

July 28, 2016

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

Submitted online at www.regulations.gov

**RE: Comments on Proposed Rule Regarding Mergers and Transfers between Multiemployer Plans:
Regulation Identifier Number (RIN) 1212-AB31**

Dear PBGC representative:

Horizon Actuarial Services, LLC is a national firm specializing in providing actuarial and consulting services to multiemployer benefit plans. We are the actuary to over 90 multiemployer pension plans across the United States. We respectfully submit for consideration our comments on the proposed rule by the Pension Benefit Guaranty Corporation (“PBGC”) to amend the regulation on mergers and transfers between multiemployer pension plans, including mergers facilitated by PBGC under the Multiemployer Pension Reform Act of 2014 (“MPRA”).

We appreciate the clarifications and guidance offered by PBGC in the proposed rule. As described below, however, we have identified a few areas where we believe a revision or further clarification to the applicable regulations may be needed.

1. Financial assistance mergers

Under section 4231(e)(2) of ERISA, PBGC may facilitate a merger by providing financial assistance it determines is necessary to enable one or more of the plans involved to avoid or postpone insolvency. PBGC must expect that any financial assistance it provides (i) will reduce its expected long-term loss related to the plans involved, and (ii) is necessary for the *merged plan* to become or *remain solvent* [emphasis added].

In its commentary on the proposed rule, PBGC notes how it does not interpret this section to preclude financial assistance to facilitate a merger of a small plan in critical and declining status into a larger, well-funded plan. Section 4231.15(f)(2) of the proposed rule, however, requires that the requested “financial assistance is necessary to mitigate the adverse effects of the merger on the *merged plan’s* ability to *remain solvent*” [emphasis added].

We believe this section of the proposed rule could be clarified to better represent PBGC’s interpretation. Without clarification, plan sponsors may interpret this section to preclude financial assistance in a situation in which the merged plan is projected to avoid insolvency under section 4245 of ERISA without financial assistance from PBGC. (Or, at least plan sponsors

may be discouraged from incurring the time and expense to apply for a facilitated merger due to the lack of clarity.)

One possible clarification to the final rule is to permit consideration of unfavorable future experience in making the required demonstration. For example, the actuary could demonstrate that financial assistance is required so the merger does not reduce the better-funded plan's ability to remain solvent in the event of possible future investment losses.

Another possible clarification to the final rule is to allow additional metrics in making the required demonstration of "plan solvency." For example, the actuary could demonstrate that financial assistance is required so the merger does not impair the better-funded plan's ability to satisfy minimum funding requirements or materially lower its projected funded percentage. (We note that PBGC's comments on this section mention these and other metrics to demonstrate plan solvency.)

2. *Solvency requirement for mergers and transfers*

The proposed rule tightens the solvency requirements under section 4231.3(a)(3) of the regulations for plans seeking a merger or transfer. Specifically, it makes the solvency tests under section 4231.6 stricter, for example, extending certain tests from five years to ten years. The proposed rule also expands the definition of "significantly affected" plans under section 4231.2 to include any plan in endangered or critical status seeking a non-de minimis transfer.

Notwithstanding the updates in the proposed rule, we believe the solvency tests in section 4231.6 are out of date and should be revised. The solvency tests for significantly affected plans under section 4231.6(b) are particularly problematic. For example, the test under paragraph (3) of that section requiring the plan to demonstrate a positive cash flow would be failed by almost any mature multiemployer plan, even one that is well-funded and projected to remain solvent indefinitely. The tests under paragraphs (1) and (4) may also be difficult to pass for many plans, especially those in endangered or critical status.

Under the proposed rule, most significantly affected plans would fail the applicable solvency tests under section 4231.6(b). Therefore, in order to meet the overall solvency requirement under section 4231.3(a)(3), these plans would be forced to "otherwise demonstrate" that they are reasonably expected to avoid insolvency under section 4245 of ERISA.

If PBGC's intent is to have the solvency tests under section 4231.6 act as the primary means for a plan to demonstrate its projected solvency, it should consider updating them to reflect the current dynamics of multiemployer pension plans. In particular, the tests for significantly affected plans could be updated to focus on metrics like those in paragraph (2) of section 4231.6(b).

If PBGC does not wish to make changes to the solvency tests under section 4231.6, it should consider providing additional guidance on how a plan might "otherwise demonstrate" that it is reasonably expected to avoid insolvency, and for how long. For example, guidance could clarify how this demonstration is similar to or different from a projection to determine whether or not a plan is in critical and declining status under section 305(b) of ERISA.

