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PENSION BENEFIT GUARANTY CORPORATION

Multiemployer Pension Reform Act of 2014; Partitions of Eligible Multiemployer Plans and Facilitated Mergers

AGENCY: Pension Benefit Guaranty Corporation

ACTION: Request for Information

SUMMARY: This document is a request for information (RFI) to inform future PBGC guidance under sections 4231 and 4233 of ERISA. PBGC is seeking comments from all interested stakeholders, including multiemployer plan participants and beneficiaries, organizations serving or representing such individuals, multiemployer plan sponsors and professional advisors, contributing employers, unions, and other interested parties.

DATES: Comments must be received on or before [insert 45 days after publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the Web site instructions for submitting comments.
- E-mail: reg.comments@pbgc.gov.
- Fax: 202-326-4224.
- Mail or Hand Delivery: Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington, DC 20005-4026.

All materials submitted will be shared with the Department of the Treasury and the Department of Labor. Comments received, including personal information provided, will be posted to

www.pbgc.gov. Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington, DC 20005-4026 or calling 202-326-4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

FOR FURTHER INFORMATION CONTACT: Joseph J. Shelton (shelton.joseph@pbgc.gov), Office of the General Counsel, at 202-326-4000, ext. 6559, or Constance Markakis (markakis.constance@pbgc.gov), Office of Negotiations and Restructuring, at 202-326-4000, ext. 6779; (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

SUPPLEMENTARY INFORMATION:

Background

The Pension Benefit Guaranty Corporation (PBGC) is a Federal corporation created under the Employee Retirement Income Security Act of 1974 (ERISA) to guarantee the payment of pension benefits earned by more than 41 million American workers and retirees in nearly 24,000 private-sector defined benefit pension plans. PBGC administers two insurance programs—one for single-employer defined benefit pension plans and a second for multiemployer defined benefit pension plans.

The multiemployer program protects benefits of approximately 10 million workers and retirees in approximately 1,400 plans. A multiemployer plan is a collectively bargained pension arrangement involving two or more unrelated employers, usually in a common industry, such as construction or trucking, where workers may move from employer to employer on a regular basis.

Under PBGC's multiemployer program, when a plan becomes insolvent, PBGC provides financial assistance directly to the insolvent plan sufficient to pay guaranteed benefits to participants and beneficiaries, and the reasonable and necessary administrative expenses of the insolvent plan.

The focus of this RFI is on two new statutory provisions regarding multiemployer partitions and mergers that apply *only* to multiemployer pension plans. The provisions were enacted on December 16, 2014, as part of the Multiemployer Pension Reform Act of 2014, Division O of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law No. 113-235 (MPRA). The first is section 122 of MPRA, which replaced the multiemployer partition rules under section 4233 of ERISA with new rules. The second is section 121 of MPRA, which added a new provision to the multiemployer merger rules under section 4231 of ERISA. Below is a summary of those rules.

Partitions of Eligible Multiemployer Plans under MPRA

Before MPRA, PBGC could partition a multiemployer plan likely to become insolvent on its own accord or upon application by a plan sponsor. In either case, however, partition was only available in certain limited circumstances involving employer bankruptcies, and the liabilities transferred were those directly attributable to service with bankrupt employers. Under the partition order, those liabilities and an equitable share of assets were transferred to a new plan created by the partition (which was both a terminated plan and a successor plan under Title IV of ERISA), at which point the original plan was no longer responsible for the transferred liabilities.[1] Section 122 of MPRA replaced this framework with new rules under section 4233 of ERISA.

[1] Upon plan insolvency, PBGC provided the terminated plan with financial assistance to cover the cost of PBGC-guaranteed benefits and reasonable and necessary administrative expenses.

Section 4233(a)(1), as amended by MPRA, provides that upon the application by the plan sponsor of an "eligible multiemployer plan," PBGC may order a partition. The statute requires PBGC to make a determination on an application for partition not later than 270 days after the date the application was filed (or, if later, the date the application was completed) in accordance with regulations to be promulgated by PBGC. Under section 4233(a)(2), the plan sponsor must provide notice of the application for partition to participants and beneficiaries (in the form and manner prescribed by regulation) not later than 30 days after submitting an application. Because regulations are required to implement section 4233 of ERISA, including the procedures for the plan sponsor to submit an application for partition, PBGC has determined that a plan sponsor may submit an application for partition only on or after a date to be specified in regulations.

