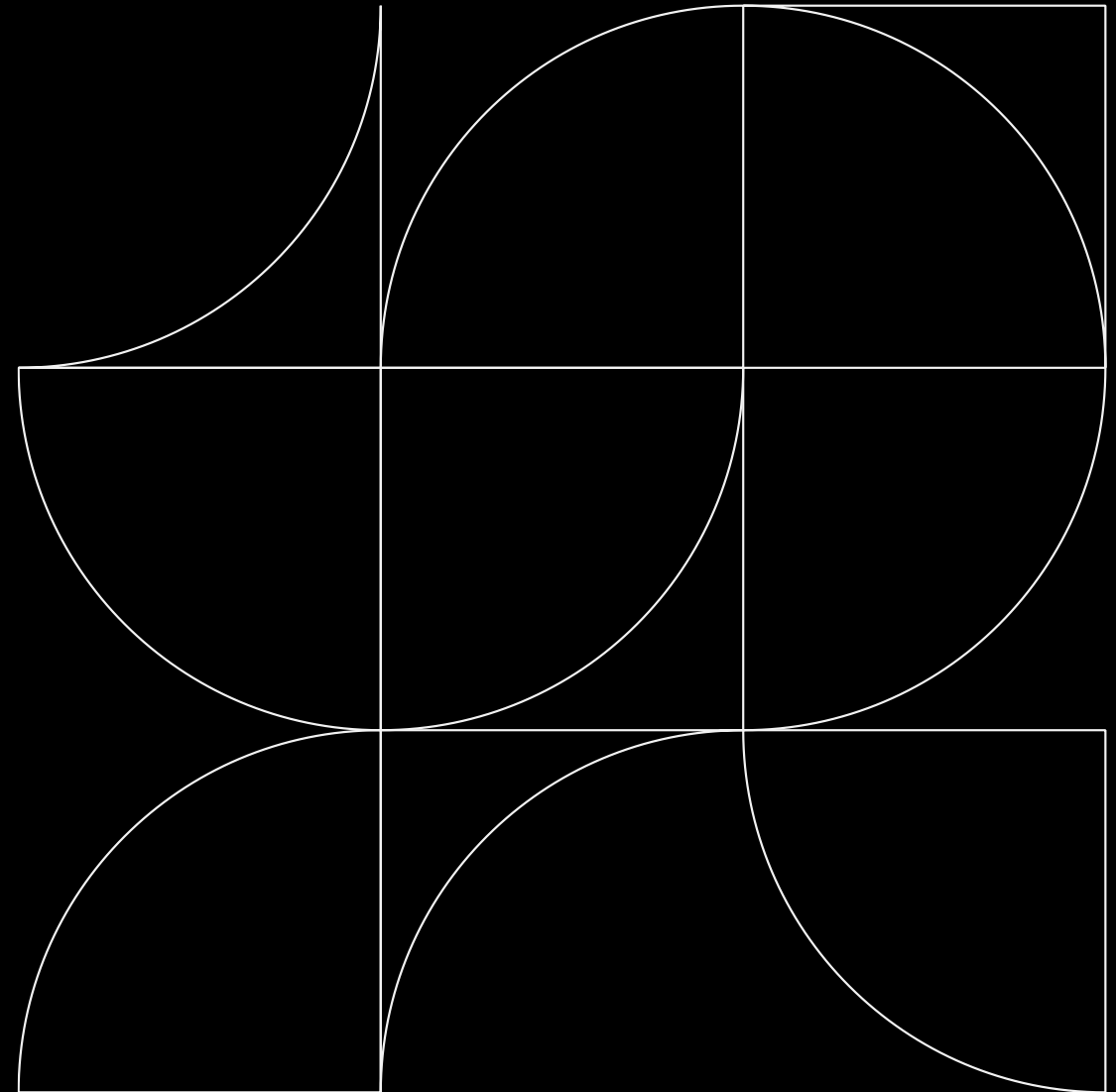
- Signed into law March 11, 2021
- Key provisions:
  - Special Financial Assistance for qualifying plans in an amount necessary to pay all benefits due through plan years ending 2051
  - Other funding relief
  - Grants, not loans - **No repayment required**
- July 9, 2021 - PBGC announces Interim Final Rule (29 CFR Part 4262), effective July 12th
  - Issued without APA notice and comment period, and 30-day delay before implementation for good cause shown and because it was impracticable
- PBGC is providing a 30-day public comment period, through August 11, 2021
  - PBGC may include changes in a final rule in response to the comments

# Multiemployer Pension Reform in American Rescue Plan Act

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- Estimated cost:
  - \$86 billion (CBO)
  - \$94 billion (PBGC)
- Estimated number of plans that will qualify:
  - 185 plans (average based on 500 simulations by the CBO)
  - More than 200 plans (PBGC modelling) covering more than 3 million participants and beneficiaries
- Estimated number of plans that would otherwise have become insolvent within 15 years: Over 100

# Eligible Plans





# Plan Eligibility

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## What plans are eligible?

