PENSION RIGHTS CENTER

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

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

The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees, and their families. This letter responds to the PBGC's request for comments relating to PBGC guidance on partitions of eligible multiemployer plans and facilitated mergers under the Multiemployer Pension Reform Act of 2014 ("MPRA").

Our comments focus on six issues: (1) the relationship between partition eligibility and benefit suspensions under Section 305(e)(9) of MPRA; (2) the role of the PBGC Participant and Plan Sponsor Advocate; (3) coordination of application for suspension of benefits under Section 305(e)(9) and applications for partition; (4) the schedule of PBGC payments to the partitioned plan; (5) notices to plan participants in partitions and facilitated mergers; and (6) enforcement of the original plan's obligations to pay the benefits of partitioned participants in excess of guaranteed amounts.

We proceed from the view that partition and facilitated mergers are merely tools that the PBGC can use in appropriate situations to support the purposes of aiding multiemployer plans, protecting the financial position of the PBGC multiemployer fund, and preserving benefits of participants in multiemployer plans. This is also consistent with one of the PBGC's fundamental statutory goals, "to encourage the continuation and maintenance of voluntary private pension plans." The PBGC has discretion to use or not use the tools as it deems prudent and in the long term interests of both the agency and plan participants.[1] Thus, we generally believe that guidance offered by the PBGC should emphasize the flexibility of these tools rather than prematurely foreclose their application to situations where they might be used to serve these purposes.

[1] In this regard, we note that MPRA provides the PBGC broad discretion in implementing partition and facilitated mergers. For both types of actions, MPRA provides that the PBGC "may" approve partition or provide financial or other support in a facilitated merger. In contrast, MPRA provides that the Department of the Treasury "shall" approve an application for benefit suspensions if the proposed suspensions satisfy statutory criteria. Moreover, the PBGC must certify to Congress that its ability to meet existing financial assistance obligations to other plans will not be impaired by partition, suggesting that the agency must be given maximum discretion when it considers whether to grant an application for partition.

At the same time, it is critically important that PBGC guidance ensure that these tools, when they are used, promote the long-term financial security of affected participants and beneficiaries, as well as that of plan sponsors and the PBGC. As noted below, this will require that the regulations delineate the scope of the Participant and Plan Sponsor Advocate's authority with respect to partition applications, provide meaningful disclosure to participants in both partitions and facilitated mergers, and ensure that the rights of partitioned participants and beneficiaries will be enforced.

Discussion

1. The relationship of partition to benefit suspensions.

ERISA § 4233(b)(2) provides that a multiemployer plan is eligible to use partition only if "the corporation determines, after 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 § 305(e)(9), if applicable." This requirement is ambiguous as to whether a plan is eligible for partition only if it first makes the maximum benefit cuts without regard to the effect of partition, or whether maximum benefit cuts are to be made only if making such benefit cuts would be reasonable, as determined by the plan sponsor, contributing employers, participants, and the PBGC.

The position that maximum benefit cuts is a mandatory pre-condition to partition is in tension with the statute. The statute permits partition only if a plan is in critical and declining status. Section 4233(b), on the other hand, permits benefit suspensions for plans in such status, but only if the plan, post benefit suspensions, is projected to remain solvent. If maximum benefit cuts are required, partition would only be available in situations in which "maximum" benefit suspensions were insufficient to meet the statute's long-term solvency requirement without a concurrent application for partition.[2] We think that it is unlikely that this is what Congress intended. Rather, we believe that Congress intended partition to be an available tool in all situations in which the PBGC determines that financial assistance will reduce the corporation's expected long-term loss with respect to the plan, is necessary for the plan to remain solvent, and will not impair the PBGC's ability to meet its existing obligations to provide financial assistance to other plans.[3]

The term "maximum benefit cuts permissible under section 305(b)(9)" itself is a contextual term and refers to the minimum level of benefit cuts that are necessary for the plan to remain solvent, an amount whose calculation is itself contingent on the expected effect of partition.

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[2] Conceivably, partition might also be a possible tool for plans whose participants under age 80 have benefits no greater than 110% of the amount guaranteed under Section 4022A of ERISA.

[3] As noted below, this is consistent with facilitated mergers, where financial assistance can be made to a post-merger plan without a requirement of benefit suspensions. Thus, if two plans in critical or declining status merge, the merged plan would be eligible for PBGC financial assistance without benefit suspensions, but neither plan could have received financial assistance through partition. It makes little sense for a statutory scheme to recognize the possibility of merged plans to qualify for financial assistance without benefit suspensions while denying that possibility in all events in an application for partition.

