

Issues Relating to Special Financial Assistance from the Pension Benefit Guaranty Corporation to Certain Multiemployer Defined Benefit Pension Plans

Notice 2021-38

I. PURPOSE

This notice provides guidance under § 432(k) of the Internal Revenue Code (Code) to sponsors of multiemployer defined benefit pension plans that are required to reinstate certain previously suspended benefits as a condition of receiving special financial assistance under § 4262 of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406 (88 Stat. 829 (1974)), as amended (ERISA). This notice also provides guidance on whether make-up payments with respect to previously suspended benefits under § 432(k)(2)(A)(ii) of the Code are eligible to be rolled over to another eligible retirement plan under § 402(c). In addition, this notice provides guidance on how to apply the rule in § 432(k)(2)(D)(i) under which any special financial assistance received by the plan is not taken into account in determining contributions required under § 431.

II. BACKGROUND

A. Special financial assistance

Section 4262 of ERISA and § 432(k) of the Code were enacted by § 9704 of the American Rescue Plan Act of 2021 (the ARP), Pub. L. 117-2, 135 Stat. 4 (March 11, 2021).

Under § 4262 of ERISA, the sponsor of an eligible multiemployer plan as defined in § 4262(b) may apply to the Pension Benefit Guaranty Corporation (PBGC) to receive special financial assistance, provided certain conditions are satisfied. Under § 4262(d), PBGC may provide, in regulations or guidance, for a temporary priority period that does not extend beyond March 11, 2023, during which only certain eligible multiemployer plans may apply for special financial assistance.

Section 432(k) of the Code provides rules relating to an eligible multiemployer plan that applies to PBGC for special financial assistance. Section 432(k)(1)(A) provides that the application must be made in accordance with PBGC guidance. Section 432(k)(1)(B) requires that, in the case of an eligible multiemployer plan for which benefits have been suspended under § 432(e)(9), the application must describe the manner in which the plan will reinstate suspended benefits in accordance with § 432(k)(2)(A). Section 432(k)(1)(C) describes the actuarial assumptions that a plan must use in an application for special financial assistance. Under § 432(k)(1)(D), in the case of a plan applying to PBGC for special financial assistance during any temporary priority period established pursuant to § 4262(d) of ERISA, the application must also be submitted to the Department of the Treasury (Treasury Department).

Section 432(k)(2)(A)(i) of the Code provides that an eligible multiemployer plan receiving special financial assistance must reinstate any benefits that were suspended under § 432(e)(9) of the Code or § 4245(a) of ERISA effective as of the first month in which the effective date for the special financial assistance occurs, for participants and beneficiaries as of that month. In addition, under § 432(k)(2)(A)(ii), the plan must provide payments equal to the amount of benefits previously suspended to any participants or beneficiaries in pay status as of the effective date of the special financial assistance. These make-up payments must be paid, as determined by the plan, either as a lump sum within 3 months of the effective date of the special financial assistance or in equal monthly installments over a period of 5 years, commencing within 3 months of that effective date, with no adjustment for interest.¹

Section 432(k)(2)(B) provides that the special financial assistance received by the plan may be used to make benefit payments and pay plan expenses. The special financial assistance must be segregated from other plan assets and invested by the plan in investment-grade bonds (or other investments as permitted by PBGC in regulations or other guidance). Section 432(k)(2)(C) describes conditions that PBGC, in consultation with the Treasury Department, may impose, by regulation or other guidance, on an eligible multiemployer plan that receives special financial assistance.

Section 432(k)(2)(D)(i) provides that any special financial assistance received by a multiemployer plan is not taken into account in determining contributions required under § 431. Furthermore, under § 432(k)(2)(D)(ii), if the plan becomes insolvent (within the meaning of § 418E) after receiving special financial assistance, the plan will be subject to all rules applicable to insolvent plans. Section 432(k)(2)(E) provides that a plan receiving special financial assistance is not eligible to apply for a new suspension of benefits under § 432(e)(9).