- Plans in critical and declining status in any plan year beginning in 2020 through 2022
- Plans that suspended benefits in accordance with MPRA prior to March 12, 2021
- Plans that meet each of the following in any plan year beginning in 2020 through 2022
  - In critical status
  - Has a modified funding percentage (current value of plan assets / current liabilities) less than 40%
  - Over 60% of participants are inactive (ratio of active to inactive less than 2 to 3)
- Plans that became insolvent after December 16, 2014 and have remained insolvent and have not been terminated as of March 11, 2021

# Plan Eligibility

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## Further clarification on eligibility

- Recall: Plans that meet each of the following in any plan year beginning in 2020 through 2022
  - In critical status
  - Has a modified funding percentage (current value of plan assets / current liabilities) less than 40%
  - Over 60% of participants are inactive (ratio of active to inactive less than 2 to 3)
- Data from Form 5500s
- Calculating active to inactive ratio
- Multiple plan years

# Plan Eligibility

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## What plans are not eligible?

- Plans that elected critical and declining status under ERISA Section 305
  - Funded status not yet certified
- Plans terminated by mass withdrawal prior to January 1, 2020

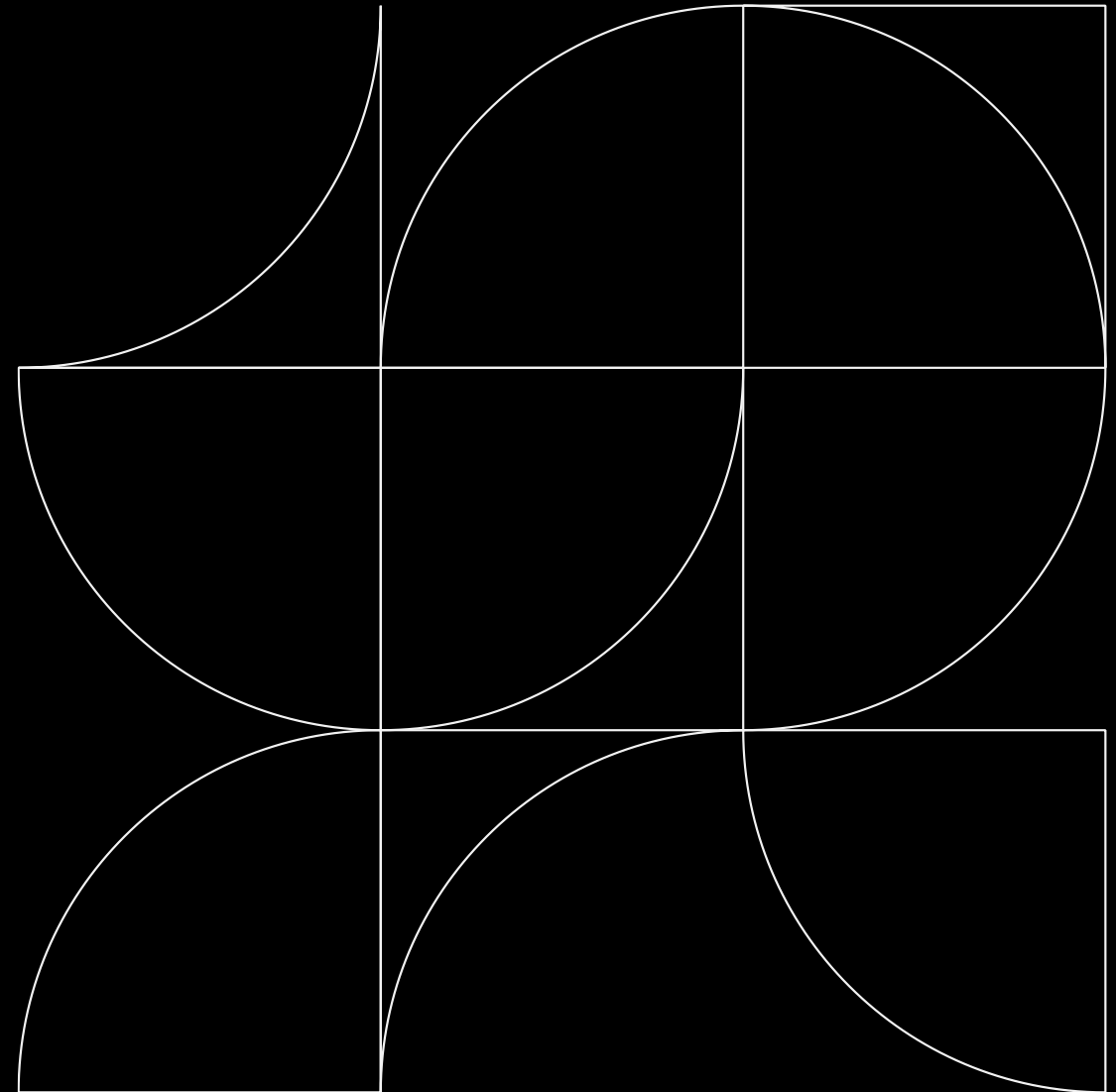
# Assumptions for Eligibility

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## What assumptions do you use to determine eligibility?

- Zone certification issued prior to January 1, 2021
  - PBGC required to accept assumptions incorporated into certification, unless clearly erroneous
- Zone certifications not issued prior to January 1, 2021
  - Plan determines whether critical or critical and declining using assumptions from certification prior to January 1, 2021, unless unreasonable
  - Must disclose proposed changes to unreasonable assumptions and demonstration they are reasonable

# Amount and Calculation of SFA



# Amount of Special Financial Assistance

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## ERISA 4262(j)(1):

- Amount of SFA 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... and ending on the last day of the plan year ending in 2051...”

## PBGC

- “the plain meaning of the statutory language is that SFA is the amount by which a plan’s resources fall short of its obligations, taking all plan resources and obligations into account.”

