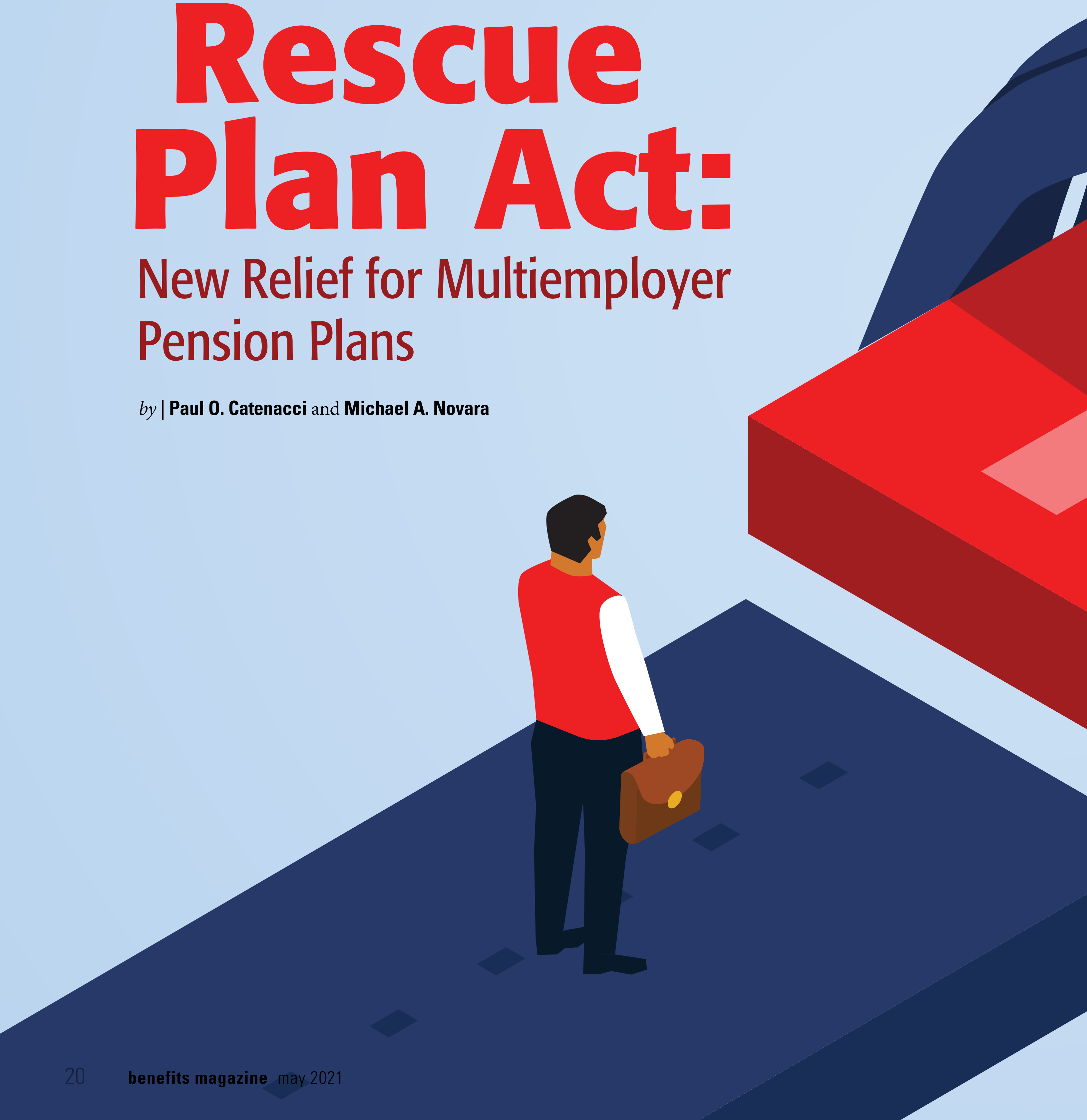
