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Regulatory Affairs Group
Office of General Counsel
Pension Benefit Guaranty Corporation
(RIN 1212-AB31)
1200 K Street, N.W.
Washington, DC 20005-4026a

Submitted electronically at: reg.comments@pbgc.gov

**Re: Comments on Proposed Regulation – Mergers and Transfers Between
Multiemployer Plans**

Dear Sir or Madam:

Thank you for the opportunity to comment on your recently published notice of proposed rulemaking: Mergers and Transfers Between Multiemployer Plans (RIN 1212-AB31). The rulemaking relates to a matter of great importance to Segal Consulting (Segal) and our approximately 400 multiemployer pension plan clients covering 3.8 million participants. Segal is a major provider of actuarial, employee benefits and human capital consulting services to employers and employee benefit plans throughout the United States, and provides actuarial services to more multiemployer pension plans than any other independent consulting firm.

General Comments

Before turning to Segal's detailed comments, it is important to emphasize our overall concern that the proposed regulations would make it much harder for multiemployer plans to merge or make transfers. The primary purpose of the Multiemployer Pension Reform Act of 2014 (MPRA) was to give financially troubled multiemployer plans and the Pension Benefit Guaranty Corporation (PBGC) tools—including enabling PBGC to facilitate mergers—to help prolong plan solvency. Rather than furthering that purpose, however, the proposed regulations effectively defeat it by significantly tightening the current rules for mergers and transfers, and then subjecting facilitated mergers to those tighter rules.

We recognize that PBGC has regulatory authority to rewrite the existing regulations on mergers and transfers. However, this tightening is not an appropriate approach in response to MPRA, which, as noted above, was intended to add, not eliminate, options. There is no suggestion in

MPRA that the merger and transfer rules should be tightened. If PBGC thought otherwise, it could have asked Congress to address that in MPRA.

Segal respectfully requests that PBGC adopt a “first, do no harm” approach to this regulatory project by not adopting the proposed substantive changes to the solvency tests, including the change to the definition of “significantly affected plan.”

Furthermore, it appears that MPRA calls for the existing merger rules to be eased to enable one or more of the plans involved “to avoid or **postpone** insolvency,” provided none of the plans involved are otherwise adversely affected.¹ As discussed in more detail below, we respectfully suggest that PBGC follow this statutory lead and exercise its regulatory authority to allow safe harbor non-financial assistance mergers and transfers generally, if the result would be to postpone insolvency for one or more of the plans, and none of the plans are adversely affected.

Specific Comments

1. Proposed Changes to Existing Merger and Transfer Regulations

a. Insolvency Test Safe Harbors Should Not Be Tightened

The proposed regulations tighten the safe harbor solvency tests for plans that are not significantly affected plans by (i) lengthening the safe harbor period from five to ten years after the proposed merger or transfer effective date; and (ii) increasing the safe harbor multiplier for the fair market value of assets immediately after the merger or transfer from five to ten times the amount of the pre-merger year’s benefit payments.² The proposed regulations also tighten the safe harbor solvency tests for significantly affected plans by lengthening the safe-harbor period of years from five to ten years after the proposed merger or transfer effective date.³

PBGC explains the changes by stating its general belief “that the proposed changes will provide a better demonstration that benefits are not reasonably expected to be subject to suspension under section 4245 of ERISA as a result of insolvency.”⁴ However, PBGC offers no back-up: it provides no data on, or examples of, problems with the existing “five-years/five-times” safe harbor requirements, nor does it provide examples of plans that passed the current five-year safe harbors and then became insolvent by the tenth year. In fact, the agency acknowledges in the same discussion the absence of past problems with the current safe harbors when it goes on to say that it “recognizes that the majority of multiemployer plan mergers will broaden the contribution base and stabilize the plans involved.”

¹ ERISA §4231(e)(2) (emphasis added). While this citation is from the financial assistance facilitated merger provisions, it makes no sense for PBGC to be able to assist plans in postponing insolvency only when it provides financial assistance if the same result could be obtained in other circumstances without the need for such an expenditure. As used in our comments, ‘postpone insolvency’ means a post-merger delay of insolvency that is longer than the pre-merger projected insolvency of one or more of the plans involved in the merger (and none of the plans are adversely affected).

² Prop. Reg. §4231.6(a).

³ Prop. Reg. §4231.6(b).

⁴ 81 *Fed. Reg.* 36233, June 6, 2016 (middle, third column).

