



# AFL-CIO

AMERICA'S UNIONS

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of Labor and  
Congress of Industrial  
Organizations**

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August 11, 2021

*Submitted via email to: [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov)*

Regulatory Affairs Division  
Office of the General Counsel  
Pension Benefit Guaranty Corporation  
1200 K Street, N.W.  
Washington, DC 20005-4026

**Re: Interim Final Rule for Special Assistance by PBGC  
RIN 1212-AB53**

Ladies and Gentlemen:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I appreciate the opportunity to comment on the Interim Final Rule (IFR), published in the Federal Register on July 12, 2012,<sup>1</sup> implementing the Special Financial Assistance (SFA) Program for financially troubled multiemployer pension plans.<sup>2</sup>

The AFL-CIO is a voluntary, democratic federation of 56 national and international labor unions that collectively represent 12.5 million working people. We help people who want to organize so they can negotiate with their employers for fair pay and working conditions. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded, and that their workplaces are safe. We also provide a voice for working people in politics and in the legislative process.

The AFL-CIO has much at stake in the SFA program and its successful implementation. By definition, a multiemployer pension plan covers workers represented by one or more unions, and the active and retired members of many unions affiliated with the AFL-CIO participate in these plans. We appreciate the PBGC's work in producing the IFR, especially given the short statutory deadline, and we welcome the opportunity to submit these comments in an effort to ensure that the final rule in no way undercuts the statutory mandate of the SFA Program.

<sup>1</sup> See 86 Fed. Reg. 36598-36631.

<sup>2</sup> The SFA Program was enacted on March 11, 2021, as part of the American Rescue Plan Act of 2021.

**The IFR is at odds with the clear statutory language that, at a minimum, plans must receive sufficient SFA to cover benefits through 2051.**<sup>3</sup> Because of an incongruity between the interest rate assumptions mandated for a plan’s SFA application and the likely rate of return on the investment of SFA assets, many plans receiving SFA will become insolvent well before 2051.

While most eligible plans will be required to use an interest rate of 5.5% in their SFA application,<sup>4</sup> that rate will not reflect the total rate of return many SFA recipient plans will likely earn. That is because, unless PBGC exercises its authority to allow for investment in other asset classes, the SFA received must be invested in investment grade bonds that earn just 2% to 3%—substantially less than the 5.5% interest rate PBGC will use to determine the amount of assistance.<sup>5</sup> Many plans certainly will not be able to attain a 5.5% return on total plan assets if they are required to invest SFA assets exclusively in investment grade bonds, thereby resulting in a funding shortfall. Thus, as it now stands, the IFR, for many plans, perversely bakes plan insolvency before 2051 into receipt of the SFA.

**We urge the PBGC to allow for SFA applications with bifurcated interest rate assumptions, as well as broaden the permitted investments for SFA assets**<sup>6</sup>.

To avoid the problematic result of the mismatched interest rate assumptions, PBGC should permit plans to use bifurcated interest assumptions in their SFA application while expanding the permitted investments for SFA assets. Under a bifurcated approach, eligible plans would perform a solvency projection. Existing assets and future contributions would be projected at the plan’s interest rate in the most recent pre-2021 zone status certification with an interest rate cap and the SFA would be projected at rates consistent with PBGC permitted investments.

We respectfully disagree with PBGC’s assertion that it lacks the authority to offer plans such a bifurcated interest rate approach—there is a clear statutory gap for PBGC to address. That is, at the time of plans’ 2020 zone certifications, the SFA program was non-existent. As no plans were in receipt of SFA, their certifications did not include an interest rate or other investment return assumption for these funds.

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<sup>3</sup> “The amount of 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 . . . .” Employee Retirement Income Security Act of 1974 (ERISA), §4262(j)(1) [Public Law 93–406] [As Amended Through P.L. 117–2, Enacted March 11, 2021]

<sup>4</sup> The plan is statutorily required to use the interest rate from its 2020 zone status certification, subject to the “interest rate limit,” i.e. the upper limit of the third segment bond rate of the 24-month average yield curve, without the 25-year corridor, for the application filing month or the preceding 3 months, plus 200 basis points. See ERISA §4262(e). This limit, currently, is just under 5.5%.

<sup>5</sup> We would also note that many other qualifying investments, U.S. Treasuries to name one, are now earning negative real returns.