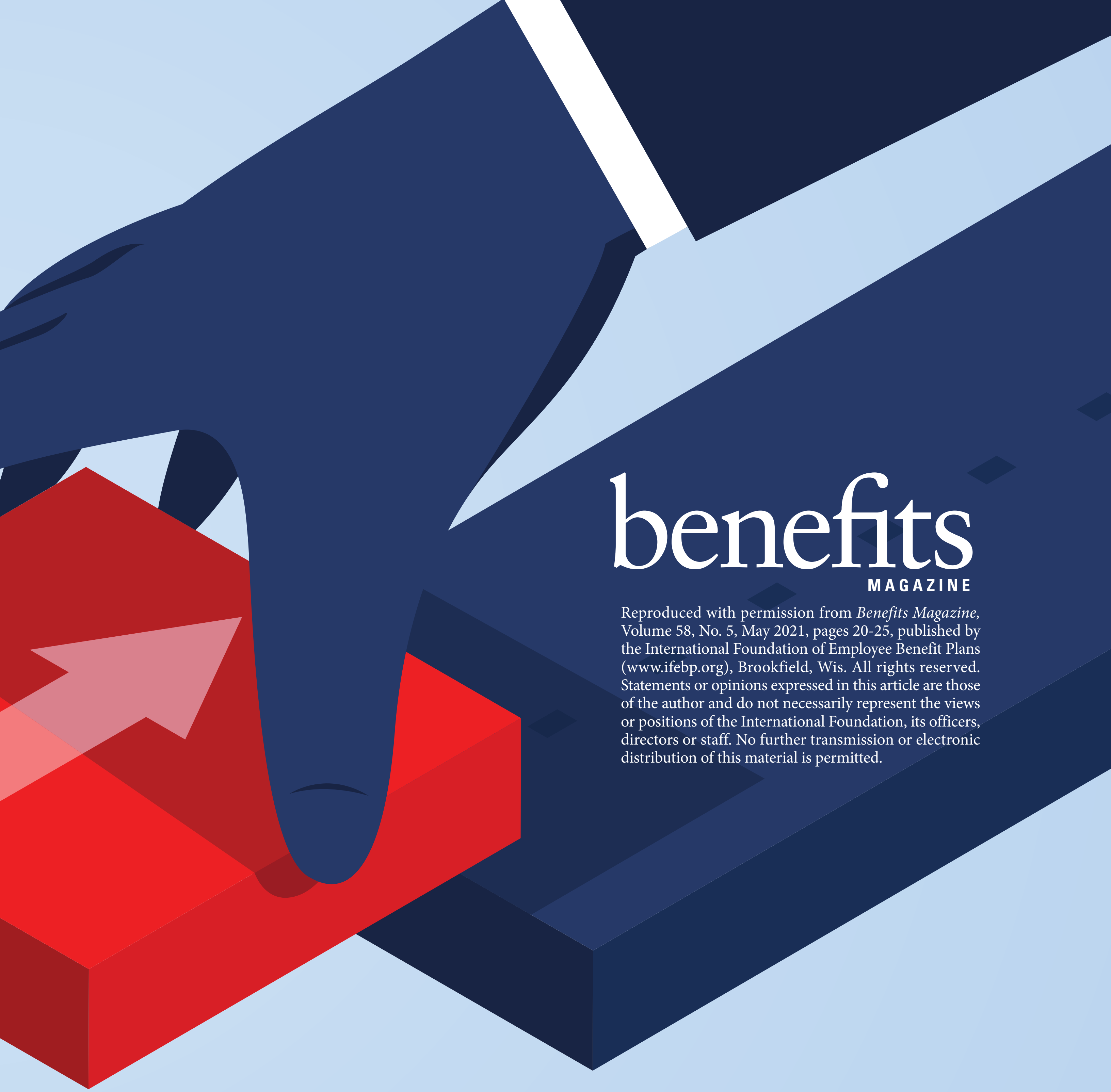
The American Rescue Plan Act:

New Relief for Multiemployer Pension Plans

by | **Paul O. Catenacci** and **Michael A. Novara**





After years of failed attempts, multiemployer pension fund reform efforts have moved forward with the passage of the American Rescue Plan Act of 2021. The authors describe the law's provisions and the impact on multiemployer pension funds.

Those who work in the multiemployer industry are all too familiar with the precarious state of the Pension Benefit Guaranty Corporation's (PBGC) funding level. Clients ruminated on what this meant for their defined benefit (DB) plan's PBGC premiums while hearing the stories of a few large plans that would sink the PBGC once they tipped into insolvency. While many expected a last-minute fix some years down the road after years of legislative gridlock, the American Rescue Plan Act of 2021 threw out a lifeline that few predicted.

Prior Efforts

Let's go back several years. Congress saw the PBGC's ship taking on water and passed the Multiemployer Pension Relief Act of 2014 (MPRA). MPRA took aim at what many thought was sacrosanct—the anticutback rule in the Employee Retirement Income Security Act (ERISA). Under MPRA, certain plans that were "critical and declining"—a new shade of red under the Pension Protection Act (PPA)—could apply for a suspension (reduction) of accrued benefits in order to avoid insolvency. MPRA also purported to make *partition,* a process that carves out a section of a plan's liability and has PBGC fund the benefits, simpler and more accessible as a remedy for underfunded plans.

When MPRA was passed, the consensus was that it was intended for the largest of underfunded plans, specifically the Central States Teamsters pension fund. Indeed, that plan was the first to apply for a MPRA suspension. Yet its application—along with many others—was denied. What became clear from the experience of Central States and plans like it was that MPRA was likely going to be an ineffective tool for them. This was because in denying these applications, the Treasury Department sent the message that if the suspensions did not make a plan solvent in the future, no relief would be granted. Over the years, some plans did indeed seek and obtain relief under MPRA. But the state of the largest underfunded plans continued to get worse, as did PBGC funding levels. And so, Congress was forced to revisit the multiemployer conundrum.

In 2018, Congress set about finding another solution. Senator Sherrod Brown, D-Ohio, proposed the Butch Lewis Act[1] (named after the late Vietnam veteran and Teamster member). The Butch Lewis Act would have created a new governmental organization that would extend loans to certain multiemployer plans that met its criteria. Shortly after the Butch Lewis Act was proposed, Congress convened the Joint Commission on Solvency of Multiemployer Pension Plans. The commission was tasked with proposing legislation to fix what MPRA did not and getting bipartisan support for the Butch Lewis Act or some version of it. The commission dissolved later that year without issuing legislation. For the next few years, the Butch Lewis Act languished while both parties of Congress floated modifications to it or new proposals entirely, but none gained any traction. Meanwhile, the financial condition of the PBGC continued to worsen.

takeaways

- The American Rescue Plan Act of 2021, signed into law in March, includes provisions of the Butch Lewis Act that provide substantial monetary relief for underfunded multiemployer pension plans.
- Certain plans may be eligible for financial assistance that will not need to be repaid. Benefit suspensions approved under the Multiemployer Pension Relief Act of 2014 (MPRA) would be reinstated.
- One open question (among many) is how the new legislation will affect withdrawal liability and how tight the rules on benefit improvements will be.
- The new law also provides temporary relief for other multiemployer plans that don't qualify for financial assistance. These provisions include the option for plans to freeze their Pension Protection Act (PPA) zone status, a five-year extension of funding improvement or rehabilitation periods, funding standard account rules, the extension of asset smoothing periods and widened asset corridors.
- Implementation regulations are expected to be issued this summer.

2021: A New Year Brings a New Law

Fast forward to early 2021. The country remained mired in a pandemic, and an evenly split Congress took up a massive stimulus package aimed at keeping the economy humming while the nation ramped up efforts to employ vaccines to bring the scourge of COVID-19 to a manageable end. Lacking consensus on the scale of the package, the Democrats turned to a parliamentary procedure known as "reconciliation" to get the legislation through. In so doing, the Butch Lewis Act (now called the Butch Lewis Emergency Pension Plan Relief Act, hereafter referred to as the *Pension Relief Act*) was given new life through inclusion in the larger American Rescue Plan Act. The new version of the bill contains far more generous provisions than even its original sponsors could have envisioned.

Unlike its predecessor, which offered a low-interest loan, the Pension Relief Act will provide certain deeply underfunded plans with a lump-sum infusion of cash that need not be repaid. There are some strings attached (the cash must be invested in investment-grade bonds, for example), but the relief shores up an eligible plan's funding needs through 2051 with no benefit reductions. It would also undo any previously approved MPRA suspensions prospectively and retroactively, thereby restoring the anticutback protections of ERISA and the pension reductions that came with approved MPRA applications.

