

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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



RANDY G. DEFREHN
EXECUTIVE DIRECTOR
E-MAIL: RDEFREHN@NCCMP.ORG

April 6, 2015

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

Submitted *online* at <http://www.regulations.gov>

**RE: Request for Information: Multiemployer Pension Reform Act of 2014;
Partitions of Eligible Multiemployer Plans and Facilitated Mergers**

Dear Ladies and Gentlemen:

The National Coordinating Committee for Multiemployer Plans (NCCMP) appreciates the opportunity to provide comments in response to the above-referenced request for information issued by the Pension Benefit Guaranty Corporation (“PBGC”) as published in the Federal Register on February 18, 2015 (the “RFI”).

The NCCMP is the only national organization devoted exclusively to protecting the interests of the over 20 million active and retired American workers and their families who rely on multiemployer plans for retirement, health and other benefits. 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.

We have responded to the questions posed in the RFI by stating each question and responding. We understand that as the PBGC and plans work through these issues and begin implementing the provisions of the Multiemployer Pension Reform Act of 2014 (“MPRA”) additional questions may arise. We will follow up these responses with any others of significance presented to us by affiliates or encourage affiliates to discuss these issues directly with PBGC.

We emphasize that in all aspects of implementing MPRA the fundamental purpose of the law, to wherever possible save multiemployer plans so that those plans may continue to provide benefits in excess of the PBGC should be the central focus. This fundamental purpose, if successful, will have the incidental benefit of decreasing the number of plans that become insolvent and must fully rely on PBGC. We believe that creating a process that is unduly expensive or lengthy for failing plans will not fulfill the fundamental purpose of MPRA and will likely contribute to the failure of plans that might have been saved. We also recognize that MPRA includes protections for participants and beneficiaries of failing plans and that these interests must be balanced with the interest of saving plans. However, wherever possible these statutory interests should be implemented with the least possible burden, expense, complexity and delay.

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?

PBGC has been aware for some time, as evidenced by its Annual Reports and Exposure Reports for the last several years, that a significant minority of multiemployer defined benefit plans may become insolvent. Some of these plans have passed the point at which they may remain solvent by use of the tools made available in MPRA. Other plans are either rapidly approaching the point at which the MPRA tools will not be of use, or delay will require deeper benefit cuts for the plans to remain solvent. For this reason it is vitally important to participants and beneficiaries in these plans that the application process for both partitions (where applicable combined with benefit suspensions) and facilitated mergers be understandable and clearly set out PBGC's requirements and expectations.

Checklists and clear instructions will help to move the process along as will a contact within the PBGC to which plans may direct questions. We suggest that electronic filing be permitted but not required.

With respect to both partitions and facilitated mergers with financial assistance, MPRA provides that one of the requirements is that PBGC's ability to provide assistance to plans already insolvent may not be impaired. Accordingly, to the extent PBGC establishes limitations, for example, on the amount of financial assistance that may be available to plans contemplating a merger, or determines that such assistance will not be immediately available, such information should be made available to plan sponsors so that time and resources are not wasted applying for such relief that is not available.

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?

Although the information available may vary somewhat from plan to plan certain information should be available to all plans applying for a partition or facilitated merger with financial assistance. NCCMP urges that whenever possible and consistent with statutory requirements, the application should be based on information that plans are already required to prepare. To satisfy statutory requirements plans applying for partition will be able to document the actuarial certification of critical and declining status and, if applicable, a copy of the application submitted to the Secretary of Treasury for benefit suspensions. A plan should be able to provide back-up documentation to the Treasury application as well as documentation, required for the Treasury application, that all reasonable measures enumerated in the statute including the maximum benefit suspensions have been taken to avoid insolvency. The plan should also be able to submit projections of the plan's actuary showing that the plan will become insolvent without a partition or facilitated merger with financial assistance. The actuarial projections should also show that the plan will remain solvent after a partition or facilitated merger with financial assistance.

