

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Tel. +1.202.739.3000
Fax: +1.202.739.3001
www.morganlewis.com

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VIA HAND DELIVERY

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

Re: Comments - Request for Information on Partitions of Eligible Multiemployer Plans and Facilitated Mergers under the Multiemployer Pension Reform Act of 2014

To The Regulatory Affairs Group:

Morgan, Lewis & Bockius LLP (“Morgan Lewis”) appreciates the opportunity to respond to the PBGC’s request for comments on matters that may be addressed in future PBGC guidance on implementing the new partition and merger tools that Congress has provided to assist multiemployer pension plans in Critical and Declining status under the Multiemployer Pension Reform Act of 2014 (“MPRA”). We respectfully request that the PBGC provide guidance that is workable and clear; provide plan sponsors with substantial discretion and flexibility in determining a plan’s needs and proposing ways to remedy its structural and financial problems; avoid a one-size-fits-all approach that fails to recognize and respond to the unique features and challenges facing many plans in Critical and Declining status; and that the PBGC’s guidance not create a burdensome and time-consuming administrative structure that would undermine MPRA’s goal of providing timely financial assistance to the most severely troubled multiemployer plans to avoid their insolvency.

I. Morgan Lewis’s Interest in the PBGC’s Request for Information

Morgan Lewis represents and provides legal counsel to the boards of trustees of numerous multiemployer defined benefit plans in various industries and, separately, advises many employers that participate in multiemployer plans. Morgan Lewis has a strong interest in the PBGC’s regulatory guidance under MPRA because the PBGC’s guidance will greatly affect

contributing employers, boards of trustees as plan sponsors, plan administrators, service providers, and plan participants and beneficiaries.

Many multiemployer plans are in perilous financial shape. These plans are in Critical status under Section 305(b)(2) of ERISA and, notwithstanding actions taken under Sections 305(e) and (f) of ERISA, are facing insolvency in the near future. Many plans are also in Critical and Declining status under new Section 305(b)(6) of ERISA.

These plans desperately need governmental approval to utilize the new tools available to plans in Critical and Declining status, including but not limited to the ability to (1) suspend benefits under Section 305(e)(9) of ERISA, (2) partition certain liabilities with financial assistance from the PBGC under Section 4233 of ERISA, and/or (3) merge with other plans under Section 4231 of ERISA with the PBGC's financial and non-financial assistance. By enacting MPRA, Congress recognized the need to save from insolvency the multiemployer plans most in need of benefit reductions, structural reform, and PBGC financial assistance.

For many plans in Critical and Declining status, time is of the essence. Not only must Trustees be given sufficient discretion and flexibility to make the difficult decisions their individual plans need in order to avoid insolvency, they must be able to take action immediately. Neither time nor funding trends are on the side of plans in Critical and Declining status. We therefore request that the PBGC issue its guidance expeditiously so that plans in Critical and Declining status can embark on the road toward solvency before it is too late.

II. Detailed Comments to the Request for Information

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?**

Merger Application Process. MPRA amended Section 4231 of ERISA to set forth a facilitated merger procedure under Section 4231(e) whereby, upon request by plan sponsors, the PBGC may take such actions as it deems necessary to promote and facilitate a merger of two or more multiemployer plans, including providing financial assistance, if certain statutory requirements are met.

MPRA provides no specific rules or application procedures that must be followed by plan sponsors in requesting PBGC assistance in promoting and facilitating a merger, and we request that the PBGC not devise any rigid rules or burdensome application procedure. Because of

major differences that exist among plans, the PBGC should offer plan sponsors maximum discretion and flexibility in the application process to respond to their particular circumstances and to request PBGC assistance as appropriate.

In addition, if the PBGC denies financial assistance for a merger, the PBGC should disclose to plan sponsors and the Plan Sponsor Advocate the reasons for the denial and provide other alternatives to facilitate a successful merger.

Partition Application Process. MPRA eliminated the previous statutory framework applicable to plan partitions and replaced it with new rules under Section 4233 of ERISA. Generally, under the new statute, upon application by an “eligible multiemployer plan,” the PBGC may issue an order of partition if the requirements set forth under Section 4233(b) are satisfied, including maximum allowable benefit suspensions under Section 305(e)(9) of ERISA.