Which Plans Are Eligible for the Special Financial Assistance?

In order to qualify for "special financial assistance" under the Pension Relief Act, DB plans need to meet any of the following criteria. They must:

- Be in critical and declining status in any plan year beginning in 2020 through 2022
- Be in critical status in any plan year beginning in 2020 through 2022 and less than 40% funded based on a modified measure of the plan's *current* funded status with a ratio of less than 2:3 between active and retired participants (think very mature pension plans)
- Have an approved MPRA benefit suspension or
- Have become insolvent after December 16, 2014, have remained insolvent and have not been terminated as of March 11, 2021.

Applications for this special financial assistance must be submitted on or before December 31, 2025. PBGC also will limit applications for up to the first two years to plans that:

- Are insolvent or projected to become insolvent within the next five years
- Are expected to receive assistance from PBGC on a present value basis exceeding $1 billion
- Have already implemented a suspension of benefits under MPRA or
- Have been deemed a priority by PBGC.

Applications are expected to be reviewed and approved within 120 days after submission, with the funds being distributed no later than one year after the approval. Plans that are not given the special priority may have to wait up to two years to apply; however, it is possible that PBGC will shorten this window or even expand the class of plans eligible to apply first.

While PBGC premiums will continue to be indexed from their current $31 level, the Pension Relief Act does increase that rate to $52 per participant starting with the 2031 plan year (the Congressional Budget Office expected these premiums to have reached $44 by then). This is a significant increase, but it is notable that prior legislative proposals flirted with the idea of higher rate variable premiums along with additional payments that would be imposed on unions, contractors and participants in pay status.

What About Withdrawal Liability?

A natural question is what this cash infusion for eligible plans will mean for withdrawal liability. Initial drafts passed between the House and Senate contained a provision that would have prohibited the federal assistance from being used to calculate withdrawal liability payments for a period of 15 years but would have allowed contributing employers to see how the assistance affected their withdrawal liability amount. However, this provision was removed, presumably to comply with the so-called "Byrd Rule," which is tied to the reconciliation process and requires that legislation passed through this mechanism impact the federal budget.

While the Pension Relief Act ended up silent on this topic, the consensus is that the restrictions with respect to withdrawal liability will reappear in forthcoming federal regulations implementing the Pension Relief Act. PBGC has wide latitude to impose conditions upon the financial assistance that it gives, and there is a near-universal expectation that it will not allow federal funds to be used by contributing em-

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ployers to help them withdraw from the plans it is seeking to help. Additional guidance on benefit improvements, changes to employer contribution rates and asset allocation are also expected to be hashed out in the new regulations.

Temporary Help for Other Pension Plans

While the cash infusion to underfunded multiemployer plans garnered the most attention, the Pension Relief Act did contain several temporary relief measures aimed at smoothing the road for multiemployer plans that do not qualify for or do not need financial assistance from PBGC. These provisions include:

1. **PPA zone status freeze:** Plans will have the option to carry over their 2019 PPA status into the plan years beginning in 2020 or 2021. Electing the freeze would absolve yellow- and red-zone plans from having to update their respective funding improvement or rehabilitation plans for a year. Also, critical-status plans will not be charged excise taxes if they fail to meet their funding standards during the frozen plan year. The intent here is to give plans a breather and some flexibility while the economy continues to slowly reopen. The zone status freeze can be used for the first or second plan year that begins on or after March 1, 2020. A special notice to PBGC and the Department of Labor (DOL) is required if the election is used by a green-zone plan.
2. **Five-year extension of funding improvement or rehabilitation period:** Plans that are endangered (yellow zone) or in critical status (red zone) under PPA will be given the option for plan years beginning after December 31, 2019 to extend these periods by an additional five years. This may be an attractive option for plans wishing to avoid stepping up contribution rates in the wake of the pandemic and in general maintain plan funding on terms more palatable to specific markets and geographic regions. One question that will need to be answered by the forthcoming regulations is how this extension factors in for plans that already elected to take a three-year extension through the Worker Retiree and Employer Recovery Act of 2008.
3. **Funding standard account rules:** Investment losses due to the pandemic can be smoothed over 30 years rather than the customary 15-year period. In addition, reductions in employer contributions can also be amortized over a 30-year period. Similar relief was given after the 2008 financial crisis; however, this time around, most plans' investments performed reasonably well due to government stimulus, although many plans likely experienced a substantial loss in hours due to the wave of lockdowns and restrictions. Forthcoming regulations will shed light on how this will work, but for many plans, the inclusion of reduced employer contributions may prove the more valuable of the two forms of relief offered in this provision.
4. **Extension of asset smoothing periods and widened asset corridors:** These two provisions are even more within the province of the plan's actuary than the others. Asset losses incurred during either or both of the first two plan years that end after February 29, 2020 can be smoothed out over a ten-year period for purposes of determining the actuarial value (*not* market value)[2] of those assets. In addition, the corridors used by the actuary to determine the actuarial value of assets will be widened from the current levels of 80-120% to 80-130%. This relief will also apply to the first two plan years that start on or after February 29, 2020.

The relief offered in points 3 and 4 above comes with prerequisites. Specifically, plans that wish to avail themselves of these methods must first pass a stress test to show that the application of the extended time periods will not drive the plan into insolvency. Furthermore, the use of these smoothing periods retains traditional PPA restrictions on benefit improvements. For the two-year period immediately following the plan year the relief applies to, no benefit improvements would be allowed unless the actuary certifies that they are paid for with new money. The actuary also must show that the funding percentage and credit balance will remain static for the two-year period the relief applies to. Plans that are granted special assistance are not eligible for this relief.

Conclusion

Regulations implementing this relief had not been issued at the time of this writing but are expected by early to midsummer. In addition to touching on how withdrawal liability will be affected, the government will need to address a number of other issues. For example, while the Pension Relief Act keeps interest rate assumptions static from the DB plan's 2020 certification, it is not clear what level of scrutiny will be given to other assumptions underlying a plan's

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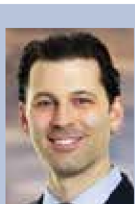

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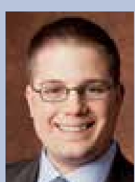

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funded status. The regulations will also need to anticipate the future operations of plans, such as what happens when new employers begin contributing, what happens when contribution rates change and how DB plans that receive the special financial assistance determine whether their minimum funding obligations have been met.

Other open questions include how the special financial assistance will be treated. For example, will plans need to fully segregate and separately manage these funds, or can they be pooled with the balance of the DB plan's assets provided the funds are traceable to permitted investment vehicles? Plans with MPRA suspensions in place will need more guidance on how they will coordinate with PBGC to undo the suspension. The Pension Relief Act requires this coordination but does not specify how it will occur.

The regulations will also need to address the permissibility of future benefit improvements after the financial assistance is received. Plans with low accrual rates and uncredited portions of the contribution rate may want to consider benefit improvements over time to retain membership and maintain financial stability.

For those plans that do not need or are not eligible for the financial assistance, the decision to consider any of the other relief offered will require significant study of the forthcoming regulations and consultation with the plan's service providers, particularly the actuary. As with all decisions made by plan trustees, ERISA fiduciary standards must be satisfied. Even if eligible to do so, the decision to select any relief offered by the Pension Relief Act must be prudent and in the best interest of the plan and its participants, and it should be properly supported by professional recommendations.

Editor's note: Benefits Magazine is in production several weeks before publication. Please be aware that federal agencies continue to release continually regulatory guidance regarding the American Rescue Plan Act. The latest guidance and updates are available at www.ifebp.org/news/featuredtopics/MPRA.

Endnotes

1. H.R. 4444 S. 4147.
2. Generally, actuarial valuations use assumptions about investments, the economy and the population of a plan. The *market value* is the measure of an asset's worth in a marketplace where that asset can be sold. Of course, that measurement becomes more complicated for alternative assets where there is not a regulated market for that investment. For a more detailed discussion on market valuation, consult your plan's certified public accountant (CPA) or auditor.

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