Section 4233(b) prescribes five requirements that must be satisfied for PBGC to determine that a plan is an "eligible multiemployer plan" for purposes of section 4233 of ERISA:

1. Section 4233(b)(1) provides that the plan must be in critical and declining status as defined in section 305 of ERISA (section 432 of the Internal Revenue Code (Code)).

2. Under section 4233(b)(2), PBGC must determine, after consultation with the Participant and Plan Sponsor Advocate selected under section 4004, that the plan sponsor has taken (or is taking concurrently with an application for partition) all reasonable measures to avoid insolvency, including the maximum benefit suspensions under section 305(e)(9) of ERISA (section 432(e)(9) of the Code), if applicable.

3. Under section 4233(b)(3), PBGC must reasonably expect that: (A) partition will reduce PBGC's expected long-term loss with respect to the plan; and (B) partition is necessary for the plan to remain solvent.

4. Under section 4233(b)(4), PBGC must certify to Congress that its ability to meet existing financial assistance obligations to other plans (including any liabilities associated with multiemployer plans that are insolvent or that are projected to become insolvent within 10 years) will not be impaired by the partition.

5. Section 4233(b)(5) requires that the cost of the partition to the PBGC arising from the partition be paid exclusively from PBGC's multiemployer fund.

Upon approval by PBGC, section 4233(c) requires that the order of partition provide for a transfer of the minimum amount of liabilities necessary for the transferring plan (*i.e.,* the original plan) to remain solvent. Under sections 4233(d)(1) and (2), the benefits in the plan created by the partition (the successor plan) are subject to the multiemployer benefit guarantee limits under section 4022A, and the plan sponsor and administrator of the original plan will also be the plan sponsor and administrator of the successor plan.

Section 4233(d)(3) prescribes special withdrawal liability rules that apply for 10 years following the date of the partition order. In the event an employer withdraws from the plan that was partitioned (the original plan) within 10 years of the partition, withdrawal liability is computed with respect to the original plan and the plan that was created by the partition order (the successor plan). If the withdrawal occurs more than 10 years after the date of the partition order, withdrawal liability is computed only with respect to the original plan (and not with respect to the successor plan).

Section 4233(e)(1) prescribes a continuing payment obligation that applies to the plan that was partitioned (the original plan), which requires it to pay a monthly benefit to each participant and beneficiary whose guaranteed benefit was transferred to the successor plan in the amount by which the benefit that would be paid under the original plan's terms (after taking into account any benefit suspensions under section 432(e)(9) of the Code and any plan amendments following the partition effective date) exceeds the PBGC-guaranteed benefit amount for that person.[2]

[2] In addition, under section 4233(e)(2), in the event the original plan provides a benefit improvement after the effective date of the partition, the plan must pay to PBGC for each year during the 10-year period following the partition, an annual amount equal to the value of the increase in benefit payments for such year attributable to the benefit improvement (or, if less, the total benefit payments from the plan created by the partition for such year).

Section 4233(e)(3) sets forth a special premium rule that applies to the plan that was partitioned (the original plan), which requires it to pay the premiums for the participants whose benefits were transferred to the successor plan for each year during the 10-year period following the partition effective date. Finally, section 4233(f) provides notice requirements that apply to PBGC (not plan sponsors).

Facilitated Mergers and Financial Assistance under MPRA

Section 121 of MPRA amends, but does not replace, the existing multiemployer merger rules under section 4231. Specifically, it adds section 4231(e), which gives PBGC new statutory authority to facilitate the merger of two or more multiemployer plans if certain requirements are met. In contrast to the partition rule discussed above, a regulation is *not* required to implement section 4231(e). Nevertheless, PBGC is considering issuing guidance under that section so that applicants have advance notice of the expected showing they must make to demonstrate satisfaction of the new statutory criteria.

Section 4231(e)(1) provides that when requested to do so by the plan sponsors, PBGC may take such actions as it deems appropriate to promote and facilitate the merger of two or more multiemployer plans if it determines, after consultation with the Participant and Plan Sponsor Advocate, that the following conditions are met:

- The transaction is in the interests of the participants and beneficiaries of at least one of the plans; and
- The transaction is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans.

For purposes of section 4231(e), "facilitation" may include training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies.