Segal believes that the intent of MPRA was to protect participants' benefits in multiemployer plans for as long as possible. The existing five-years/five-times safe harbors were adopted in 1983 in response to new ERISA §4231, as added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The multiemployer world was very different when MPPAA was enacted and the existing regulations were adopted. MPRA was enacted in recognition of the shift that has occurred since then to mature and maturing plans and the decreased number of employers contributing to the plans. Tightening the safe harbors is not an appropriate response to a law that was aimed at helping today's multiemployer world. This is not the time to make the solvency tests harder to pass. Doing so puts mergers and transfers out of reach for the plans that would benefit from them.

PBGC should be creating safe-harbors that allow mergers and transfers to extend the life of troubled plans. For example, with regard to mergers, and as discussed in more detail in Section 1.c., below, a plan that will be insolvent in four years should be able to merge with another plan that will be insolvent in six years if the merger allows the combined plan to remain solvent for eight years. Such a merger would benefit all plan participants and beneficiaries, furthering the goals of MPRA.

b. Definition of Significantly Affected Plan Should Not Be Expanded

The proposed regulations expand the definition of “significantly affected plan” to include all endangered and critical status plans for purposes of transfers (other than de minimis transfers).⁵ Current regulations draw a bright line for “significance” at 15%, and look to whether a transferor plan is “sending” 15% or more of its pre-transfer assets or a transferee plan is “receiving” unfunded accrued benefits equal to 15% or more of its pre-transfer assets. The proposed regulations treat *any transfer* by an endangered or critical status plan as significantly affected, no matter how small a percentage of assets or liabilities (in excess of de minimis amounts) is involved.

PBGC justifies this change by stating that, in its view, “endangered and critical status plans generally present a greater risk of insolvency, and when these plans engage in non-de minimis transfers, their risk of insolvency may increase.”⁶ We acknowledge that endangered and critical status plans are at a greater risk of insolvency; but, by subjecting them to the significantly affected plan rules, the proposed regulations make it virtually impossible for such plans to engage in transfers that could mitigate that risk. We are aware of several critical status plans where a transfer of unfunded accrued benefits to another plan would help the transferor plan remain solvent longer or would not change the transferor plan's solvency and would result in a well-funded transferee plan (due to separately negotiated contributions related to minimum funding). In these cases, all participants and beneficiaries benefit from the transfer or at a minimum, are not harmed by it. However, if transferor plans were required to satisfy the significantly affected plan solvency requirements, these transactions would not be workable.

PBGC should not categorize endangered and critical status plans as significantly affected plans for purposes of non-de minimis transfers. To do so effectively precludes all transfers for

⁵ Prop. Reg. §4231.1. This treatment applies to transfers only, not mergers.

⁶ 81 Fed. Reg. 36233, June 6, 2016 (top, first column).

endangered and critical plans. We believe this is contrary to the intent and purpose of MPRA to help troubled plans and we respectfully request that PBGC not adopt this approach.

Segal suggests that PBGC create an alternative safe harbor that would permit the kinds of transfers described in the example above. If instead PBGC adopts the approach in the proposed regulations, PBGC should specify circumstances in which endangered or critical status plans would be able to make transfers, and any solvency test should use realistic measures that reflect the general principle of improving solvency for one or more plans, with none being adversely impacted.

c. New Safe Harbor Needed

As suggested above, PBGC should add an alternative safe harbor test for plans that cannot pass a safe harbor (in either the existing or proposed forms). Such an alternate safe harbor is especially needed for transferor plans where the proposed safe harbor for significantly affected plans precludes transactions, even though the transaction is beneficial to both participants and the PBGC

Any such test should use realistic measures that are appropriate for mature plans and are tied to postponing insolvency. For example, the additional safe harbor could require that, as provided in ERISA §4231(e)(1), the transaction be “in the interests of the participants and beneficiaries of at least one of the plans and ... not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans.” A showing that a merger or transfer increases the period of solvency for one or more of the plans, and does not decrease the solvency period for any, would satisfy the safe harbor.

d. Option to “Otherwise Demonstrate” Likelihood of Solvency Needs Clarification

The proposed regulations retain the provision from the current regulations allowing a plan that cannot pass the applicable safe harbor tests to engage in a merger or transfer if the plan is able to “otherwise demonstrate” it is not reasonably expected to become insolvent after the transaction.⁷ PBGC appears to imply that the continuing availability of this option is a viable and satisfactory alternative for plans that are not able to satisfy either the current solvency safe harbor tests or the proposed new tests.