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

Obviously projections over extended time periods are less reliable than over shorter time periods because there is a greater likelihood that unexpected occurrences will affect a plan. Nevertheless, the statute is intentionally silent in stipulating a specific period over which the plan must remain solvent. Instead the standard is that the plan must demonstrate that the requested intervention will enable the plan to remain solvent (i.e., that the declining trend line seen absent intervention which projects insolvency is ultimately

reversed as a result of such intervention). Those issues concerning long-term projections exist now, but such projections are an integral part of an actuary's professional portfolio. What is important is that the actuary use the best available information at his or her disposal consistent with their professional standards. Notwithstanding such a requirement, because projections represent any individual actuary's best estimate based on his or her professional judgment, these are projections are estimates and may vary from actuary.

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

While some expenses of either the partition or facilitated merger with financial assistance process will be somewhat proportional to plan assets other expenses will not be substantially smaller for small plans. This means that the partitions or facilitated merger process may place a proportionally heavier financial burden on smaller plans. For the same reasons these smaller plans may carry a heavier load of administrative expenses due to their small size since some expenses are relatively fixed (e.g., preparation of summary plan description, plan document restatement and determination letter filing). To make these tools accessible to small plans the process should be as efficient as possible.

These small plans would benefit a great deal from a facilitated merger. In the event of a partition, the liabilities to be assumed by the PBGC would likely be minimal. The partition and merger of Bakery Drivers Local 33 Pension Plan in 2014 is an example of this even though this partition was under prior law and the merger did not include financial assistance.

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?

We reiterate that the core purpose of MPRA was to provide tools for multiemployer defined benefit plan to remain solvent and pay benefits in excess of the PBGC guarantee. In complying with Congressional intent, it is important that the application and review process be as expeditious as possible to enable those plans otherwise heading to insolvency in the near term to survive and continue paying benefits to their participants. Once again, this argues for building into the process efficiencies to eliminate unnecessary duplication of effort and to rely, to the maximum extent possible, on the checks and balances already built into the statute, rather than attempting to replicate steps already taken by the plan fiduciaries and bargaining parties as they evaluate the options available to them.

Another purpose is to protect participant interests during the suspension and partition process. NCCMP has noted with dismay the fear among participants caused by irresponsible reporting in the media of the provisions of MPRA which made it sound as if all multiemployer plans would be slashing retiree benefits. Both plan sponsors and PBGC should be concerned with providing clear communications to participants and beneficiaries so that they have the means to understand the process, the alternatives and how their benefits may be affected.

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?**

NCCMP agrees that a model notice would likely be helpful reduce the burden for plans and to provide examples of the information that PBGC believes should be communicated. However, because plan designs vary significantly, a required model notice is impractical. A checklist in addition to or in place of a model notice would be useful for those plans with designs or issues substantially different from the model notice.

- **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)?**

Because the amount of liabilities (including the identities of the participants and beneficiaries) to be transferred in a partition may not be known at the time the notice is given, a specific notice with examples may not be possible and should not be required. Instead the notice should explain that the plan sponsor is applying for a partition to enable the plan to remain solvent;. The notice should also include a general description of how the partition will work, if approved, and how benefits will be paid for participants and beneficiaries included in the new plan created by the partition. If an application for benefit suspension is being filed with the partition application, that information should be included as well.

It may also be instructive for the notice to include a description of how payments will be made to participants and beneficiaries whose benefits were transferred to another plan under the partition, but whose benefits are above the level guaranteed by PBGC. For example, would a participant or beneficiary in this situation receive one or two pension checks?

If the amount of liabilities that will be transferred in a partition is not known at the time notice is given, we suggest the notice disclose this. Because the continuing portion of the plan will supplement the benefits paid by the partitioned portion by the PBGC, the benefits of participants and beneficiaries will be the same whether or not the individual (or a portion of the individual's benefit) is included in the transfer portion of the plan under the partition order. This should also be explained.

We also note that the notice to participants regarding an application for benefit suspensions (under section 432(e)(9)(F) of the Code) must be provided at about the same time as the notice regarding an application for a partition (under section 4233(a)(2) of ERISA). We encourage PBGC and Treasury to coordinate guidance so that that a single notice may satisfy both requirements. If the notices are not combined or at least coordinated as to timing and content there is a substantial risk that participants and beneficiaries will be confused by the two notices.