# Amount of SFA (cont.)

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- Amount of SFA is the amount, as of the SFA Measurement Date, by which:

SFA-Eligible Obligations

exceed

SFA-Eligible Resources

# Amount of SFA (cont.)

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## SFA-Eligible Obligations:

- Present value of benefits expected to be paid during SFA Coverage Period (including any reinstatement of benefits that were suspended), plus
- Present value of administrative expenses expected to be paid by the plan during the SFA Coverage Period (excluding amounts an insolvent plan may owe the PBGC for financial assistance already received).



# Amount of SFA (cont.)

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## SFA-Eligible Resources:

- FMV of plan assets, plus
- PV of future contributions, withdrawal liability payments, other payments expected to be made to the plan (excluding SFA and any amounts that an insolvent plan expects to receive)

# Amount of SFA (cont.)

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## Insolvent Plans

- PBGC assistance to insolvent plans is paid as loan.
- PBGC will issue a demand for repayment of loan when SFA application is approved.
- SFA will include amount owed to PBGC (as of the date SFA is paid), and will be deducted from SFA.

# Calculation of SFA

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- Deterministic: Calculations to be made on a deterministic basis using a single set of assumptions and generally acceptable actuarial practices and provisions as set forth in Section 4262.4(e)
  - Projections must be made based on participant data as of the 1st day of the plan year in which the initial application is filed.
  - If the filing is less than 270 days after the 1st day of the plan year, and that year's actuarial valuation is not complete, projections may be based on the prior year.
- Interest Rate Assumption: Calculations to use a rate that is ***the lesser of***:
  - The long-term interest rate used for funding standard account purposes as projected in the most recent certification of plan status completed before January 1, 2021; and
  - The “third segment rate” specified in ERISA Section 303(h) (corporate bond yield curve based on bonds maturing after 20 yrs) plus 200 basis points, for the month the plan's application is filed or one of the three preceding months, as selected by the plan (approximately 5.5% currently)

# Calculation of SFA

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- Assumptions other than the Interest Rate:
- Plan to use other assumptions from most recent certification of plan status prior to January 1, 2021 -- as long as reasonable.
- If the Plan determined that any such assumptions are unreasonable, it may include a proposed change in its SFA application, except with respect to the interest rate assumption. The application must include
  - Why the original assumption is no longer reasonable
  - Propose and demonstrate why the changed assumption is reasonable
- The PBGC will accept a plan's proposed changes to these assumptions (other than interest rate) unless it determines that the assumption is "individually unreasonable," or the proposed changes in assumptions (excluding the interest rate) are "unreasonable in the aggregate."
- PBGC will provide guidelines for changed assumptions at [www.pbgc.gov](http://www.pbgc.gov).

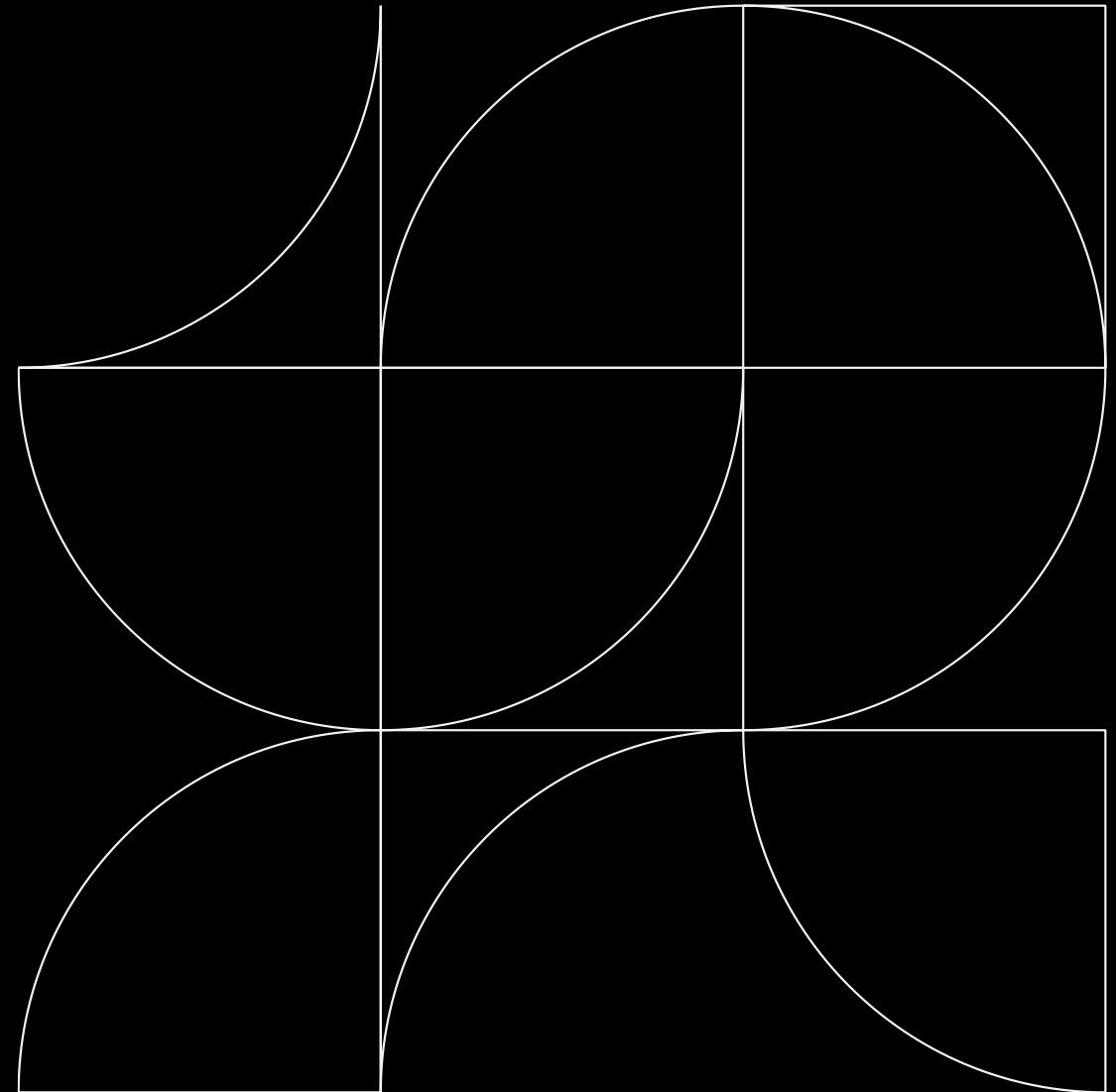
# Events disregarded for Calculation of SFA