3. Mergers or transfers that postpone insolvency

A related – but perhaps more significant – issue is that the solvency requirement under section 4231.3(a)(3) under the proposed rule effectively prohibits a merger or transfer involving a plan that would not be projected to avoid insolvency after the transaction. The proposed rule makes no exception for a transaction that would *improve* overall projected solvency for the plans involved, but we believe it should.

In practice, a merger or transfer can do significant good for plan participants and beneficiaries – as well as PBGC’s multiemployer program – even if not all of the plans existing after the transaction are projected to remain solvent forever. For example:

- Consider a merger between two or more plans in critical and declining status. The plans would not be able to avoid insolvency as a result of the merger, but they would gain efficiencies from lower expenses related to administration and investments. These savings could result in a material improvement in the projected solvency for the plans involved.
- Consider a non-de minimis transfer of unfunded accrued benefits from a multiemployer plan in critical and declining status into a larger, well-funded multiemployer plan, where following the transfer, the receiving plan would remain well-funded. The transferring plan would remain in critical and declining status, but its projected solvency would be extended. More importantly, the benefits transferred into the well-funded plan would now be secure.

In both of these examples, some or all covered participants would be better off as a result of the transaction, perhaps significantly. Furthermore, no participants would be disadvantaged by the transaction, and PBGC’s expected losses related to the plans involved would be reduced.

Under the current regulations, and depending on the facts and circumstances, it is possible that either of these transactions could meet the applicable solvency requirements in section 4231.3(a)(3). For example, these plans could demonstrate they are not significantly affected, and they would be able to pass the current five-year solvency tests under section 4231.6(a).

With the enhanced solvency requirements in the proposed rule, however, both of these transactions would likely be prohibited. In the first example, the merged plan would probably not be able to pass the new ten-year solvency tests under section 4231.6(a). In the second example, the plan in critical and declining status would be significantly affected, and it would not be able to pass the tests under section 4231.6(b). (Furthermore, absent additional guidance, these plans would probably not be able to “otherwise demonstrate” projected solvency under section 4245 of ERISA.)

Under section 4231(a) of ERISA, PBGC has the authority to issue regulations permitting mergers or transfers that do not meet the requirements of section 4231(b), including (but not limited to) the solvency requirement under section 4231(b)(3). We encourage PBGC to use this authority to issue regulations permitting mergers or transfers that *improve* overall solvency for the plans involved and lessen PBGC’s expected losses.

For example, PBGC could issue regulations to provide that a merger or transfer would meet the solvency requirements under section 4231.3(a)(3) if the enrolled actuary could demonstrate

that the transaction (i) would postpone solvency for one or more of the plans involved, (ii) would not decrease the ability of any plan involved to remain solvent, and (iii) would reduce the expected long-term risk to PBGC related to the plans involved.

4. *Mergers following benefit suspensions*

Under section 305(e)(9)(C)(ii) of ERISA, a plan that has suspended benefits must demonstrate annually that the suspensions are necessary to avoid insolvency. If the demonstration cannot be made, the suspended benefits must be restored. Clarification is needed on this rule for situations involving a merger of two or more plans.

As an example, a small plan in critical and declining status may suspend benefits under section 305(e)(9) to make itself a more attractive merger partner to a large, well-funded plan. Following the merger, however, the suspensions may not be necessary for the merged plan to remain solvent. In that situation, it appears that the suspended benefits would have to be restored, thereby undoing a key precondition for the merger. Absent clarification on this rule, well-funded plans would be discouraged from merging with plans that had suspended benefits.

We understand that the Department of the Treasury (“Treasury”) has regulatory authority over the implementation of suspensions of benefits. That said, we encourage PBGC to work with Treasury to issue guidance clarifying this issue.

Perhaps guidance on section 305(e)(9)(C)(ii) could permit separate accounting of assets and liabilities attributable to each of the plans that existed prior to the merger when making the required annual determination. In other words, a separate projection would be performed with respect to a notional plan consisting of assets and liabilities attributable the plan that suspended benefits prior to the merger. The suspended benefits would be restored only if this projection showed that the suspensions were not necessary for this notional plan to remain solvent.

We appreciate the guidance provided by PBGC on this very important topic of mergers and transfers between multiemployer pension plans. We also appreciate the opportunity to provide comments on the proposed rule. If you have any questions or would like to discuss our comments, please feel free to contact us directly.

Respectfully,



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