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?**

Plan circumstances vary so widely that we believe it would be impossible to define the specific actuarial, demographic, industry and other information the plan sponsor must present to document that it has taken all

reasonable measures to avoid insolvency. It appears from the similarity of statutory language and the reference to section 305(e)(9) that Congress may have intended the determination of “all reasonable measures” to be based on documentation similar to that to be submitted in support of a suspension application including the factors listed in ERISA § 305(e)(9)(C)(ii)/Code § 432(e)(9)(C)(ii) added by MPRA § 201.¹ It should be noted that such language makes it clear that the list of items cited is illustrative (“...In its determination, the plan sponsor may take into account factors including the following:...”). Similarly, we recommend either that the determination of “all reasonable measures” for purposes of ERISA § 4233(b) be based on the language in ERISA § 305(e)(9)(C)(ii)/Code § 432(e)(9)(C)(ii) or that PBGC develop a similar non-exclusive list of factors.

• 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?

Several of the factors on which the “all reasonable measures” determination of ERISA § 305(e)(9)(C)(ii)/Code § 432(e)(9)(C)(ii) are made include actions that may impact participants and participants’ continuing support for the plan which the Advocate may be uniquely positioned to evaluate. The Advocate should assist PBGC to evaluate factors within the Advocate’s area of expertise.

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:

¹ “(ii) The plan sponsor determines, in a written record to be maintained throughout the period of the benefit suspension, that the plan is still projected to become insolvent unless benefits are suspended under this paragraph, although all reasonable measures to avoid insolvency have been taken (and continue to be taken during the period of the benefit suspension). In its determination, the plan sponsor may take into account factors including the following:

“(I) Current and past contribution levels.

“(II) Levels of benefit accruals (including any prior reductions in the rate of benefit accruals).

“(III) Prior reductions (if any) of adjustable benefits.

“(IV) Prior suspensions (if any) of benefits under this subsection.

“(V) The impact on plan solvency of the subsidies and ancillary benefits available to active participants.

“(VI) Compensation levels of active participants relative to employees in the participants’ industry generally.

“(VII) Competitive and other economic factors facing contributing employers.

“(VIII) The impact of benefit and contribution levels on retaining active participants and bargaining groups under the plan.

“(IX) The impact of past and anticipated contribution increases under the plan on employer attrition and retention levels.

“(X) Measures undertaken by the plan sponsor to retain or attract contributing employers.

- **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.

Although at first glance based on the timing of required approvals it may appear as if the partition and suspension applications are not coordinated other statutory provisions noted above confirm Congressional intent that the applications are to be coordinated. If both applications are filed at the same time, the approval deadline for the suspension comes 45 days (at 225 days v 270 days) before the deadline for approval of the partition. However, because the survival of the plan and therefore its eligibility for benefit suspensions and partition may depend on approval of both the suspension and partition application, it will be extremely important for the agencies to coordinate this process to avoid requiring duplicative effort and expense from a failing plan. If possible a single application should be used or one application could be a supplement to the other application so that information developed and provided to one agency may be used for the other application.

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?**

The identification of the liabilities to be transferred and the determination of how much to transfer is heavily dependent on plan records. The change in statutory language makes partition post-MPRA much more flexible and accessible to all plans including those in which participants work for many employers over their careers. As a result there may be many different way to define the liability to be transferred. Plan records vary greatly in their specificity and accessibility. While some plans may be able to identify every employer for which each active or inactive employee earned credit since the inception of the plan many plans lack detailed records from pre-computer periods. In addition, plans that have accepted merged groups may have only summary information for credited service from those groups. Therefore, some plans will be limited in the ways they can identify and divide liabilities based on credited service.

Plans typically have credited service information for individual employees but have not been required to identify which portion of each employee's service was attributable to which employers. Some plans may have this information in digital form, many plans would have the original remittance reports from which such information could be derived at significant effort and expense some plans do not have this detail at all for segments of participants such as merged groups.

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

See previous comment.