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Certain events occurring from July 9 ,2021 to SFA Measurement Date disregarded in determining amount of SFA:

- Mergers
- Transfer of assets or liabilities (including spinoffs)
- Benefit increases (other than restoration of benefits suspended under MPRA)
- Contribution reductions (unless the plan demonstrates, in accordance with instructions on the PBGC website, that the risk of loss to participants and beneficiaries is reduced by the reduction)

# Application Process



# Application Process

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## What needs to be filed with SFA application?

- Initial application
  - Basic plan information (ERISA Reg. Section 4262.7)
  - Actuarial and financial information (ERISA Reg. Section 4262.8)
- Executed plan amendment
  - “Beginning with the SFA measurement date selected by the plan in the plan’s application for special financial assistance, 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.”

# Application Process

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## What needs to be filed with SFA application?

- Proposed plan amendment to reinstate MPRA cuts
- PBGC checklist and other required information from [www.PBGC.gov](http://www.PBGC.gov)
- Trustee signature
  - “Under penalties of perjury under the laws of the United States of America, I declare 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, and such facts are true, correct, and complete.”
- Actuarial certification
- Duty to supplement and clarify
- Publicly available



# Application Process

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## What about plans with partitions?

- Approved for partition by PBGC prior to March 11, 2021
- Alternative process (ERISA Reg. Section 4262.9)
- Single application
- Priority group 2

# Application Process

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## What's the deadline to apply?

- Initial applications – December 31, 2025
- Revised applications – December 31, 2026
- PBGC -- 120 day turnaround

# Application Process

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## Multiple Applications

- ERISA 4262(f) provides two application deadlines - one for initial applications (12/31/25) and one for revised applications (12/31/26).
- PBGC clarifies that there is no limit to number of times that a plan can file a revised application (as long filed by 12/31/26).
- Assumed interest rate is rate used in initial application.

# Application Process

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## Which plans will be given priority?

- Priority until March 11, 2023
- Priority Groups
  1. Plan is insolvent or expected insolvent by March 11, 2022
    - Applications beginning July 9, 2021
  2. Plan suspended benefits under MPRA as of March 11, 2021, or expected insolvent within 1 year of application, or undergone PBGC partition
    - Applications beginning January 1, 2022, or earlier date specified on PBGC website

# Application Process

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## Which plans will be given priority?

3. Plan in critical and declining and 350,000 or more participants
  - Applications beginning April 1, 2022, or earlier date specified on PBGC website
4. Plan project insolvent by March 11, 2023
  - Applications beginning July 1, 2022, or earlier date specified on PBGC website
5. Plan project insolvent by March 11, 2026
  - PBGC will specify date on website not later than February 11, 2023
  - At least 21 days in advance of such date
6. Plan project by PBGC to have present value of financial assistance under ERISA Section 4261 that exceeds \$1,000,000,000.
  - PBGC will specify date on website not later than February 11, 2023
  - At least 21 days in advance of such date
- Additional priority groups