Practitioners are not generally aware of plans that have successfully opted to “otherwise demonstrate” solvency. We believe that it is unclear how such a demonstration could be made. If PBGC is limiting plans that cannot satisfy the safe harbor solvency tests to “otherwise demonstrate” that they are not reasonably expected to become insolvent, PBGC should explain how plans have, or could, demonstrate such compliance. For example, PBGC could provide an example in the regulations recognizing that one of the ways to “otherwise demonstrate” solvency would be to show that the insolvency of one or more plans would be postponed and that no plan’s individual projected solvency would be adversely affected, as we suggest above.

⁷ Current and Prop. Reg. §4231.3(a)(3)(ii).

We note that the legislative history of the “otherwise demonstrate” provision makes it clear that the provision was not intended to result in PBGC having discretionary authority with respect to an alternative demonstration.⁸

2. New Proposed Regulations on Facilitated Mergers

a. PBGC Should Provide More Information About Non-Financial Facilitation

ERISA §4231(e)(1), which was added by MPRA, includes a standard under which PBGC may take actions it deems appropriate to promote and facilitate mergers. Under that standard, PBGC may take such actions if the transaction is in the “interests of 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 any of the plans.” It would be helpful if PBGC added examples of the help it envisions providing to merging plans. For example, how will PBGC help plans in their dealings with other government agencies? PBGC should also provide examples of the type of technical assistance it is willing to provide with respect to submissions to PBGC or to other agencies.

b. PBGC Should Not Limit Financial Assistance for Mergers to the Amount Available for Partition

The proposed regulations require plans that wish to obtain financial assistance for a merger to submit a substantial amount of information, much of which parallels the information plans that are applying for a partition must submit. As discussed below, this approach is not necessary for a merger, results in an inappropriately restrictive cap on assistance, and significantly increases the cost to the plan when applying for such assistance.

As an initial matter, a merger is fundamentally different from a partition, and financial assistance for a merger should not be evaluated as if it were a partition. A critical and declining plan that

⁸ The preamble to the original 1983 final regulations states:

One of the comments [on the proposed regulations] received raised several questions concerning the plan solvency tests under §2672.5 of the regulation and the alternative demonstration permitted by §2672.2(a)(3)(ii). As previously noted, §2672(a)(3)(ii) of the proposed regulations stated that, rather than satisfy the applicable plan solvency test in §2672.5, a plan may otherwise demonstrate “to the satisfaction of the PBGC” that benefits are not reasonably expected to be suspended due to insolvency. The comment expressed concern that this quoted language may give rise to an implication that an alternative demonstration under §2672.2(a)(3)(ii) would require prior approval by the PBGC before the transaction could be consummated. The comment stated that such **prior approval is contrary to the intent of ERISA section 4231**. PBGC agrees. PBGC’s approval is not required for transactions subject to Section 4231, (although it is required that PBGC be notified of the transaction before it occurs). In order to avoid a contrary implication, PBGC has deleted the phrase, “to the satisfaction of the PBGC”, from §2672.2(a)(3)(ii) of the final regulation.

48 *Fed. Reg.* 54344, December 2, 1983 (emphasis added). The regulatory sections referred to above were renumbered in 1996 without substantive change.

applies for a partition (with an accompanying suspension of benefits, as applicable) is asking for permission to take the wrenching step of cutting benefits, including the benefits of many of those in pay status, to 110% of the applicable PBGC guarantee. Because of the negative impact of those cuts on participants and beneficiaries, there is little question that detailed substantiation must be provided before the agencies can approve such action. A critical and declining plan that applies for financial assistance to merge, however, is in a different category. It is asking for assistance so that it can continue to pay benefits for a longer period. Unless coupled with a suspension, it is not asking for permission to cut benefits and should not have to provide the same degree of substantiation in order to obtain assistance as a plan that is cutting benefits.

With regard to the amount of financial assistance available to a critical and declining plan in a facilitated merger, we understand PBGC's current thinking is to limit the amount available to the amount the plan could have received for a partition, or less.⁹ In this regard, we note that the amount available to a plan for partition is an amount that relates only to a portion of the plan's liabilities. We suggest that the approach PBGC adopted for pre-MPRA facilitated mergers would be more appropriate. Under that approach, assistance was limited to an amount generally less than the present value of the amount of future financial assistance to the plan.¹⁰ If PBGC retains the approach as stated in the proposed regulations, a more complete discussion of PBGC's rationale in linking the partition cap and amounts available for financial assistance mergers would help plans better understand their options.