<sup>6</sup> “Restrictions on the Use of Special Financial Assistance.—Special financial assistance received under this section and any earnings thereon may be used by an eligible multiemployer plan to make benefit payments and pay plan expenses. Special financial assistance and any earnings on such assistance shall be segregated from other plan assets. *Special financial assistance shall be invested by plans in investment-grade bonds or other investments permitted by the corporation.*” ERISA §4262(l) [emphasis added.]

As such, the expected return on SFA assets is not the return used in the 2020 zone certification; it is based on a new assumption to which the cap does not apply. Accordingly, PBGC has latitude to clarify that the interest rate assumption described under ERISA section 4262(e)(3) does not apply to the expected rate of return on SFA assets, and plan actuaries should be able to select an interest rate assumption for SFA assets consistent with the investment restrictions imposed on the SFA.

The use of a bifurcated interest rate approach would have a relatively modest impact on the total cost of the SFA program. Based on the interpretations in its IFR, PBGC estimates total financial assistance to be \$94 billion. We believe a bifurcated interest approach would increase that amount by not much more than 20%—in other words, to not much more than \$113 billion.<sup>7</sup>

As to broadening the category of permitted SFA investments, the security of SFA assets and the need for higher investment returns can be balanced appropriately by permitting pension plans to invest SFA assets in prudently selected investments that will provide a higher return. As the statute provides, “[s]pecial financial assistance shall be invested by plans in investment-grade bonds *or other investments as permitted by the corporation.*”<sup>8</sup> For example, PBCG’s approval of equity investments as part of a prudent asset allocation, along with modest exposure to other asset classes such as real estate, high yield bonds, and private credit, would greatly improve pension plans’ ability to achieve a rate of return that matches the prescribed discount rate without significant additional risk. Moreover, to further minimize exposure to material losses, PBGC can provide maximum limits on investments in particular asset classes.

**MPRA plan trustees face an impossible dilemma which is at odds with the statutory objective.** Since the enactment of the Multiemployer Pension Reform Act of 2014 (MPPRA), 18 plans have made the difficult and painful decision to reduce benefits in order to remain solvent. These plans, if they elect the SFA, will be required to back-fill benefit cuts and reinstate full benefits going forward. Clearly, plans that choose to receive the SFA will do right by their retirees—but accepting the SFA will jeopardize active participants’ future benefits. This is because the Treasury Department’s approval of the MPRA benefit suspensions was contingent on their ability to restore plan solvency.<sup>9</sup> In contrast, as the IFR now stands, there is no question that the amount of SFA received will at best forestall, and not restore, plan solvency.

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<sup>7</sup> The Segal Group, in a July 29, 2021 presentation to the AFL-CIO Retirement Security Working Group, provided examples that illustrate the impact of the bifurcated interest rate approach, assuming an interest rate of 2.5% is applied to SFA assets. The examples showed the bifurcated approach would increase the amount of SFA by about 20% when compared to using a single interest rate of 5.5%. Segal also noted that the percentage increase in SFA would be less for eligible plans that have interest rate assumptions lower than 5.5%. The examples provided by Segal are attached to these comments.

Alternatively, PBGC could prescribe a reasonable interest rate assumption for SFA assets. For example, depending on what investments PBGC permits for SFA assets, it may be reasonable to prescribe an assumption based on the first, second, and third segment bond rates of the 24-month average yield curve (without adjustment).

<sup>8</sup> ERISA §4262(l).

<sup>9</sup> See 26 C.F.R. 1.432(e)(9)-1(d)(5)(ii)(A)(3).

Plan trustees will then face a problematic choice, pitting retirees against active participants. Their decision, whatever they decide, inevitably will lead to expensive and needless litigation..<sup>10</sup>

To avoid this outcome, we recommend that PBGC adopt the solvency standard found in MPRA which was designed to ensure that plans approved for benefit suspensions would not run out of money right at 30 years. In this way, MPRA plans receiving SFA will not be financially worse off than they would have been without the assistance.

If PBGC cannot adopt the solvency standard found in MPRA, we encourage other measures that will avoid—or at least lessen—the challenge facing MPRA plan trustees. For example, PBGC could apply a special rule that permits MPRA plans to determine their amount of SFA based on an adjusted asset value that disregards any investment gains from the effective date of the benefit suspension to the SFA measurement date. Furthermore, PBGC could permit these plans to use projected contribution base units consistent with their MPRA application as a safe harbor assumption. Finally, PBGC could provide a minimum amount of SFA equal to the present value of the required restoration of suspended benefits. These rules, when combined with a bifurcated interest rate approach, as described above, may enable some MPRA plans to accept the SFA without jeopardizing active participants' future benefits.

