NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, DC 20006 • PHONE 202-737-5315 • FAX 202-737-1308

August 5, 2016

RIN 1212-AB31
Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005-4026

Submitted electronically at: reg.comments@pbgc.gov

Re: Comments on Proposed Rule—Mergers and Transfers Between Multiemployer Plans

Dear Ladies and Gentlemen:

The National Coordinating Committee for Multiemployer Plans (NCCMP) appreciates the opportunity to provide comments on the above-referenced proposed rule (the "Proposed Rule") issued by the Pension Benefit Guaranty Corporation (the "PBGC"). The Proposed Rule contains proposed amendments to implement section 121 of the Multiemployer Pension Reform Act of 2014 ("MPRA") and also reorganizes and updates the existing regulation on mergers and transfers between multiemployer plans.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the over 10 million active and retired American workers and their families who rely on multiemployer plans for retirement security. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans and contributing employers in every major segment of the multiemployer plan universe, including in the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service, steel and trucking industries.

The Vital Role of Mergers for Multiemployer Plans

The multiemployer merger/transfer regulations are significant for multiemployer plans because mergers and transfers have long been an important tool for the survival of multiemployer plans and that is even more important today than in the past. Mergers (and transaction involving transfers) enable multiemployer plans to combine thus creating a broader and more stable contribution base. The Legislative History of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") recognized the importance of these transactions stating that it was the

Committee's purpose to encourage mergers "which expand a plan's contribution base to provide greater stability".[1]

The importance of mergers to the preservation and strengthening of multiemployer defined benefit plans can be seen clearly from the statistics in PBGC's Data Book.[2] Table M-6 shows that in 1980 there were 2244 insured plans. In 2014, there are 1425 insured plans, a reduction of 819 plans. In 1980 there were 1330 plans with fewer than 1000 participants. By 2014, the number of such plans was reduced by 737 plans to 593 plans. The number of plans receiving financial assistance from PBGC was 81 in 2014 so plans coming under the PBGC Guaranty did not account for more than a small percentage in the reduction of individual plans. At the same time the number of insured participants increased from 7,997,000 in 1980 to 10,303,000 in 2014. These numbers demonstrate that although the number of individual plans decreased, the plans themselves have consolidated through mergers. Table M-6 shows that the smaller plans had the greatest decrease in numbers from 1980 through 2014.

The evidence of the continuing consolidation of multiemployer defined benefit plans is not surprising to anyone familiar with such plans. Consolidation through merger has offered multiemployer plans a number of distinct advantages. Congress, as stated by the Labor and Education Committee in the Legislative History of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), recognized the advantage of added stability from an expanded contribution base which was as true in 1980 as it is today. In addition, as the regulatory requirements applicable to such plans have become more complex (and expensive) and because the two economic downturns in the first decade of the 21st century have contracted the asset base of all plans and put pressure on the cost of administration, consolidation through merger offered the advantage of cost savings from economies of scale.

The costs of operating a plan fall more heavily on a small plan than on a larger plan. Although some costs are related to size, other costs bear little relationship to the size of the plan. For example, all plans must adopt certain required amendments, must prepare and regularly update the plan's formal document and Summary Plan Description (SPD), must conduct an annual audit. While the plan document or SPD of a larger more complex plan may be more expensive to prepare, even the smallest and most basic plan must adopt required updates and distribute SPD's. While no such studies have been published recently, studies of plan expenses by size in the 1990's showed that smaller plans typically expended a larger portion of their income on administrative expenses.

> Eighth, one of the most interesting results of this survey was to confirm that large plans seem to operate more efficiently than very small plans. That is, very small plans tend to spend more on expense items, both as a percentage of income and on a per participant basis, than do larger plans. The effect is most obvious on plans with less than $1,000,000 in annual employer contributions, and less than 1000 participants …. For instance, welfare plans with $200,000 to $500,000 in annual contributions spent an average of 12.74% (7.56% for pension) of income on total expenses, while plans with over $5,000,000 in contributions spent 6 to 7% (less than 4% for pension) of income on total operating expenses. Plans with 500 or

[1] House Committee on Education and Labor, HR Rep. No. 869, 96th Cong., 2nd Sess. 87 reprinted in (1990) U.S. Cong. And Ad. News 2918, 1955.

[2] References are to the 2014 PBGC Data Book, http://www.pbgc.gov/documents/2014-data-tables-final.pdf

> fewer participants spent an average of 11.29% (9.91% for pension) of their income on total operating expenses, while plans with over 2,500 participants spent 8% or less (less than 6% for pension) of their income on expenses….[3]

These conclusions concerning the comparatively greater expenses of smaller plans are consistent with the significant reduction in the number of such smaller plans shown in the PBGC Data Book.