Under § 432(k)(3)(A), a multiemployer defined benefit pension plan is eligible to apply for special financial assistance pursuant to section 4262 of ERISA if:

- (i) In any plan year beginning in 2020 through 2022, the plan is in critical and declining status (within the meaning of § 432(b)(6) of the Code);
- (ii) As of March 11, 2021 (the date of enactment of the ARP), a suspension of benefits under § 432(e)(9) has been approved with respect to the plan;
- (iii) In any plan year beginning in 2020 through 2022, the plan is certified by

¹ Section 4262(k) of ERISA provides rules that are parallel to § 432(k)(2)(A) of the Code. Under § 4262(k)(1) of ERISA and § 432(k)(1)(B) of the Code, the Secretary of the Treasury must issue guidance relating to the rules for determining the benefit reinstatement and make-up payments that must be made by a multiemployer plan receiving special financial assistance, for purposes of ERISA as well as the Code. Accordingly, the guidance in this notice applies for purposes of § 4262(k) of ERISA as well as § 432(k) of the Code. Section 4262(k) of ERISA also requires the Secretary of Labor, in coordination with the Secretary of the Treasury, to ensure that plans reinstate the suspended benefits and pay the make-up payments in accordance with the guidance issued under § 432(k) of the Code.

the plan's actuary to be in critical status under § 432(b)(3), has a modified funded percentage (as defined under § 432(k)(3)(B)) of less than 40 percent, and has a ratio of active to inactive participants that is less than 2 to 3; or

- (iv) The plan became insolvent within the meaning of § 418E after December 16, 2014, has remained insolvent, and has not been terminated as of March 11, 2021.

B. Benefit suspensions

Section 305(e)(9) of ERISA and § 432(e)(9) of the Code permit the sponsor of a multiemployer defined benefit plan in critical and declining status to suspend benefits in certain situations.

Section 4245 of ERISA and § 418E of the Code provide rules with respect to insolvent multiemployer defined benefit pension plans. Under those sections, in any case in which benefit payments under an insolvent multiemployer plan exceed the resource benefit level (within the meaning of § 4245(b)(2) of ERISA and § 418E(b)(2) of the Code), any payment of benefits that are not basic benefits (within the meaning of § 4001(a)(6) of ERISA) must be suspended to the extent necessary to reduce the total benefits paid to the greater of the resource benefit level or the level of basic benefits.

C. Eligible Rollover Distributions

Under § 401(a)(31)(A) of the Code, a qualified plan must provide that if a participant or beneficiary receiving an eligible rollover distribution elects that the distribution be paid directly to an eligible retirement plan (as defined under § 402(c)(8)(B)), then the distribution must be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan specified by the participant or beneficiary.

Section 402(c) provides rules applicable to the rollover of a distribution from a qualified retirement plan, including a multiemployer defined benefit pension plan. Subject to certain exclusions, § 402(c)(4) provides that an eligible rollover distribution means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified plan. Section 402(c)(4)(A) excludes from the definition of an eligible rollover distribution any distribution that is one of a series of substantially equal periodic payments payable for life, over life expectancy, or for a specified period of 10 years or more.

Section 402(f)(1) requires a plan administrator to provide a written explanation to the recipient of an eligible rollover distribution within a reasonable period of time before making the distribution. The written explanation must describe, among other items, (i) the provisions under which the recipient may have the distribution directly transferred to an eligible retirement plan and that the automatic distribution by direct transfer applies to certain distributions in accordance with § 401(a)(31)(B), (ii) the provision

which requires the withholding of tax on the distribution if it is not directly transferred to an eligible retirement plan, and (iii) the provisions under which the distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution.

Under § 3405(c)(1), if an eligible rollover distribution is not directly rolled over into another eligible retirement plan, the distribution is subject to withholding at the rate of 20 percent.

Section 1.402(c)-2, Q&A-6(a) of the Income Tax Regulations provides that, except as provided under paragraph (b) of that Q&A, a payment is treated as independent of the payments in a series of substantially equal payments (and thus not part of the series) if the payment is substantially larger or smaller than the other payments in the series. Section 1.402(c)-2, Q&A-6(b)(2) provides that a supplemental payment from a defined benefit plan to retirees or beneficiaries will be treated as part of a series of substantially equal payments, rather than as an independent payment, provided that the supplemental payment satisfies certain conditions. These conditions are: (i) the supplement is a benefit increase for annuitants, (ii) the amount of the supplement is determined in a consistent manner for all similarly situated annuitants, (iii) the supplement is paid to annuitants who are otherwise receiving payments that would constitute substantially equal periodic payments, and (iv) the aggregate supplement is less than or equal to the greater of 10 percent of the annual rate of payment for the annuity, or \$750 or any higher amount prescribed by the Commissioner in guidance of general applicability.

