



April 6, 2015

Pension Benefit Guaranty Corporation
1200 K St NW
Washington, DC 20005-4026

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

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we submit this letter to the Pension Benefit Guaranty Corporation (PBGC) in response to a request for information on the Multiemployer Pension Reform Act of 2014; Partitions of Eligible Multiemployer Plans and Facilitated Mergers which was issued on February 18, 2015.¹

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. More than 96% of the Chamber's members are small businesses with 100 or fewer employees, 70% of which have ten or fewer employees. Yet virtually all of the nation's largest companies are also active members. Each major classification of American business - manufacturing, retailing, services, construction, wholesaling and finance - is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees and task forces.

Chamber members also include sponsors of multiemployer pension plans. Consequently, the Chamber has been engaged in multiemployer pension reform including the reforms in the Pension Protection Act of 2006, Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, and most recently the Multiemployer Pension Reform Act of 2014 (MPRA) contained in the Consolidated and Further Continuing Appropriations Act of 2015.

¹ 80 Fed. Reg. 8712 (Feb. 18, 2015).

Introduction

In 2005, organized labor and the business community joined together to create a coalition to address the issues concerning multiemployer pension plans. The coalition created a proposal which was included in the Pension Protection Act of 2006 (PPA). As part of a compromise, the PPA multiemployer provisions were set to expire at the end of 2014. Again labor and the business community came together to lobby for comprehensive multiemployer pension reform. MPRA is a significant first step in comprehensive reform.

MPRA makes permanent the multiemployer provisions under the PPA; gives PBGC authority to promote and facilitate plan mergers; allows plan sponsors to apply to the PBGC to partition a plan; increases the PBGC premium for multiemployer plans to \$26/person and bases future increases on the wage index; and allows for benefit suspensions in certain plans in critical status.

The enactment of the MPRA was welcomed by the Chamber and its employer members that contribute to multiemployer plans. The precarious state of underfunding by many multiemployer plans threatens insolvency for such plans and for the Pension Benefit Guaranty Corporation (PBGC) and is a serious threat to participating employers. A bold approach was necessary to permit the survival of plans in critical and declining status and the solutions offered by MPRA (partition by the PBGC and benefit suspensions by the underfunded plans) should be recognized as essential components of an overall approach to restoring financial stability to troubled plans. While the Chamber believes that more attention to the problem will be necessary, MPRA is a strong first step in addressing these issues.

General Comments

Plans asking for partitions and mergers are already in precarious financial situations and do not have extra financial or administrative resources. As such, the processes associated with partitions and mergers should be flexible enough to allow plans to comply with requirements without having to expend unnecessary or redundant resources.

While the basic purpose of MPRA is to stave off insolvency of troubled multiemployer plans, numerous factors, some common and some unique, have contributed to financial problems faced by such plans and must be considered and afforded appropriate weight by each respective plan contemplating benefit suspensions. Congress believed and we strongly concur that the best decision-makers as to how each multiemployer plan will approach its own problems are the plans' own trustees as informed by their actuaries and other consultants. Neither the IRS nor the PBGC can know what is or will afford the optimal approach in determining whether or how to suspend benefits or work toward partition. For this reason, Congress established a framework of conditions, limitations, factors for consideration, protections, notices and procedures that all serve to observe and protect the interests of participants while permitting the plans wide latitude within such a framework.

Response to Questions

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?

Several pieces of information are required by statute. To fulfill these requirements, plans should be given as much flexibility as possible in the format of the application. As long as the information provided to the PBGC is clear and transparent, the format of the information should not matter. Nonetheless, a model template for the application may be useful in expediting the application process for both the plan and the PBGC. Our primary concern is that the agency receives the information it needs to make a determination without unduly burdening the plan. As such, the form of the information should not outweigh its function.

With respect to submissions of applications, we again reiterate the need for flexibility and encourage the PBGC to allow for both electronic and paper submissions. In addition to saving on resources, many plans find electronic delivery to be a more efficient means of communication than traditional mail. At the same time, we also have members who may not have access to the resources to provide the application electronically. Therefore, both options should be made available for application submissions.

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?*

The Chamber recommends that information required for the application should be based on information and calculations that are already gathered and performed by the plans. Specifically, plans generally have the following information: the actuary's plan evaluation that is usually performed annually; the Form 5500, including Schedule M and B; the plan auditor's reports; the rehabilitation plans; the Funding Standard Account. Additional information may include: financial ratios or measures that are part of normal business use; balance sheet information based on fair market value assets to current benefit liabilities; net income/loss statements; contribution and other income minus benefit and administrative expenses; cash flow statement; and total income, including ROI minus plan benefit and other expenses.