Following the two economic downturns of the first decade of the 21st century there were additional stresses that encouraged the merger of multiemployer defined benefit plans. Many multiemployer plans that were well funded prior to 2000, first experienced withdrawal liability around 2002 -2004. The 2010 proposal by the Financial Accounting Standards Board (FASB) to require employers contributing to multiemployer defined benefit plans to disclose potential withdrawal liability, although subsequently modified, focused attention of employers and, more importantly, lenders on withdrawal liability to the extent that even the potential for withdrawal liability has now become a significant factor in driving employers away from multiemployer defined benefit plans and preventing the participation of new employers. Most plans have experienced a contraction of the employer/contribution base as employers go out of business or withdraw from the plan. Mergers have enabled smaller plans with reduced contribution bases to gain some stability, to continue to provide benefits to participants and to provide some measure of assurance to participating employers.

Merger Proposals in Multiemployer Pension Reform Act of 2014 (MPRA)

It was because of the vital importance of mergers to the survival of multiemployer plans, that provisions were included in MPRA to provide for mergers facilitated by the Pension Benefit Guaranty Corporation (PBGC). The MPRA provisions for facilitated mergers include mergers with financial assistance from the PBGC and those with technical and consultative but no financial assistance. In the case of facilitated mergers with financial assistance, the statute clarifies the circumstances under which such financial assistance, provided in the past by PBGC but not in recent years, could be given. The goal was to save troubled plans from insolvency by encouraging the merger of such plans with stronger plans. This was one of several tools for saving troubled plans included in MPRA.

Unfortunately, several provisions in the Proposed Rule work against the intent of MPRA by discouraging mergers of troubled plans into healthier plans. Several interpretations proposed in the Rule, discussed below, discourage mergers of troubled plans and do not seem to carry out the legislative intent. As a result the PBGC multiemployer insurance program is more likely to be called upon to assist plans that could have been saved by merger. Given the precarious financial position of the PBGC multiemployer insurance program, this is not good policy.

There are other provisions in the Proposed Rule that we believe are helpful. On balance, for troubled plans, the helpful provisions do not offset the effect of provisions that discourage mergers.

---

[3] Whitehead, Mitchel D, Michael A. Conte, and William Christopher DeLeon. *Plan Expenses for Multiemployer Pension Plans and Multiemployer Health and Welfare Plans*. Chicago, Ill: Commerce Clearing House, 1995., p. 27-28.

Specific Comments:

MPRA Provisions

1. Facilitated Mergers

Section 121 of MPRA authorizes PBGC to facilitate the mergers of multiemployer plans. The statutory provisions are different with respect to those mergers facilitated without financial assistance and those facilitated with financial assistance. Only those mergers facilitated with financial assistance are required to include at least one plan in critical and declining status.

NCCMP supports the provision in the Proposed Rule that provides for informal consultation with PBGC to discuss a potential merger or transfer. This is particularly important because the Proposed Rule provides that a formal request for a facilitated merger or transfer must be requested with the notice of merger. Some transactions, particularly those resulting from the mergers of the sponsoring employee organizations by parent unions and/or mergers or divisions of sponsoring employer associations may drive merger and/or transfer transactions and the way to structure the transaction is the subject of the technical assistance sought. In such case, it would be premature to provide notice of merger and/or transfer.

NCCMP agrees with other commenters that requested additional information from PBGC of the types of assistance it envisions providing. Although we support the flexibility of PBGC to encourage this form of support to develop, if there are some types of assistance that will or will not be provided, this information will conserve the resources of both the PBGC and the plans seeking assistance.

2. Coordination of Suspension and Merger Provisions

As we noted in the introduction to our comments, the intent of MPRA was to provide additional tools to financially challenged multiemployer plans to enable those plans to avoid insolvency and thereby to avoid the drain on PBGC's multiemployer insurance program. This legislative purpose is noted in the Preamble to the Proposed Rule as follows:

> In December 2014, Congress enacted, and the President signed, the Consolidated and Further Continuing Appropriations Act, 2015, of which MPRA is a part. MPRA contains a number of statutory reforms to assist financially troubled multiemployer plans, and to improve the financial condition of PBGC's multiemployer insurance program.[4]

Given this legislative intent acknowledged by PBGC, we are greatly concerned that the Proposed Rule adopts an interpretation of the interaction of the merger rule with the suspension rule, and on which there is no specific statutory provision, that is inconsistent with the acknowledged legislative intent.

The Preamble to the Proposed Rule explains that before considering an integrated transaction that involves a benefit suspension and a facilitated merger, plan sponsors must consider how the provisions of ERISA 305(e)(9) and 4231 would impact that transaction. The Preamble

[4] 81 Fed. Reg. 36229, 36230 (June 6, 2016).

then explains that a critical and declining plan that has suspended benefits could subsequently merge into a larger well-funded plan. The Preamble takes the position that the plan sponsor of the merged plan would then become responsible for making the annual determination under ERISA 305(e)(9) and the regulations thereunder whether benefits may continue to be suspended. The Preamble notes that under ERISA 305(e)(9)(C)(ii), benefits may continue to be suspended for a plan year only if the plan sponsor determines that although all reasonable measures to avoid insolvency have been and continue to be taken, the plan is still projected to become insolvent unless benefits are suspended.