D. Minimum Funding Requirements

Section 412(a)(2)(C) provides that a multiemployer plan satisfies the minimum funding standard for a plan year if the employers make contributions to or under the plan for any plan year that, in the aggregate, are sufficient to ensure that the plan does not have an accumulated funding deficiency under § 431 as of the end of that plan year. Section 431(a) provides that the accumulated funding deficiency of a multiemployer plan for any plan year is the amount, determined as of the end of that plan year, equal to the excess (if any) of (i) the total for all plan years of the charges to the funding standard account of the plan under § 431(b)(2), over (ii) the credits to that account under § 431(b)(3) (including employer contributions under § 431(b)(3)(A)) for those plan years. Accordingly, the contributions required under § 431 for a plan year (that is, the contributions necessary to avoid an accumulated funding deficiency under § 431) are the employer contributions (determined as of the end of that plan year) that would enable the total credits to the funding standard account under § 431(b)(3) to be no less than the total charges to that account under § 431(b)(2).²

² Sections 302 and 304 of ERISA provide rules that are parallel to §§ 412 and 431 of the Code. Under § 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over those provisions for purposes of ERISA as well as the Code. Accordingly, the guidance in this notice applies for purposes of §§ 302 and 304 of ERISA.

III. GUIDANCE

A. Reinstatement of suspended benefits

Under § 432(k)(2)(A)(i) of the Code, if an eligible multiemployer plan receiving special financial assistance was previously amended to suspend benefits pursuant to § 432(e)(9) of the Code or § 4245(a) of ERISA (which corresponds to § 418E(a) of the Code), the plan must be amended to reinstate those suspended benefits, effective as of the month in which the special financial assistance is paid to the plan, for individuals who are participants or beneficiaries as of that month. Accordingly, that month's benefit payment and any future payment of benefits to a participant or beneficiary must be made as if the amendment suspending benefits had never been adopted. If a plan has been amended to suspend benefits under § 432(e)(9), then the benefits that must be reinstated pursuant to § 432(k)(2)(A)(i) include all benefits suspended pursuant to that plan amendment, without regard to whether those benefits would have been reduced or eliminated in the absence of the suspension.³

If an eligible multiemployer plan receiving special financial assistance had suspended benefits operationally under § 418E(a) without adopting a plan amendment, the plan must be amended to reinstate suspended benefits, effective as of the month in which the special financial assistance is paid to the plan, for individuals who are participants or beneficiaries as of that month. The reinstatement will apply through the end of the plan year in which the effective date of the special financial assistance occurs. For subsequent plan years, the plan must apply § 418E by taking into account all plan assets, including the special financial assistance.

Under § 432(k)(2)(A)(ii), an eligible multiemployer plan that receives special financial assistance must also be amended to provide make-up payments to individuals who are participants or beneficiaries on, and who have commenced benefits by, the date the special financial assistance is paid to the plan. The make-up payments to a participant are equal to the total amount of benefits that were not paid to the participant because of the suspension under § 432(e)(9) or § 418E. Similarly, the make-up payments to a beneficiary are equal to the total amount of benefits that would have been paid to the beneficiary in the absence of the suspension that were not paid to the beneficiary because of the suspension. Thus, without regard to whether the benefits are paid to a participant or to a beneficiary, the make-up payments equal the total amount of benefits that were not paid to that individual on account of the suspension, with no actuarial adjustments (such as for interest).

The make-up payments to a participant or a beneficiary must be paid, as determined by the plan sponsor, either as a lump sum within 3 months of the date the special financial assistance is paid to the plan or in equal monthly installments over a period of 5 years, commencing within 3 months of the date of the special financial assistance is paid. The

³ If, after a suspension under § 432(e)(9), the plan has been amended to restore some or all of the benefits that were suspended, then the benefits that are reinstated pursuant to § 432(k)(2)(A)(i) do not include the benefits that were previously restored.

plan amendment providing for the make-up payments must also specify which distribution form (that is, as a lump-sum payment or as monthly installments) will apply for the make-up payments to a participant or beneficiary. If the make-up payments are paid over 5 years, then the installments do not include any adjustment for interest and must be paid without regard to whether the participant or beneficiary survives to the end of the 5-year period.

B. Rollover eligibility of make-up payments

Because a multiemployer plan that receives SFA is required to be amended to provide make-up payments to retirees and beneficiaries in addition to the annuity payments those individuals already receive, these make-up payments are independent payments under § 1.402(c)-2, Q&A-6(a) for purposes of §§ 401(a)(31), 402(c) and (f), and § 3405(c)(1) unless the payments satisfy the requirements of § 1.402(c)-2, Q&A-6(b)(2) to be treated as supplemental payments that are part of a series of substantially equal periodic payments.