Section 4231(e)(2) prescribes four requirements that must be satisfied for PBGC to provide financial assistance. Specifically, the statute provides that to facilitate a merger that PBGC determines is necessary to enable one or more of the plans involved to avoid or postpone insolvency, PBGC may provide financial assistance only if the following conditions are met:

- One or more of the multiemployer plans participating in the merger is in critical and declining status as defined in section 305 of ERISA (section 432 of the Code);
- PBGC reasonably expects that: (i) such financial assistance will reduce the corporation's expected long-term loss with respect to the plans involved; and (ii) such financial assistance is necessary for the merged plan to become or remain solvent;
- PBGC certifies that its ability to meet existing financial assistance obligations to other plans will not be impaired by such financial assistance; and
- PBGC financial assistance is paid exclusively from its multiemployer fund.

Request for Information

PBGC is requesting information from stakeholders on a range of issues regarding the application process for partitions and facilitated mergers to better inform its future guidance under sections 121 and 122 of MPRA.

PBGC welcomes comments from all interested stakeholders, including participants and beneficiaries, organizations serving or representing such individuals, plan sponsors and professional advisors to multiemployer plans (including those in the actuarial and legal communities), contributing employers, unions, and other interested parties. In responding, please provide as much specificity and detail as possible, as well as any supporting documentation, including research and analyses, to ensure that we have the most helpful information for future guidance. Recognizing the linkage between MPRA's partition rules and the benefit suspension rules under section 432(e)(9) of the Code, and the possibility that a plan sponsor may apply to PBGC for a partition (or facilitated merger) concurrently with an

application for benefit suspension to the Department of the Treasury, comments relating to the *interaction* between these provisions are especially welcome. PBGC is *not*, however, seeking comments on section 432(e)(9) of the Code or any other provision of MPRA.

The Department of the Treasury is issuing its own RFI seeking comments on certain matters that may be addressed in future guidance implementing section 432(e)(9) of the Code. PBGC and the Department of the Treasury intend to coordinate on the development of their processes as a result of these RFIs.

Issues Affecting both Partitions and Facilitated Mergers

1. *Application Process:* With respect to MPRA's changes to the rules governing mergers and partitions under sections 4231 and 4233 of ERISA, respectively, on which aspects of the application process would guidance be needed or helpful?

2. *PBGC Determinations:* With respect to a PBGC determination under section 4233(b)(3) that a partition is necessary for a plan to remain solvent, or in the case of a facilitated merger involving financial assistance under section 4231(e)(2)(B) that financial assistance is necessary for a merged plan to become or remain solvent:

    - What types of actuarial and plan administrative information and analysis are available to demonstrate that a partition or facilitated merger of the plan is necessary to remain solvent?

    - What issues arise in demonstrating solvency over an extended duration?

3. *Small Plans:* What special concerns do small multiemployer plans and their sponsors have regarding partition and facilitated mergers?

4. *Participants and Beneficiaries:* What special concerns do participants and beneficiaries in multiemployer plans have regarding the process for considering applications for partition and facilitated mergers?

Issues Affecting Partitions Only

5. *Notice:* With respect to the requirement under section 4233(a)(2) to provide notice to participants and beneficiaries not later than 30 days after submitting the application for partition:

- How can PBGC reduce the burden of providing the notice under current law, while still providing important information to participants and beneficiaries? Should PBGC consider issuing a model notice in future guidance?

- What type(s) of information would participants and beneficiaries find most helpful?

- Given that the amount of liabilities required to be transferred in a partition may not be known at the time notice is issued, how should the notice reflect the requirements of section 4233(e)(1), which ensure that affected participants and beneficiaries will receive no less than they would have received prior to the partition (taking into account benefit suspensions under section 305(e)(9) and any plan amendments following the partition effective date)?

6. *PBGC Determination:* For purposes of the requirement under section 4233(b) that PBGC determine, in consultation with the Participant and Plan Sponsor Advocate, that the plan sponsor has taken (or is taking concurrently with an application for partition), all reasonable measures to avoid insolvency, including the maximum benefit suspensions under section 432(e)(9) of the Code:

   - What actuarial, economic, industry, or other information could a plan sponsor provide to make such a showing? What information or analysis might be difficult to provide?

   - With respect to the consultation process under section 4233(b)(2), how can the Participant and Plan Sponsor Advocate best assist PBGC in making its determination under this section?