We also note that Section 4233 refers to benefit suspension "if applicable." Section 305(b) does not, however, permit benefit cuts unless a majority of the plan's participants vote to approve them. Thus, in such cases, benefit cuts would not be applicable, even if the statute unambiguously required applicable benefit cuts as a precondition for partition. We also believe it would be unnecessarily costly to require the plan sponsor to submit an application for benefit suspensions if the plan sponsor believes that participants would not ratify the suspensions or if the plan sponsor determines, with PBGC concurrence, that suspensions were otherwise not a reasonable measure.

In our view, the statute permits the Department of the Treasury and the PBGC to consider an application for benefit suspension and partition simultaneously and cooperatively in situations in which the plan sponsor determines that the maximum benefit cuts are not a reasonable measure but that more limited benefit suspensions (combined with partition) would be a reasonable measure.

Finally, we note that in facilitated mergers, the PBGC can provide financial support to merged plans without benefit suspensions. This shows that Congress foresaw situations in which PBGC could provide financial assistance to a plan that has not invoked the benefit suspension procedure under MPRA. Finally, our suggested resolution of the statutory ambiguity provides PBGC enhanced flexibility to manage its multiemployer program and would place no obligations on the agency to approve a particular partition request.

2. The Role of the PBGC Participant and Plan Sponsor Advocate

Both the facilitated merger and partition provisions of MPRA require that the PBGC consult with the PBGC Participant and Plan Sponsor Advocate in considering a plan sponsor's application for partition or request for facilitated merger. In the case of partition, the Advocate's role is to advise the PBGC as to whether the plan sponsor has taken "all reasonable measures to avoid insolvency," including maximum benefit suspensions if applicable. In order for the Advocate to fulfill this responsibility the regulations should suggest the range of factors that could be reviewed, and require plan sponsors to provide the Advocate with relevant information. These factors might include whether a plan sponsor has eliminated 13th checks, fully implemented the benefit reductions authorized by the Pension Protection Act of 2006, increased employer contributions, and modified investment strategies or actuarial assumptions. In addition, the guidance should specify that the Advocate can consider the extent to which a plan sponsor has taken steps to reduce administrative and investment management expenses.

It seems probable that in some cases, the plan sponsor will seek to discuss partition and merger with the PBGC prior to making a formal application or request. The details of a partition application, or the steps that the plan sponsors take before submitting such an application, may reflect the substance of those pre-application discussions. In order to fulfill its statutory responsibilities, the Participant and Plan Sponsor Advocate should be present during any such discussions, and also discussions after the Plan submits an application, and should have discretion to notify affected participants of the discussions and ensure that they have an opportunity to discuss potential partitions and mergers with the PBGC.

3. Coordinating Section 4233 and Section 305(b).

ERISA § 305(b) requires that the Secretary of the Treasury accept or reject a benefit suspension within 225 days after submission. If the Secretary approves the suspension, the Department of the Treasury, in consultation with the PBGC and the Department of Labor, must administer a vote for ratification of the benefit suspensions within 30 days of the approval. It is unclear how long the administration and tabulation of the vote may take, but there is no express statutory time limit and we assume that the process could take upwards of a month to allow participants sufficient time to receive counsel from their advisors and to cast a reasoned and secure ballot. If the vote is negative, the Secretary of the Treasury, again in consultation with its sister agencies, must determine within 14 days of the adverse vote whether the plan is a systemically important plan, and if it determines that the plan is systemically important must then within 90 days either approve the suspension of benefits or modify the suspension of benefits so long as the plan is projected to avoid insolvency. This process under some circumstances could require almost a year's time, and in some routine cases might exceed the 270 days by which PBGC must approve an application for partition.

The PBGC time limit means that in the case of a plan's coordinated, and thus mutually dependent, applications for a partition order and for benefit suspensions, the PBGC would be required to grant the partition order before knowing whether the benefit order would go into effect, which would not be possible given the statute's requirement that partition is necessary for the plan to remain solvent, a determination that cannot be made until the PBGC knows if benefit suspensions have been approved.[4]

PBGC regulations can address this statutory conundrum through either of two approaches: (i) authorizing the PBGC to grant a conditional partition order, which will take effect only if the Department of the Treasury approves the application of benefit suspension, or (ii) requiring a plan sponsor to waive the 270 day requirement for disposition of the partition application.[5]