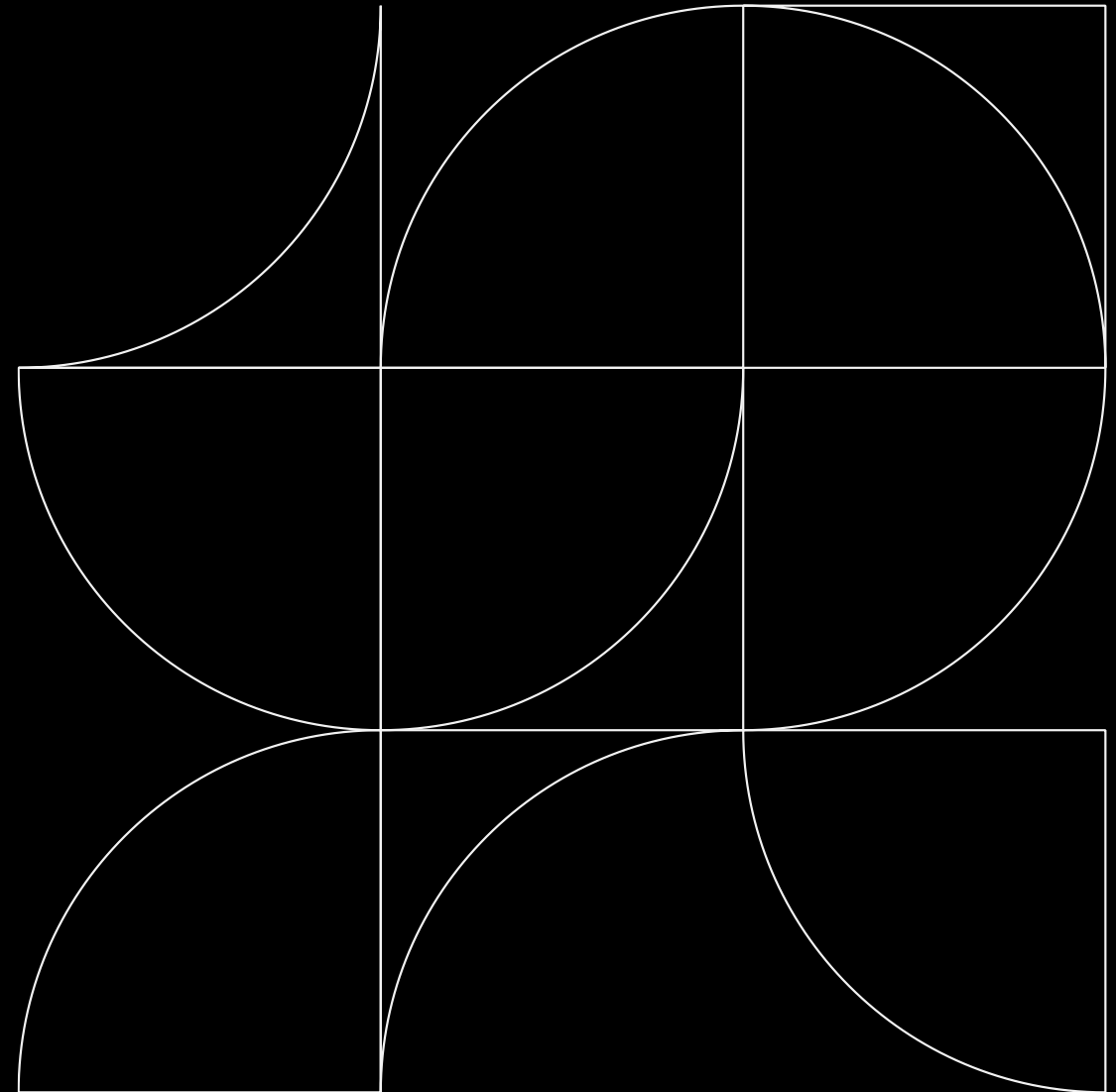
# Application Process

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## How do you submit an emergency filing?

- Beginning with PBGC starts accepting **applications for prior group 2**
- May submit emergency application if:
  - Plan is insolvent or expected insolvent within 1 year of filing application or suspended benefits under MPRA
- Notifies PBGC before submitting application
  - Qualifies as **emergent**
  - PBGC website

# SFA Restrictions and Conditions



# General Restrictions on Use of SFA

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- Must be segregated from other plan assets
- May only be used to pay benefits and administrative expenses
- May be used before other plan assets



# Investment Restrictions

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- Can only be invested in fixed income securities denominated in U.S. dollars. Can be:
  - Individual bonds, securities, other debt securities
  - Permissible fund vehicles
    - ETFs
    - Mutual funds
    - Pooled trusts
- Permissible fund vehicles must be invested solely in U.S. dollar denominated fixed income securities, where average credit quality is investment grade, weighted by market value

# Investment Restrictions (cont.)

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- Up to 5% of assets attributable to SFA may be invested in securities or permissible fund vehicles that were investment grade at time of purchase but no longer are.
- Limits on use of leverage and derivatives: Can't increase interest rate risk or credit risk beyond risk of physical securities.
- During SFA Coverage Period, plan assets, including SFA, must be invested in permissible investments sufficient to pay at least 1 year (or, if earlier, until the plan is projected to become insolvent) of projected benefit payments and administrative expenses.

# PBGC Requesting Comment on Investment Restrictions

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- PBGC recognizes that overly restrictive investment requirements could have adverse impact on plan financial health, especially considering historically low interest rates on fixed income.
- Investment requirements are intended to be “starting point.”
- PBGC looking for balance between safety and flexibility for plan to decide overall investment policy.
- PBGC seeking comment on specific questions:
  - Other vehicles that are like fixed income?
  - Appropriate to limit investments in fixed income?
  - Appropriate amount of SFA to be invested in non-investment grade securities?
  - Proper relationship of SFA restrictions to other plan asset allocations?

# Conditions on Relief

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## What conditions apply to plans receiving relief?