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

Prior to enactment of MPRA, ERISA section 4233(c) limited the liabilities that could be transferred from the "original" plan to the partitioned "successor plan", whose participants would be subject to the PBGC minimum benefit guarantee. Specifically, ERISA section 4322(c) provided that pursuant to a partition order, liabilities equal to no more than the non-forfeitable benefit directly attributable to service with the bankrupt employer would be transferred to the successor plan. The MPRA, in an effort to enable the PBGC to provide greater assistance to certain financially troubled multiemployer plan, expanded the circumstances in which the PBGC could provide financial assistance beyond plans with bankrupt employers to include "any plan deemed to be in "critical and declining" status. MPRA also amended ERISA section 4233(c) to provide:

"The Corporations partition order shall provide for a transfer [to the plan created by a partition order] of the minimum amount of the plan's liabilities necessary for the [original] plan to remain solvent."

The MPRA amendments to ERISA section 4233(c) establish a clear method for determining the total amount of the liabilities that will be transferred to a successor plan pursuant to a partition. In determining the method of allocation of such liabilities we would encourage that plans be given broad discretion, consistent with the intent of MPRA's benefit suspension provisions, so that the impact on plan participants be distributed equitably across participant classes.

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?**

Once the liabilities have been identified and the plans partitioned, we do not anticipate additional recordkeeping or benefit processing issues. NCCMP believes that guidance should be given regarding allocation of expenses between the old plan and the partitioned plan.

- **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?**

NCCMP believes the statute is sufficiently clear with respect to withdrawal liability.

- **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?**

NCCMP believes the statute is sufficiently clear with respect to the special benefit improvement and premium rules.

- **Is there a need for additional postpartition 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 nonfinancial technical advice that would help facilitate multiemployer mergers?

NCCMP believes that PBGC can provide valuable non-monetary assistance in connection with mergers to multiemployer plans. Some plans, particularly small plans, may not have the professional expertise to design and complete a merger including a submission to PBGC. NCCMP recommends that PBGC develop a merger checklist, model notices, and other resources that can be made available to plans considering merger.

In addition, NCCMP is aware that plans may have been reluctant to merge because of uncertainty regarding the legal standard that applies to the merger. Until the passage of MPRA it has been unclear whether a fiduciary standard applied so that both plans must be shown to benefit from a merger or whether the standard discussed in the legislative history of the Multiemployer Pension Plan Amendments Act (“MPPAA”) controlled.²

The legal standard that applies to PBGC facilitated mergers is clear and this will hopefully provide confidence to plan fiduciaries to proceed with mergers that will benefit multiemployer plans through efficiencies of operation.

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?**

Plans contemplating merger will typically have a merger study performed to determine the impact on the group proposing to merger and on the plan post-merger. Plans should be able to provide this information. An example of a showing may be in the case of a small plan proposing to merger into a much larger plan, that the cost savings to the small plan resulting from the merger would permit that small plan to maintain approximately the same level of benefits with no contribution increases and would have no discernable impact on the larger plan because the contributions to the small plan cover the liabilities accruing and administrative costs.

² House Comm. on Education and Labor, H.R. Rep. No. 869, 96th Cong., 2nd Sess. 87 reprinted in [1980] U.S. Code Cong. & Ad. News 2918, 2955:

The rules regarding mergers and transfers are designed to allow mergers in all cases where the resulting plan will not be expected to be in financial trouble. This facilitates the committee's purpose of encouraging mergers which expand a plan's contribution base to provide greater stability by looking at the prospects for the resulting plan instead of focusing on the narrow mechanical test provided under current law. The committee believes that a merger which complies with the conditions will generally be in the best interest of plan participants.

• **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?**

The Advocate could help the plan sponsor understand what assistance is available from PBGC, how to access that assistance and who to contact in PBGC.

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?

The comments concerning timing made in response to Question 7 also apply here. We recommend that the information required on both applications and the method of applying be as similar as possible. We are concerned regarding the impact on the application process if one application is rejected. For this reason, we suggest that the suspension and facilitated merger application request disclosure whether the other application has been filed. The agencies should coordinate processing of the applications to the extent possible.

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We appreciate the opportunity to comment on the concerns raised by the PBGC in the development of the regulations under the Multiemployer Pension Reform Act of 2014 and would be happy to answer any questions that may arise in the review of such comments.

Respectfully submitted,



Randy G. DeFrehn
Executive Director