4. PBGC Payments to Partitioned Plans.

ERISA § 4233(c) provides that the "corporation's partition order shall provide for a transfer to the plan . . . of the minimum amount of the plan's liabilities necessary for the plan to remain solvent." This provision is ambiguous as to whether Congress intended that a partition order is to provide a one-time lump sum payment projected to be the minimum necessary for the plan to remain solvent over its anticipated life, or if it contemplates annual transfers, similar to financial assistance that the PBGC provides insolvent plans to enable them to pay benefits at guaranteed levels under ERISA§ 4261. The latter approach seems to us more consistent with the statute, even though the statute refers to "a transfer," rather than to a series of annual transfers. Annual payments equal to the benefits payable (and expenses of plan administration) in such year will both ensure that the PBGC transfers only the minimum necessary for the plan to remain

[4] The Department of the Treasury does not face this issue because the statute provides that in the case of concurrent applications for benefit suspensions, the benefit suspensions do not become effective until the effective date of the partition.

[5] The first suggested approach may be problematic in cases in which the Department of the Treasury revises a plan of benefit suspension in the case of a systemically important plan, since the partition order may in some cases have to be modified to reflect the revision.

solvent and also ensures that the plan will be able to continue paying benefits regardless of subsequent plan experience. We believe lump sum transfers are only appropriate in cases in which the PBGC determines that it would be beneficial for it and the plan participants to purchase an irrevocable insurance commitment to provide benefits under the partitioned plan.

5. Notices to Participants in Partitions and Facilitated Mergers.

Although partition of a plan, aside from any accompanying benefit suspensions, will not generally adversely affect plan participants, the prospect of partition will nevertheless create concern and anxiety among participants, particularly older retirees who no longer have a connection to the workplace. Developing notices that address likely participant concerns and misconceptions is thus important.[6] We believe the PBGC is in a better position than individual plan sponsors to fashion explanations that will address participant concerns and also to identify unusual features of a particular partition application that may concern participants in the plan. Thus, we would encourage PBGC to create either model or required language for the notice and to review each participant communication to ensure that it is accurate, comprehensible to participants, particularly older participants, and addresses likely concerns and misconceptions. We urge the PBGC to use focus groups that include retirees and to consult with the Plan Participant and Plan Sponsor Advocate in developing model language

When a plan sponsor concurrently files applications both for partition with the PBGC and for suspension of benefits with the Department of the Treasury, those participants whose benefits are reduced by plan amendment will of course be adversely affected. To avoid likely confusion, the PBGC should ensure that the notice of the partition application include a complete and comprehensible description of the proposed benefit suspensions or with the Department of the Treasury require a single combined notice that explains the effects of the proposed partition and benefit suspensions.

A facilitated merger can also cause anxiety to participants, particularly those in well-funded plans that are being combined with plans that are less financially secure. For this reason, the regulations should require notices that include statements about the benefits and potential costs of the transaction to participants. The notice should also identify classes of participants who may be adversely impacted by the merger. These statements can be prepared by plan sponsors but should be reviewed by the PBGC to ensure that they do not mislead participants.

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[6] Unlike prior law, MPRA provides no guidance on which participants and beneficiaries can be transferred to a partitioned plan. They may be former employees of companies that have gone into bankruptcy, or that have withdrawn from the plan without paying withdrawal liability, but they also could have worked for employers that have withdrawn from the plan having paid full withdrawal liability, or employers still contributing to the plan. It is also possible that a partitioned plan could be limited to retirees and deferred vested participants, or to retirees exempt from benefit suspensions, or other groups with large liabilities. Affected participants are likely to be bewildered and wonder why they have been separated from the original plan and worried that their benefits could stop. Even though they will receive benefits that in dollar terms will be equal to those received by participants in the original plan, they are likely to be troubled by being placed in a plan with no assets. A plain-English explanation of the rationale for their removal from the original plan and assurances that their benefits will continue to be paid with funding from the PBGC and the original plan would help provide a measure of reassurance.

6. Obligations of Original Plan to Participants

Finally, the statute requires the original plan to pay benefits to participants in a partitioned plan equal to the excess of plan benefits over the guaranteed benefits paid by the partitioned plan. It is important that the PBGC's regulations ensure that participants and beneficiaries have an effective and speedy remedy if the original plan fails to timely satisfy its benefit obligations to them.[7]

For questions about these comments, please contact Norman Stein at (215) 571-4740, nps32@drexel.edu or Karen Ferguson at (202) 296-3776, kferguson@pensionrights.org.

Sincerely,

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Director

[7] If this is not clarified, we fear that a plan might in the future argue that an individual whose benefits are partitioned is no longer a participant or beneficiary in the original plan and thus would lack standing to bring a civil action against the original plan. Indeed, we think the regulations should clarify that an individual retains participant status in the original plan so long as the original plan has an obligation to make payments under Section 4233(e)(1).