**The added eligibility flexibility for plans in “critical” status is on its face welcome, but it will deliver nothing for many technically eligible plans, as the PBGC has acknowledged.**

One of the four<sup>11</sup> categories of plans eligible for the SFA program are plans certified to be in “critical” status, less than 40% funded on a current liability basis, and with an active-to-inactive participant ratio that is worse than two to three. The IFR helpfully clarifies that plans may satisfy the criteria for critical status plans to become eligible for SFA in any of the three measurement plan years, and that all of the criteria need not be met in the same plan year. However, because many of these plans are projected to be able to make full benefit payments for 30 years, they will not receive a dime of federal assistance. It is important to note that many of these plans' participants and employers have taken hits in the form of drastic reductions in benefits and higher contribution rates to improve plan financial stability. The resulting imbalance between the low benefits and high contribution rates will, undoubtedly, erode the bargaining parties' support for these plans, thereby making them unsustainable. An estimated 700,000 participants in almost 70 plans are in this category.<sup>12</sup> We hope to work with Congress and the PBGC to address this untenable situation.

**SFA assets should be excluded from the calculation of withdrawal liability.** The IFR provides that plans in receipt of SFA shall include these assets in determining the level of unfunded vested benefits for the assessment of withdrawal liability for an employer that withdraws from the funds after the SFA is received.

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<sup>10</sup> We are aware of the Department of Labor's view that such concerns are unwarranted because the decision to accept the SFA is not a fiduciary decision. However, even if plan trustees are on firm legal ground that the decision to accept or reject the SFA is a plan design decision, and not a fiduciary decision, they are unlikely to avoid litigation alleging a fiduciary violation given the sharp opposing interests involved.

<sup>11</sup> See ERISA §305(B)a)

<sup>12</sup> See NCCMP Comments on the IFR Implementing the Special Financial Assistance in the American Rescue Plan Act (August 11, 2021).

The statute provides no substantive basis for PBGC to have rejected numerous stakeholders' requests that SFA assets be disregarded in this calculation. Any rationalization that to do so would be too administratively complex should be overridden by the increased likelihood that, by excluding SFA assets, the primary purpose of the Act would be fulfilled, namely that pension plans have sufficient assets to pay benefits at least through 2051. To include the SFA assets in the calculation of withdrawal liability will encourage long-term contributing employees with significant assessments that already are limited by the 20-year cap to withdraw from the plan after the SFA is received. And the use of mass withdrawal liability rates will result simply in the capped employers paying their installments over twenty years.<sup>13</sup> Thus, the current approach to withdrawal liability serves only to add a greater risk of insolvency for plans in receipt of SFA and to the PBGC in the long term.

**Every effort should be made to speed up the SFA application process.** The rule establishes six priority classes for when eligible plans may apply for assistance with rolling dates when applications will be accepted. While we can appreciate the need for designating priority applications in order to manage the administrative burden placed on the PBGC—and we are aware that PBGC will permit applications earlier than the listed dates if its review of applications is quicker than expected—we note that plans having to wait until 2023 to apply will continue to burn through existing assets, thereby making the final amount of SFA they require that much greater. Moreover, there are a number of plans in the seventh category that do not yet have a date by which they may apply for assistance. Plans clearly entitled to the SFA should not have to deal with several years of uncertainty surrounding the absence of a clear application window. We therefore encourage PBGC to make creative use of resources to aid in application processing wherever possible, such as by utilizing detailees, as appropriate, from the Departments of Labor and Treasury.

Thank you for your consideration of our views.

Sincerely,



Elizabeth H. Shuler  
Acting President

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<sup>13</sup> The IFR does not appear to change the calculation of employer installment payments.