This interpretation will work against the legislative intent of MPRA by making financially distressed plans less likely to be merged as plans likely to take in a financially distressed plan would be compelled to restore suspended benefits to the detriment of its own financial position. If such plans are able to suspend benefits and reduce their liabilities, they are significantly more likely to attract merger partners. If PBGC had the resources to make up the difference between the liabilities with suspended benefits and liabilities with restored benefits, the legislative intent might be realized. But it is clear that PBGC does not have the necessary resources because another of the legislative goals of MPRA was to protect the PBGC multiemployer insurance program. So this interpretation, not stated in the statute is contrary to legislative intent because it will impede mergers of plans that could be saved and that may very well turn to PBGC's financially challenged multiemployer insurance program for assistance.

Finally, even though there is no statutory provision concerning the interplay of the suspension and merger rules, ERISA 4231(b)(2) specifically states as a requirement for a multiemployer plan merger that "no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date." This does not require restoration of benefits cut prior to merger and we believe this is a basis for not requiring such restoration. Based upon this actual statutory requirement for merger and the recognized legislative intent of MPRA, we urge PBGC to reconsider the unsupported interpretation that is contrary to the interests of PBGC, financial troubled plans and legislative intent.

Proposed Changes to Existing Merger and Transfer Rules

We agree with other commenters that it is not appropriate to modify existing regulations in a way that restricts options for multiemployer plans in the process of implementing a statutory provision that was intended to expand options for those plans. As discussed below, PBGC has not explained the basis for these changes or indicated that they are necessary to protect multiemployer plans from insolvency. NCCMP believes that these changes may further limit the plans that can take advantage of the merger and transfer provisions to prevent.

One of the requirements for merger under 4231.3 is that for each plan that exists after the transaction (either a merger or transfer) an enrolled actuary must determine that the plan meets applicable plan solvency requirement in 4231.6. The requirement for this determination has not changed from the current regulations but applicable plan solvency requirements in 4231.6 have changed. For plans that are not significantly affected plans, the Proposed Rule extends the time period from five (5) to ten (10) for which the plan's expected fair market value of assets plus expected contributions plus investment earnings must equal or exceed expected expenses and benefit payments for each year or the plan's fair market value of assets immediately after the merger or transfer equals or exceeds ten (10) times (instead of the previous five (5) times) the benefit payment for the last plan year ending before the proposed effective date of the merger or transfer.

PBGC provides no explanation for these changes other than a reference to their experience under the multiemployer program since the original regulation. It is not clear if plans that satisfied the safe harbor tests of the current regulations subsequently became insolvent. If so, we do not believe these were frequent cases. We believe that tightening the safe harbor provision will make mergers more difficult and therefore are contrary to the legislative purpose of MPRA.

The Proposed Rule also expands the definition of "significantly affected plan" to include all critical and critical and declining plans regardless of the percentage of assets or liabilities transferred (other than *de minimis* transfers). Under the current regulations, to be a significantly affected plan the plan must transfer 15% or more of its assets or receive a transfer of unfunded accrued benefits that are 15% or more of its pre-transfer assets. Under the Proposed Rule a critical and declining plan that transfers more than a *de minimis* amount of its liabilities but retains all of its assets would still be a significantly affected plan subject to the tougher tests of the Proposed Rule.

The Proposed Rule would require significantly affected plans to meet the following modified requirements:

1. Expected contributions must equal or exceed the estimated amount necessary to satisfy the minimum funding requirement of Code 431 for the ten years (current regulations require five years) after the proposed effective date of the transfer.
2. The plan's expected fair market value of assets immediately after the transfer must equal or exceed the total amount of expected benefit payments for the first ten years (current regulations require five years) beginning on or after the proposed effective date of the transfer.

The Proposed Rule retains the provision of the current regulations that if the plan actuary must determine that a plan meets the applicable plan solvency requirement in 4231.6 or "otherwise demonstrates that benefits under the plan are not reasonably expected to be subject to suspension under 4245 of ERISA."[5] We were unable to locate any guidance or information regarding how such a demonstration should be made. Because of the changes to the safe harbor rules of the current regulations, this demonstration will become important to plans seeking to engage in mergers and transfers. Therefore, PBGC should include in the regulations some guidance or examples regarding how such a demonstration could be made. Otherwise, resources of both plans and PBGC may be wasted exploring this approach.

[5] 29 CFR §4231.3(ii).

We greatly appreciate the opportunity to comment on the Proposed Rule as it may apply to multiemployer plans. We are more than happy to discuss any questions you may have regarding these comments.

Respectfully submitted,

Randy G. DeFrehn
Executive Director