- Deemed to be in critical status until the last plan year ending in 2051
- Prohibition on benefit increase during SFA period if based on service accrued prior to relief (other than restoring MPRA cuts)
- No decreases in contributions per CBUs (e.g. \$ per hour worked)
  - Compared to CBAs or plan documents in effect on March 11, 2021
- PBGC approval of reductions in contributions over \$10 million or 10% of all employer contributions

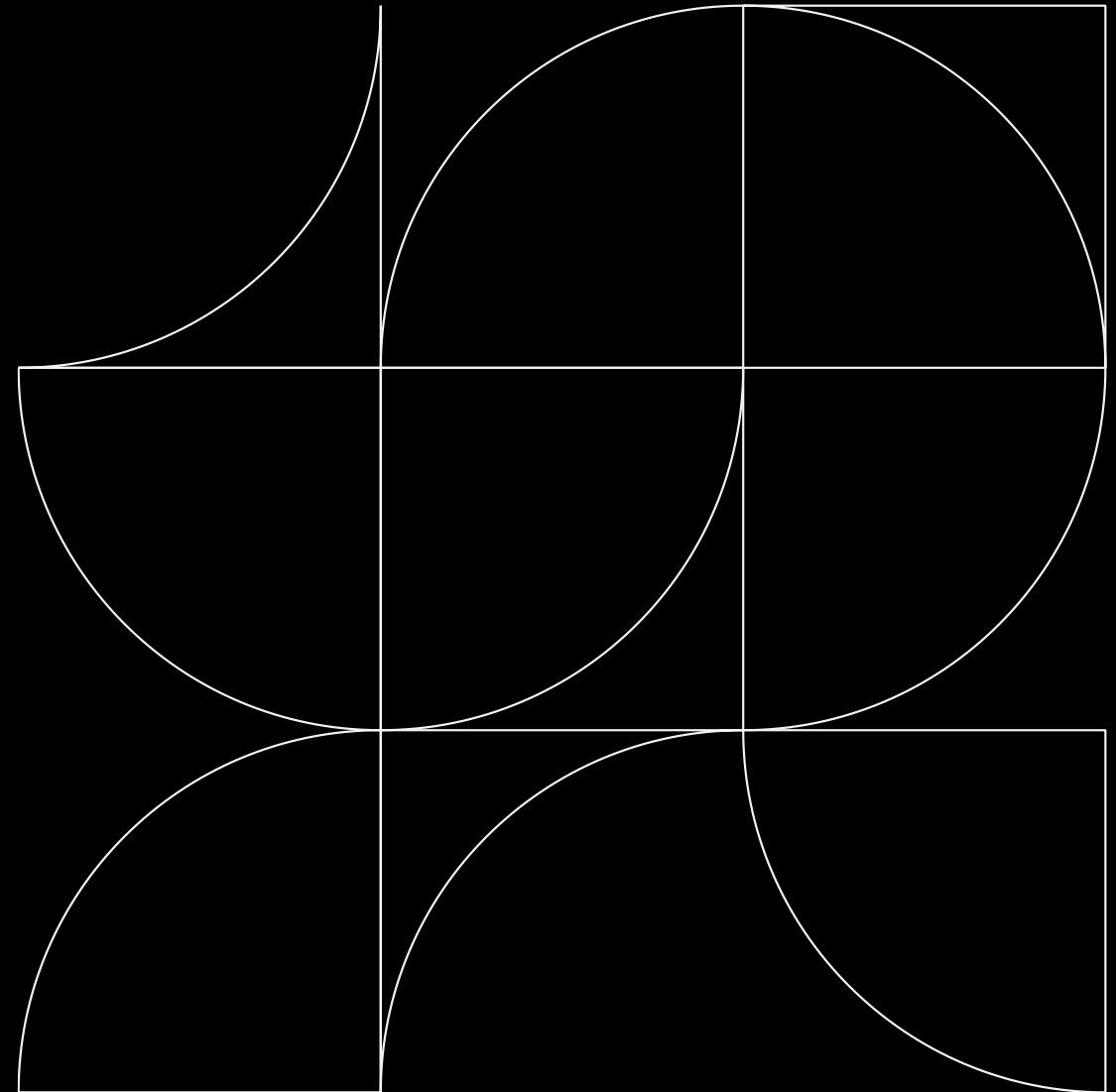
# Conditions on Relief

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## What conditions apply to plans receiving relief?

- PBGC approval for transfers of assets or liabilities (e.g., spinoff/merger)
- Soliciting public comments
- The PBGC, in consultation with Treasury, is authorized to issue additional regulations/conditions on plans receiving special financial assistance
  - May 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
  - PBGC also authorized to regulate withdrawal liability for plans receiving assistance

# Withdrawal Liability



# Withdrawal Liability

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- Earlier drafts of ARPA provided that SFA would not be counted when calculating withdrawal liability.
- The Interim Final Rule **does not** require that plans disregard SFA in calculating withdrawal liability
  - PBGC acknowledged the benefits of such a restriction
  - Ultimately rejected it because “[t]his alternative was determined to be more administratively complex and therefore less desirable.”
- Adopted two other restrictions
- PBGC can always amend the rules at a later date
- PBGC recognizes that the payment of SFA “was not intended to reduce withdrawal liability or to make it easier for employers to withdraw.”

# Withdrawal Liability – Restriction #1

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- Withdrawal liability interest assumptions must be the PBGC’s mass withdrawal interest assumptions that approximate the market price that insurance companies charge to assume a similar pension-benefit-like liability for withdrawals after the plan year in which the plan receives SFA 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.
- Without the interest assumption change “the receipt of SFA could substantially reduce withdrawal liability owed by a withdrawing employer,” and “could cause more withdrawals in the near future than if the plan did not receive SFA.”