AFL-CIO Retirement  
Security Working Group

# PBGC Guidance on Special Financial Assistance Program

**Virtual Briefing: July 29, 2021**

Joe LoCicero | Chairman

Jason Russell | Senior Vice President and Actuary

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*This presentation was prepared by Segal at the request of the AFL-CIO Retirement Security Working Group. It is not complete without the commentary by Segal at the July 29, 2021 virtual briefing.*

Excerpts from virtual briefing



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# Interest Rate Assumption

## **Statutory definition**

- In general, use plan's interest rate from 2020 zone status certification
- Interest rate subject to upper limit of third PPA segment rate plus 200 basis points
- Most eligible plans are limited to an interest rate of about 5.5%

## **Major internal inconsistency**

- Statute requires SFA assets to be invested in investment-grade bonds
  - ... Or other investments permitted by PBGC through regulation
- Current yields on investment grade bonds are around 2% to 3%
- Many eligible plans cannot reasonably attain 5.5% benchmark return on total plan assets
- If plans fall short of benchmark return, they will become insolvent before 2051

## **“Bifurcated” interest assumption**

- Recommended by several commenters to PBGC
- Use bond yields to project SFA assets, plan's limited interest rate for non-SFA assets
- PBGC rejected this approach in its interim final rule

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# Case Study: Impact of SFA

## Two hypothetical plans

- Both plans in critical and declining status
- Both plans have same benefits and actuarial liabilities
- Plans differ in current asset values and future contributions
- In both regards, Plan A is weaker than Plan B

## Assumptions

- Both plans have been de-risking investments
- Both plans have actuarial interest rate of 5.5%
- Limited interest rate for SFA calculations is also 5.5%
- SFA assets are invested in bonds returning 2.5% per year

## Illustrative solvency projections

- Status quo: plans receive no SFA
- Impact of SFA on Plan A
- Impact of SFA on Plan B

For both Plan A and Plan B, compare SFA based on single interest rate (per PBGC IFR) to SFA under possible “bifurcated” interest rate

*For simplicity, examples assume the plans will receive SFA at end of 2021; in reality, they may not receive SFA until 2023.*