7. *Concurrent Applications:* What practical issues do plan sponsors and their professional advisors anticipate may arise in connection with a decision to submit combined applications for partition to PBGC under section 4233 of ERISA, and suspension of benefits to the Department of Treasury under section 432 of the Code? In responding to this question, consider the following:

   - *Timing*: With respect to an application for partition, PBGC is required to make a determination not later than 270 days after the application date (or, if later, the date such application was completed). With respect to an application for suspension of benefits, the Treasury Secretary (in consultation with PBGC and the Secretary of Labor) is required to approve or deny an application within 225 days after submission.

   - *Effective Date*: With respect to a concurrent application for partition and suspensions of benefits, the suspension of benefits may not take effect prior to the effective date of such partition.

- *Solvency:* Under section 4233(c), the amount to be transferred in a partition is the minimum amount of the plan's liabilities necessary for the plan to remain solvent. Section 432(e)(9)(D)(iv) of the Code provides that any suspensions of benefits, in the aggregate (and, if applicable, considered in combination with a partition of the plan under section 4233 of ERISA), shall be reasonably estimated to achieve, but not materially exceed, the level that is necessary to avoid insolvency.

8. *Transferred Liabilities*: Prior to MPRA, PBGC's partition order would provide for a transfer of no more than the non-forfeitable benefits directly attributable to service with the bankrupt employer and an equitable share of assets. In contrast, under section 4233(c), the partition order will provide for a transfer of the minimum amount of the plan's liabilities necessary for the plan to remain solvent. In addition, section 4233(e)(1) prescribes a continuing payment obligation that applies to the plan that was partitioned (the original plan).

   - What types of actuarial and administrative information and data do multiemployer plans generally maintain that would allow PBGC to determine the minimum amount of the plan's liabilities necessary for the plan to remain solvent?

   - What administrative or operational issues (*e.g.*, recordkeeping, benefit processing, allocation of expenses) arise in connection with this change?

   - Are there additional issues that arise with respect to the transfer of the plan's liabilities for particular groups of individuals?

9. *Post-Partition:* With respect to issues that might arise post-partition:

   - What kinds of administrative or operational issues (*e.g.,* recordkeeping, benefit processing, allocation of expenses, the original plan's ongoing payment obligations under section 4231(e)(1)) might arise post-partition for plan sponsors?

   - What issues or challenges do plan sponsors and their professional advisors anticipate in connection with the special withdrawal liability rule under section 4233(d)(3), which applies for a 10-year period following the partition effective date?

   - What issues or challenges do plan sponsors and their professional advisors anticipate in connection with the special benefit improvement and premium rules under sections 4233(e)(2) and (3) of ERISA, which apply for a 10-year period following the partition effective date?

   - Is there a need for additional post-partition oversight by PBGC to ensure compliance with MPRA's post-partition requirements, and if so, in what areas?

Issues Affecting Facilitated Mergers Only

10. *Technical Assistance:* MPRA provides a non-exclusive list of the types of non-financial assistance that PBGC may provide in the context of a facilitated merger (*e.g.*, training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies). For purposes of a facilitated merger, which of these types of assistance would plan sponsors and professional advisors find most helpful? Are there other examples of non-financial technical advice that would help facilitate multiemployer mergers?

11. *PBGC Determination:* For purposes of the facilitated merger requirement under section 4231(e)(1) that PBGC determine, in consultation with the Participant and Plan Sponsor Advocate, that the transaction is in the interests of the participants and beneficiaries of at least one of the plans and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of the plans:

    - What actuarial, economic, industry, or other information could the plan sponsors of the plans involved in the proposed merger provide to make such a showing?

    - With respect to the consultation process under section 4231(e)(1), how can the Participant and Plan Sponsor Advocate best assist PBGC in making its determination under this section?

12. *Concurrent Applications:* What procedural issues do plan sponsors and their professional advisors anticipate in connection with a decision to request assistance from PBGC for a facilitated merger under section 4231(e) of ERISA, concurrently with an application for suspension of benefits from the Department of Treasury under section 432(e)(9) of the Code?

Although PBGC is specifically requesting comments on the issues and questions discussed above, PBGC also invites comment on any other issue relating to the application process for partitions and facilitated mergers under sections 121 and 122 of MPRA.

Issued in Washington, D.C., this 13th day of February 2015.

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Alice C. Maroni
Acting Director
Pension Benefit Guaranty Corporation

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