



Statement of Enforcement Policy Regarding Return of Excess Special Financial Assistance Payments

The American Rescue Plan established the Special Financial Assistance (SFA) Program to protect millions of workers in multiemployer pension plans who faced cuts to their benefits, including potentially catastrophic benefit reductions in many cases. Before the program's creation, it was estimated that two to three million workers, retirees, and their families would not receive the full benefits they had earned because of plan insolvencies. With the SFA Program's support, these workers, retirees, and their families can now expect to receive their full pension benefits for the next three decades.

The SFA Program is administered by the Pension Benefit Guaranty Corporation (PBGC) and funded with taxpayer dollars. In some cases, the PBGC made SFA payments to multiemployer pension plans in amounts that exceeded what they should have received because of inaccuracies in plan census data that was used to prepare benefit projections needed to determine the amount of SFA to be paid to the plans as part of the SFA application process. The Department recognizes that plans do not have access to the Social Security Administration's Full Death Master File, which PBGC is in a unique position to use to cross-check participant data.

For plans that applied under PBGC's former procedures, plan census data was generally verified using private vendors, but not compared to the Death Master File, which meant that some of the plans received an excess payment amount under the SFA Program. While these excess payment amounts may represent only a small fraction of total SFA payments, they would not otherwise have been paid and, as such, must be refunded to the United States government. The plans do not have a valid claim to the funds, which never should have been paid and would not otherwise have been.

The Department understands the PBGC will work with the plans to recalculate the plans' SFA entitlement and the amount of the excess payments. We understand that this process has already begun. Although plans have expressed their willingness to refund these excess payments, some have expressed concern about possible arguments that refunding those excess payments could violate the requirement of ERISA Section 403(c)(1), which provides that plan assets must be held for "the exclusive purposes of providing benefits to participants....and defraying reasonable expenses of administering the plan," or the duties of prudence and loyalty as set forth in ERISA Sections 404(a)(1)(A) and (B).

The Department confirms, however, that these provisions do not prevent plans from refunding any excess payments received through the SFA Program, or excuse any failures to return SFA funds to which the plans are not entitled. The excess payments would not have been made to the plans absent the inaccurate census data, and the excess payments gave rise to an equal and offsetting liability owed by the plans to the United States government. These excess payments can and must be repaid, and in the Department's view, such repayments would not violate the ERISA provisions noted above or related provisions of the Internal Revenue Code, including section 401(a)(2). The Department has confirmed its understanding with the Department of the Treasury and the Internal Revenue Service.

Consistent with these observations, the Department does not intend to take any enforcement action against a plan that repays excess SFA amounts based on inaccurate census information that is subsequently corrected through the PBGC's use of the Death Master File. The Department notes that the conclusions above should not be read as suggesting that the plans failed to exercise proper care in connection with the applications for SFA but rather that some of the applications were premised on inaccuracies in census data that the PBGC is in a unique position to detect and for which the United States government has a bona fide restitution claim.