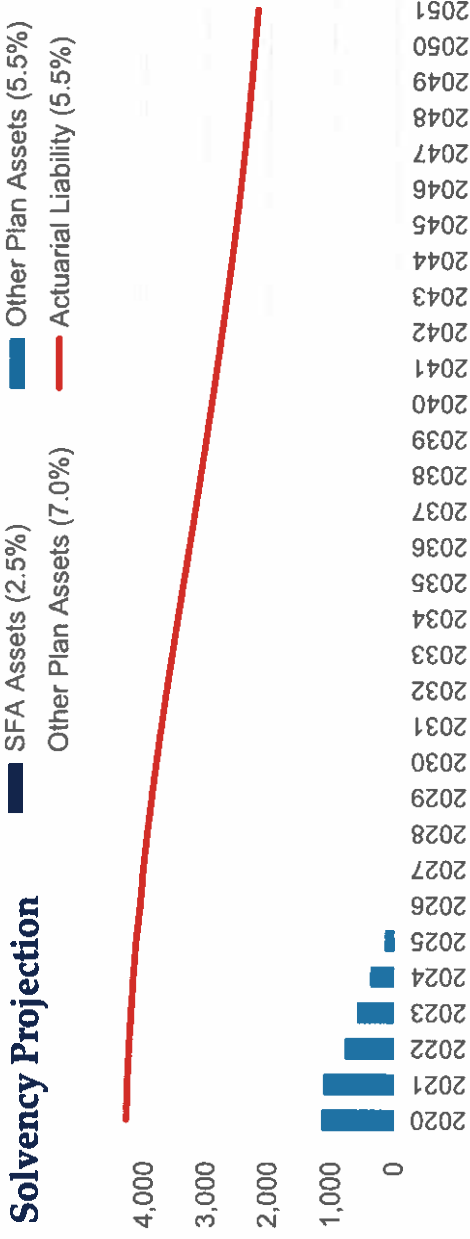


# Status Quo: Plans Receive No SFA

*Generalized illustrations; results will vary by plan and assumptions*

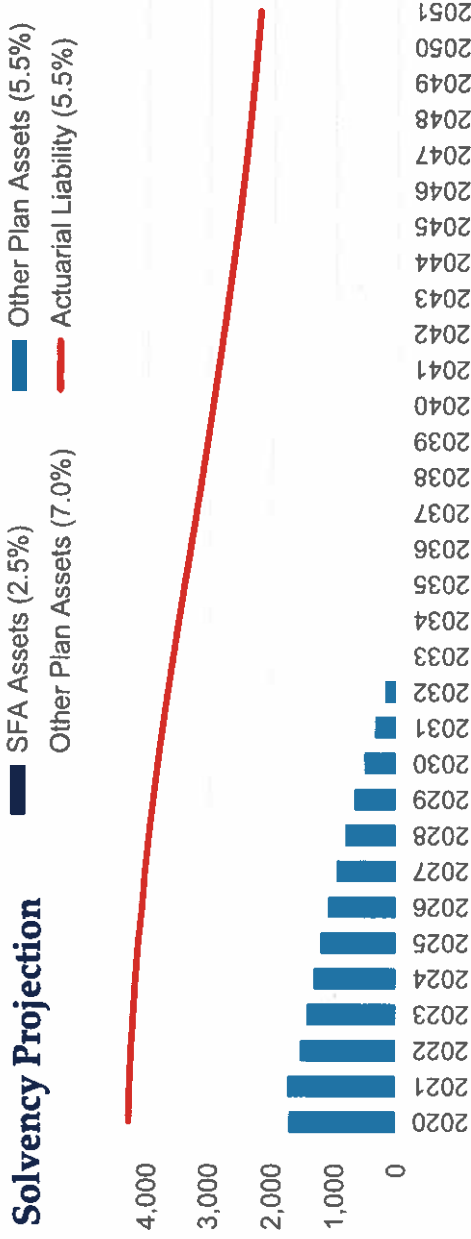
## Plan A

- Insolvent in 2026 without assistance
- Assumes plan assets return 5.5%
- If plan assets return 7.0%, solvency extended by less than 1 year



## Plan B

- Insolvent in 2033 without assistance
- Assumes plan assets return 5.5%
- If plan assets return 7.0%, solvency extended into 2035



*Examples assume plan exhausts all SFA assets before paying benefits and expenses from non-SFA assets*

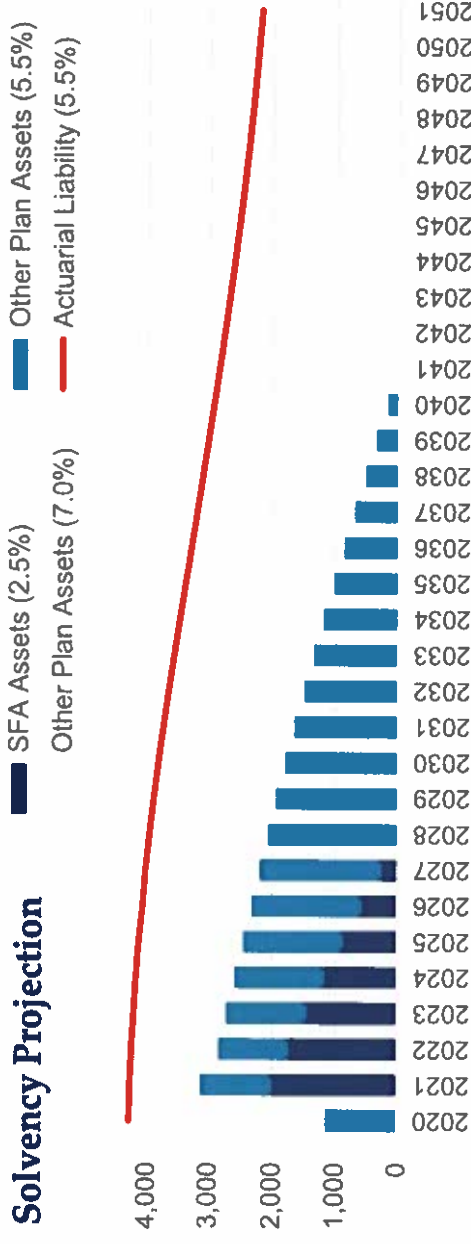
# Impact of SFA on Plan A

*Generalized illustrations; results will vary by plan and assumptions*

## Plan A: SFA under IFR

- Receives **\$2,000** in SFA
- Amount of SFA based on 5.5% single interest rate
- If SFA assets return 2.5%, other plan assets return 5.5%, insolvent in 2041
- If other plan assets return 7.0%, insolvent in 2048