# Withdrawal Liability – Restriction #2

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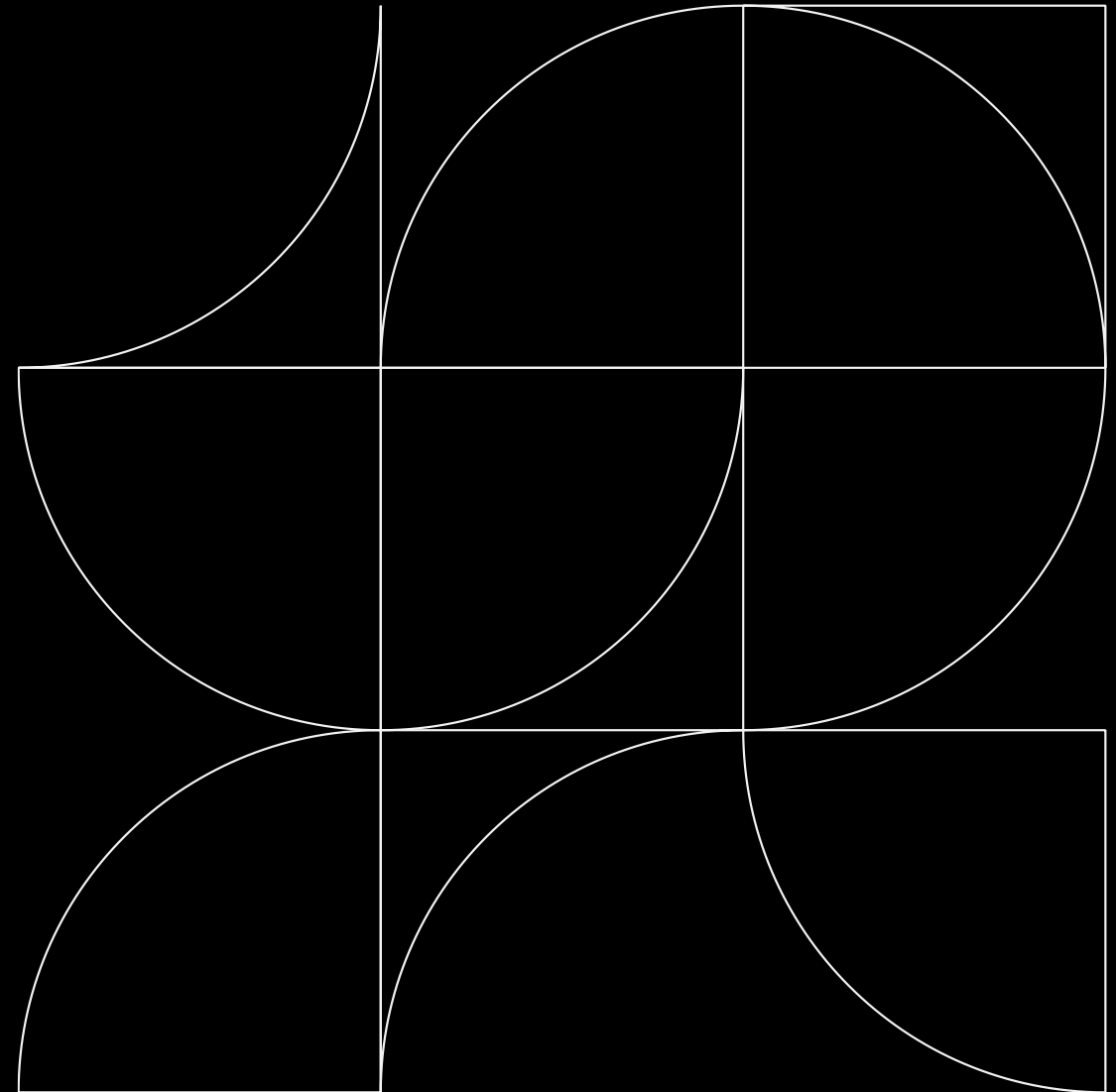
- Withdrawal liability settlements during the SFA coverage period (generally from SFA application through 2051) are subject to PBGC approval if the amount of the liability settled is greater than \$50 million calculated as the lesser of --
  - the employer’s share of UVB or the present value of the payment stream discounted using mass withdrawal interest assumptions
- Approval conditioned on PBGC determining that it is in the best interests of the plan participants and does not create an unreasonable risk of loss to PBGC.
- Information that must be provided to the PBGC for consideration includes:
  - the proposed settlement agreement and the facts leading to the settlement and amount (including the discount rate used, employer’s financial condition, and other factors);
  - employer’s most recent 3 yrs of audited financials and a 5-year cash flow projection;
  - the plan’s most recent actuarial evaluation; and
  - a statement certifying the trustees have determined that the proposed settlement is in the best interest of the plan, its participants and beneficiaries.

# Impact of Withdrawal Liability Restrictions

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- Interest Rate: Whether a withdrawing employer's liability will be greater, the same or less than it would have been "but for" a plan's receipt of SFA depends.
  - For plans already using mass termination rates for withdrawal liability, an employer's withdrawal liability should it withdraw after the plan receives SFA should be lower.
  - For plans using higher interest rates, the lower discount rate will offset the SFA, but whether an employer's liability would be higher, the same, or lower, would need to be calculated on a plan-by-plan basis.
- Settlement Approval: Unknown.
  - Barring demonstrated employer financial distress, will the PBGC bless a settlement using a discount rate higher than the mass termination rate?
  - Will the PBGC defer to the plan determination to settle and discounting based upon financial risks or the risks raised by challenges to the assessment?
  - Will the PBGC bless settlements waiving potential mass withdrawal liability?