We are not suggesting that all of this information be required. Rather, the trustees should be able to provide any of this information that supports the application for a merger or partition.

Furthermore, duplicative information or information not normally captured by the plan should not be required.

As you are aware, estimations of solvency can vary between actuaries and over time. Therefore, proving solvency over time is not an exact science. Consequently, we expect plans to give their best and reasonable estimates but should not be held to a standard of perfection.

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

While all plans require flexibility in this process, small plans will require even more because the scale of their resources will be even smaller. As such, the application process for small plans should be as streamlined and efficient as possible. For example, the cost of actuaries and other service providers is probably a significant concern since these plans are already losing money. It would be helpful if the PBGC—specifically through the Participant and Plan Sponsor Advocate—could provide staff to assist small plans that are considering filing an application.

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)?*

While we stress flexibility, a model notice and checklists of necessary documentation and plan findings might ease the application process. However, if the PBGC creates a model notice, we urge the agency to stress that the model is not a requirement and is only provided to ease the application process. As noted above, we encourage the use of model forms to promote expediency but warn against the agency promoting form over function.

In addition, we urge the PBGC to work with Treasury to coordinate the notice required here with the notice required for the notice of benefit suspensions. To the extent possible, we would further recommend that plans be allowed to combine these notices where applicable or to combine with the Annual Funding notice or other required plan disclosures.

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?*

The Chamber reiterates the need for flexibility. The type of information should be clear enough to show the need for the partition without requiring information that would be difficult or expensive for the trustees to attain.

In addition, we believe the Participant and Plan Sponsor Advocate would be very useful as a point person/liaison in this process. For example, the Advocate could be an important liaison between the agency and plans by aiding plans with the application process and providing administrative and financial assistance. However, we are not certain that there are adequate resources at this time for the Advocate to adequately carry out this role.

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.*

We recommend that the information required on both applications and the method of applying be as similar as possible. One concern is the impact on the application process if one piece is rejected. For example, if Treasury rejects the application for the benefit suspensions, will the plan have to submit another application for the partition? We recommend against requiring an

entire new application; rather, we encourage the agency to request additional information as necessary.²

Issues Affecting Facilitated Mergers Only

10. Technical Assistance: MPRA provides a non-exclusive list of the types of nonfinancial 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?

The PBGC could be very helpful with plan communication. In particular, this assistance could help trustees be seen as having the backing of the agency. We recommend that the communications include model notices, a general explanation of mergers (written and oral) that can be provided to plan participants, and access to the Advocate for participants and beneficiaries.

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?*

The Chamber reiterates the need for flexibility. The type of information should be clear enough to show the need for the partition without requiring information that would be difficult or expensive for the trustees to attain.

In addition, we believe the Participant and Plan Sponsor Advocate would be very useful as a point person/liaison in this process. For example, the Advocate could be an important liaison between the agency and plans by aiding plans with the application process and providing administrative and financial assistance. However, we are not certain that there are adequate resources at this time for the Advocate to adequately carry out this role.

²This strategy is used successfully by other agencies. For example, under the Hart-Scott-Rodino Act, the Federal Trade Commission and the Department of Justice review certain proposed transactions for antitrust concerns. After the companies report a proposed deal, the agencies will do a preliminary review. After the preliminary review, the agency may need additional information. Rather than rejecting the application, the agency can ask the parties to turn over more information so it can take a closer look at how the transaction will affect competition (this action often is referred to as a “second request.”).

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?*

As noted in the response to Question 7, we recommend that the information required on both applications and the method of applying be as similar as possible. One concern is the impact on the application process if one piece is rejected. For example, if Treasury rejects the application for the benefit suspensions, will the plan have to submit another application for the partition? We recommend against requiring an entire new application; rather, we encourage the agency to request additional information as necessary.

Conclusion

Partitions and facilitated mergers are a critical component of the reform provisions implemented in MPPRA. To ensure the maximum benefit of these provisions, we ask that deference and flexibility be given to plan trustees as they are in the best position to understand the needs of the plan. The Chamber thanks you for your consideration of these comments and looks forward to working with you and other interested parties on this very important issue.

Sincerely,



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