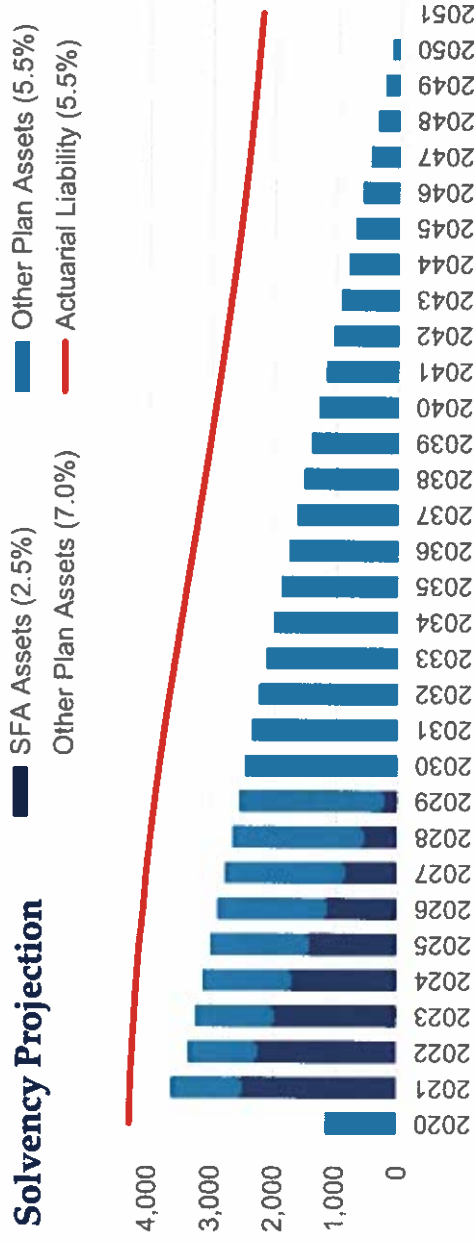
### Solvency Projection



## Plan A: Bifurcated Interest

- Receives **\$2,500** in SFA
- Amount based on bifurcated interest (2.5%, 5.5%)
- Assuming same asset returns, insolvent in 2051
- If other plan assets return 7.0%, solvent indefinitely, approach 100% funding

### Solvency Projection



*Examples assume plan exhausts all SFA assets before paying benefits and expenses from non-SFA assets*

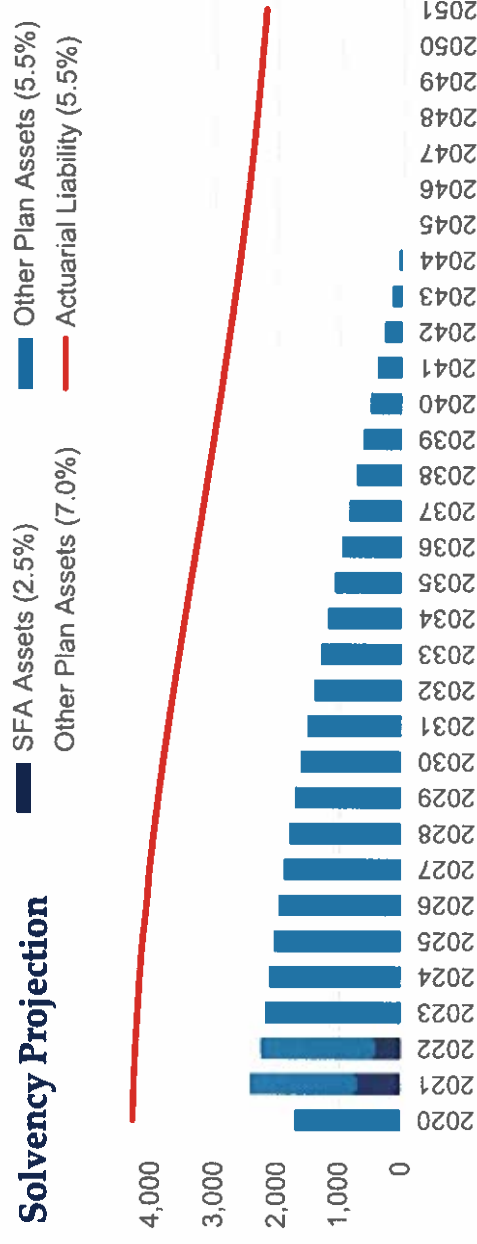
# Impact of SFA on Plan B

*Generalized illustrations; results will vary by plan and assumptions*

## Plan B: SFA under IFR

- Receives **\$700** in SFA
- Amount of SFA based on 5.5% single interest rate
- If SFA assets return 2.5%, other plan assets return 5.5%, insolvent in 2045
- If other plan assets return 7.0%, solvent indefinitely