# Additional Regulations

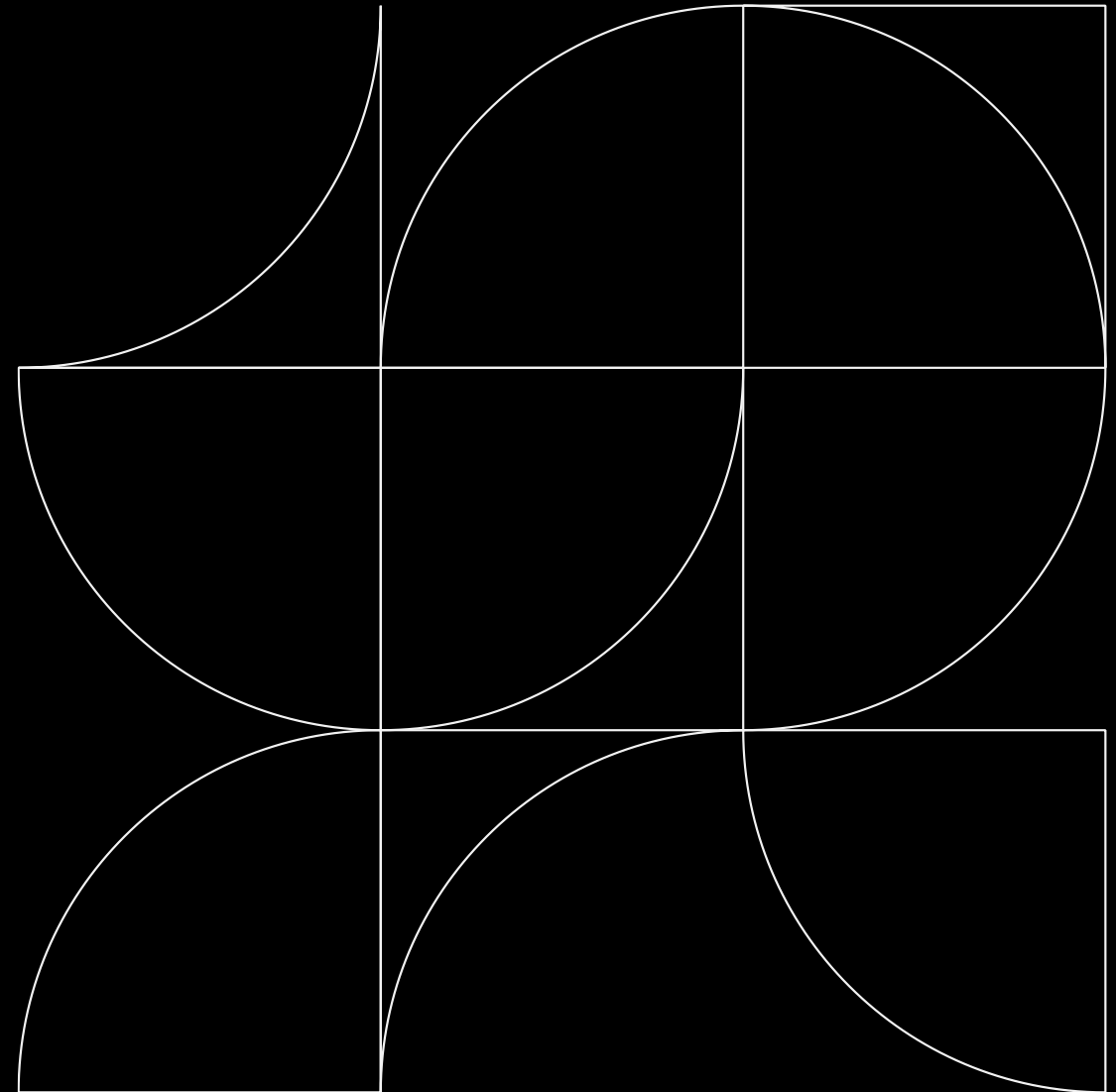


# Additional Regulations

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- Interim Final Rule subject to change
  - PBGC may change rules based on public comments
  - PBGC specifically seeking public input on refining its SFA investment rules, and on its exceptions to its SFA conditions
- PBGC plans to use its authority under ERISA Section 4213(a) to propose a separate rule of general applicability setting forth actuarial assumptions which “may” be used to determine an employer’s withdrawal liability.
  - Presumably not limited to those that receive SFA.
  - Could have a significant impact on how withdrawal liability is calculated in the future.

# Discussion



# Big Questions

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- Will the SFA as calculated and invested be enough to last 30 years?
- What happens to plans after year 30?
- Will there be a legal challenge to the interim final rule?
- What changes will the PBGC make in the final rules?
  - investment restrictions
  - withdrawal liability
- Will the SFA withdrawal liability rules work as intended?
- Impact on hybrid plans?
- Impact on ongoing employer participation?
- Will there be broader pension reform?

# Next Steps

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- Plans
  - Must assess eligibility as quickly as possible
    - Determine which priority group the plan is in
  - If eligible, apply when permitted
- Employers
  - See which plans qualify
  - Evaluate rules imposed on plans that qualify
  - Analyze long term impact on plans
  - Factor changes into benefits analysis
- Both
  - Consider whether to submit comments – deadline August 11th
  - Follow any rule amendments

# Questions?





## **Additional Resources :**

### **Beneficially Yours Blog**

<https://www.beneficiallyyours.com/>

### **Employer Labor Relations Blog**

<https://www.employerlaborrelations.com/>

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