Finally, with regard to the costs associated with applying for a financially assisted merger, the partition approach would make the cost of applying for assistance considerably larger. Generally, the information for a partition application is developed when the plan does extensive information gathering and analysis (including numerous projections) for purposes of simultaneously applying to the Department of the Treasury (Treasury) for MPRA benefit suspensions. In such cases, the additional cost created by the partition application requirements is relatively small. In the case of a financially assisted merger, however, the plan has no independent reason to develop the information needed for a suspension/partition application. Accordingly, the plan would have to incur the considerable suspension/partition information cost solely for purposes of showing PBGC that the financial assistance is no more than the cost of a hypothetical partition. Requiring plans with limited assets to incur such costs diminishes the amount of assets available to pay benefits and increases the amount of financial assistance requested from PBGC. Requiring small financially troubled plans to do so will be particularly burdensome and counterproductive.

PBGC justifies this cost in its cost-benefit discussion for the proposed regulations on the basis that the required information is the same information that must be submitted with a partition application.¹¹ But if a plan is not applying for partition, this justification is not sufficient. If PBGC retains this partition cap despite the unnecessary time, effort, and costs plans will incur, PBGC should further explain the reasons for the cap and provide examples of how it would calculate the cap for purposes of a financially facilitated merger.

⁹ 81 *Fed. Reg.* 36231, June 6, 2016 (bottom, second column).

¹⁰ 81 *Fed. Reg.* 36230, June 6, 2016 (top, third column).

¹¹ 81 *Fed. Reg.* 36236, June 6, 2016 (bottom, first column).

3. Impact of Treasury's Suspension Regulations on Plan Mergers

As PBGC observes in the preamble to the proposed regulations, plan sponsors must be mindful of the interplay between the requirements of a financially facilitated merger and the requirements for the suspension of benefits under Treasury's final suspension regulations.¹² The example PBGC uses is of a critical and declining status plan that has suspended benefits merging into a well-funded plan. If the merged plan cannot meet the requirements for suspension, the suspended benefits must be restored under the rules created by Treasury. Such a result severely undercuts MPRA's remedial intent and we respectfully suggest that PBGC work with Treasury to provide a revised interpretation of the suspension rules that does not require such a result.

4. Responses to Specific PBGC Questions

- a. *How would actuaries determine expected funded status of the merged plan under the "any reasonable estimation for determining the expected funded status" standard in 4231.15?*

"Reasonable estimation" is not a new concept for actuaries. The actuarial standards of practice (ASOPs) provide sufficient guidance for making such an estimation. We believe this proposed approach is on target, as "any reasonable estimation technique" generally implies estimating amounts for each plan before the merger to reflect a single set of assumptions appropriate for the merged plan and then adding these estimates together. PBGC's optional approach may allow an actuary to add up numbers from pre-merger zone certifications of the plans, even if the assumptions are different for the two plans. That might be very useful and a practical approach for expediting the process if the pre-merger plans use different actuarial firms. Either the proposed "any reasonable estimation" approach or the "optional" approach could be used for the components of each funded ratio, funding standard account, and solvency projection needed to estimate the zone status of the merged plan.

- b. *Under 4231.15(f)(1), critical status plans would be subject to a different solvency requirement than non-critical status plans. To encourage the merger of critical and declining status plans into stable plans, the proposed rule provides for a solvency demonstration based on circumstances and challenges specific to the merged plan. What are alternative approaches or methods of demonstrating plan solvency?*

As discussed earlier in these comments, we believe that the purpose of MPRA was to help critical plans, including critical and declining plans, to postpone insolvency. We do not believe that requiring a merged plan to be projected solvent for a minimum of 20 or 30 years is consistent with that purpose or realistic for many plans today. If plans can postpone insolvency by a merger, that should be enough to allow financial assistance. For a merger of a critical and declining status plan into a stable plan, we believe that the solvency measure should be that the merger does not increase the risk of insolvency for the merged plan.

In addition, while perhaps arising infrequently, the regulations should not preclude providing financial assistance to an insolvent plan to merge into a solvent plan if such a merger would not

¹² 81 Fed. Reg. 36232, June 6, 2016 (top, first column).

increase the risk of insolvency for the merged plan. Such mergers would give meaning to the statutory language that authorizes financial assistance if necessary for a plan “**to become ... solvent.**”¹³ PBGC should leave itself this flexibility if the appropriate situation arises.

Thank you for the opportunity to provide comments on this very important subject. If you have any questions about these comments please contact Serena Simons, Senior Vice President and National Retirement Compliance Practice Leader at 202-833-6472 or ssimons@segalco.com.



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¹³ ERISA §4231(e)(2)(B)(ii) (emphasis added).