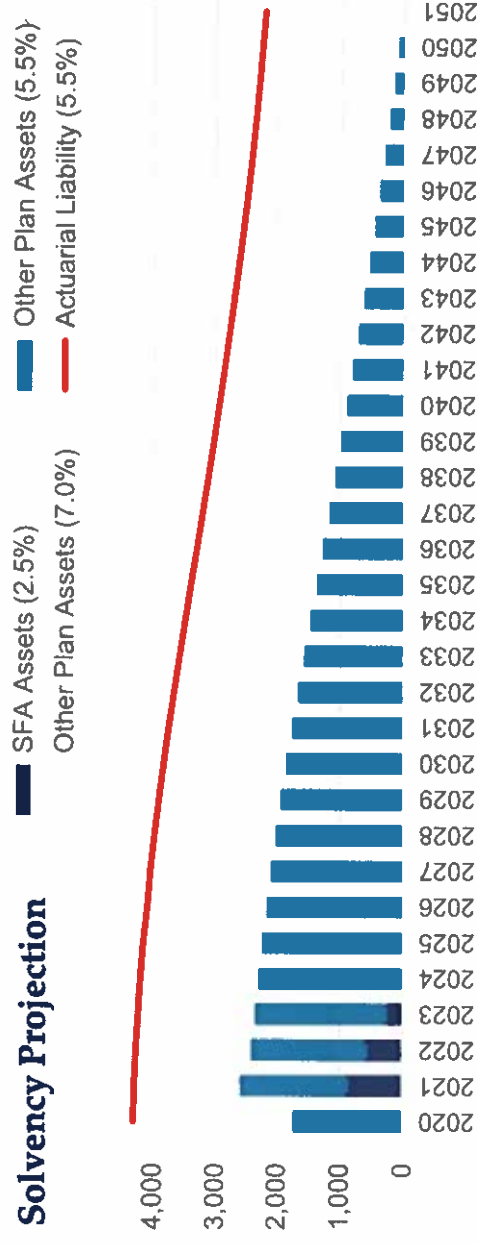
### Solvency Projection



## Plan B: Bifurcated Interest

- Receives **\$850** in SFA
- Amount based on bifurcated interest (2.5%, 5.5%)
- Assuming same asset returns, insolvent in 2051
- If other plan assets return 7.0%, solvent indefinitely, approach 100% funding

### Solvency Projection



*Examples assume plan exhausts all SFA assets before paying benefits and expenses from non-SFA assets*

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# Actuarial Statement

This presentation was prepared at the request of the request of the AFL-CIO Retirement Security Working Group. This material is not complete without the verbal commentary from Segal at the virtual briefing on July 29, 2021.

The illustrative solvency projections included in this presentation were performed under the supervision of Jason Russell, FSA, MAAA, EA, who meets the qualification standards by the American Academy of Actuaries to issue Statements of Actuarial Opinion. (The illustrative projections on slides 15 and 16 were reordered from the original July 29 presentation.)

The projections included in this projection were based on plan cash flows for an actual multiemployer plan that will be eligible for special financial assistance (SFA) from the Pension Benefit Guaranty Corporation (PBGC) under the American Rescue Plan Act of 2021 (ARPA). The plan's cash flows and asset value were adjusted to preserve anonymity and to illustrate different scenarios for plan solvency with and without SFA.

For illustration, the scenarios assume that the limited single interest rate assumption for determining SFA for these hypothetical plans, as described in PBGC's interim final rule, will be 5.5%. The scenarios also assume that future investment returns on non-SFA assets will be either 5.5% or 7.0% per year, and that returns on SFA assets will be 2.5% per year. Other assumptions regarding future investment returns would produce different outcomes.

In the scenarios that evaluate the impact of using a "bifurcated" interest rate, the amount of SFA is determined based on a solvency projection that would result in plan solvency through the end of the 2051 plan year. Amounts of SFA were rounded to the nearest \$50 units for simplicity and to not imply precision.

Projections, by their nature, are not a guarantee of future results. The projections included in this presentation are intended to serve as illustrations of possible future outcomes. Actual experience may differ due to such factors as interest rate movement, stock market performance, the overall economy, demographic experience, and any changes in PBGC guidance or regulations.