A make-up payment paid in monthly installments satisfies the requirements of § 1.402(c)-2, Q&A-6(b)(2)(i) (that the supplement is a benefit increase for annuitants); § 1.402(c)-2, Q&A-6(b)(2)(ii) (that the amount of the supplement is determined in a consistent manner for all similarly situated annuitants); and § 1.402(c)-2, Q&A-6(b)(2)(iii) (that the supplement is paid to annuitants who are otherwise receiving payments that would constitute substantially equal periodic payments). However, because the make-up payments vary in size relative to the size of a participant's or beneficiary's annuity payments, a make-up payment could fail to satisfy the maximum payment condition under § 1.402(c)-2, Q&A-6(b)(2)(iv) (that the aggregate supplement is less than or equal to the greater of 10 percent of the annual rate of payment for the annuity, or \$750 or any higher amount prescribed by the Commissioner in guidance of general applicability). Pursuant to this authority to increase the \$750 limit, this notice provides that, with respect to a make-up payment under § 432(k)(2)(A)(ii) that is paid in the form of monthly installments over 5 years, to the extent that the aggregate supplement exceeds the limit set forth in § 1.402(c)-2, Q&A-6(b)(2)(iv), that limit is increased to the amount of the make-up payment. Accordingly, make-up payments that are paid in the form of monthly installments over 5 years are treated as part of a series of substantially equal periodic payments and are not eligible rollover distributions subject to the requirements of §§ 401(a)(31), 402(f), or 3405(c)(1).

A make-up payment under § 432(k)(2)(A)(ii) that is paid in the form of a lump sum also satisfies the requirements of § 1.402(c)-2, Q&A-6(b)(2)(i) – (iii) and, if the lump sum is less than or equal to the greater of 10 percent of the annual rate of payment for the annuity or \$750 (determined without regard to the increase in the preceding paragraph), the lump sum also satisfies the requirements of § 1.402(c)-2, Q&A-6(b)(2)(iv). In that case, the lump sum is treated as part of a series of substantially equal periodic payments and, accordingly, is not an eligible rollover distribution. By contrast, a make-up payment paid in the form of a lump sum that exceeds the limit under § 1.402(c)-2, Q&A-6(b)(2)(iv) is not a supplemental payment that is part of a series of periodic

payments and retains its character as an independent payment that is an eligible rollover distribution. As a result, the plan administrator must provide the participant or beneficiary who is receiving the make-up payment in the form of a lump sum exceeding that limit with the § 401(a)(31) election to make a direct rollover to an eligible retirement plan and the notice described under § 402(f). Unless that participant or beneficiary elects to roll over that payment to an eligible retirement plan within the meaning of § 402(c)(4), the make-up payment will be subject to withholding under § 3405(c)(1) at the rate of 20 percent. This notice does not exercise the Commissioner's authority to increase the limit under § 1.402(c), Q&A-6(b)(2)(iv) with respect to make-up payments paid as lump sums.

C. Submission of certain applications to the Treasury Department

Section 432(k)(1)(D) of the Code requires, in the case of a plan applying for special financial assistance under PBGC's rules providing for temporary priority consideration, that the plan's application be submitted to the Treasury Department. In the case of an application to which that provision applies, the requirement will be satisfied by submission to PBGC in accordance with guidance issued by PBGC. See 29 CFR 4262.10(c)(2), which provides PBGC will transmit the application to the Treasury Department on behalf of the plan.

D. Disregard of special financial assistance

As described above, § 432(k)(2)(D)(i) of the Code provides that any special financial assistance received by a multiemployer plan is not taken into account in determining contributions required under § 431. Accordingly, the amounts in the special financial assistance account established pursuant to § 4262 of ERISA are not included in the plan's assets for purposes of determining the contributions required under § 431 of the Code. This exclusion of the special financial assistance account applies for all purposes under § 431, including the determination of the fair market value of assets used under § 431(c)(6) and the determination of the actuarial value of assets under § 431(c)(2) (based on the fair market value of assets).

The amount in the special financial assistance account is equal to the initial special financial assistance paid by PBGC as adjusted by the investment return on the assets held in that account and reduced by benefit payments and expenses that are paid from that account. To the extent that a liability for benefits or expenses is satisfied by payments from the special financial assistance account, there will be no corresponding reduction in the portion of the plan's assets that are taken into account for purposes of § 431. As a result, any benefit or plan expenses paid from the special financial assistance account during a plan year will generate an actuarial gain for that plan year. If the funding method used by the plan includes a determination of an actuarial gain or loss for each plan year, then the actuarial gain generated from any benefit or plan expense paid from the special financial assistance account in a plan year will be included in the actuarial gain or loss for that plan year and amortized over 15 years in accordance with § 431(b)(3)(B)(ii).

IV. DRAFTING INFORMATION

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