We do not think that the PBGC should issue guidance that attempts to limit or define which plan liabilities or beneficiaries may be transferred or partitioned out of the original plan and moved to a successor plan to avoid plan insolvency. Congress provided no such limiting language in MPRA, and this is largely because defining those who might be eligible for partitioning will vary depending on the particular multiemployer plan and industry. One plan, for example, may decide that a partition order should include any “orphan” beneficiary whose last signatory employer is not contributing to the plan as well as any “orphan” beneficiary whose last signatory employer has withdrawn from the plan and not paid its full withdrawal liability. Partitioning such beneficiaries (combined with benefit suspensions) might be sufficient for a plan to avoid insolvency.

For other plans, however, such a definition may not be sufficient to enable the plan to avoid insolvency and/or may not accurately reflect the work histories in the industry. For example, a plan could have many retirees who worked for 20-30 years for a company that went bankrupt without paying any withdrawal liability, and subsequently, worked only a few years for a contributing employer before retiring. To the extent the retirees’ last signatory employer continues to contribute to the plan for hours worked by active employees, the retirees would not be considered “orphans” eligible for partitioning under the definition noted in the example above. The plan, however, would be burdened with substantial unfunded vested liability and perhaps unable to avoid insolvency.

Similarly, to avoid insolvency, some plans may need to partition all of the liabilities attributable to those beneficiaries for whom 50% or more of their credited service was not and is not supported by employer contributions.

In short, the PBGC should not establish rules restricting how a plan sponsor may propose to define which plan liabilities or beneficiaries are eligible for partitioning. Plan sponsors should

have substantial discretion in determining which plan liabilities or beneficiaries are eligible to be partitioned.

In addition, if the PBGC preliminarily determines that financial assistance for a partition would impair the PBGC's ability to meet its existing financial obligations, the PBGC must disclose to plan sponsors and the Plan Sponsor Advocate sufficient financial and other information to evaluate and verify any such claim, and give the plan sponsor and Plan Sponsor Advocate an opportunity to respond.

Except as noted above, we do not think the Participant and Plan Sponsor Advocate should have any significant involvement in the merger and the partition processes. The Advocate should bring forward specific issues that may need to be addressed, but should not become a procedural hurdle that the plan sponsor must overcome or satisfy to obtain a partition or merger.

- 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?**

Under Sections 4231 and 4233 of ERISA, the PBGC's grant of financial assistance to facilitate a plan merger, or similarly, the PBGC's grant of a partition order, each require the plan sponsor to demonstrate that the PBGC's action or assistance is necessary for the partitioned or merged plan to remain solvent.

To demonstrate that a partition or merger is necessary for a plan to remain solvent, the PBGC should require certification by the plan's actuary, based on reasonable actuarial estimates, assumptions, and methods, most of which is already prepared and available. The PBGC should review the actuary's certification under a standard of reasonableness and not second-guess the actuary's judgment. The PBGC's review of the actuary's certification should be on a case-by-case basis, considering all relevant facts and circumstances, including industry declines and any other special challenges facing the particular plan. Such factors may vary greatly for those plans applying to the PBGC for assistance; therefore, we recommend that the PBGC should not issue rigid guidelines concerning what evidence the plan must present to the PBGC to establish that a partition or merger is necessary for the plan to remain solvent.

In addition, MPRA references the need for a plan to remain solvent, with no reference to the period of time that the plan should remain solvent. We believe that for this provision, the PBGC should require a plan to demonstrate that a partition or merger is necessary for the plan to remain solvent for at least 15 years, but not more than 30 years and not for an indefinite period. A period less than 15 years would suggest a short-term fix and likely require the plan to return to the PBGC for additional assistance. We do not think that result was ever the intent of MPRA.

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

The PBGC has requested comments regarding potential concerns for “small plans” seeking merger or partition assistance from the PBGC. If the PBGC will release guidance under Sections 4231 and 4233 of ERISA pertaining to “small plans,” we believe “small plans” should be appropriately defined in the guidance. If the PBGC intends on referring to the definition in Section 303(g)(2)(B) of ERISA, then that reference should be clearly stated in the guidance. In addition, the PBGC should be receptive to a simultaneous partition and merger, or a staggered partition and merger of these small plans. In some situations, it may be desirable to first partition a plan to make it more attractive as a merger partner.

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?*

Plan sponsors have concerns that participants and beneficiaries will not fully understand the consequences of opposing or attempting to block a proposed partition or merger. If a plan proposes a partition, the plan’s participants and beneficiaries probably will be fearful, apprehensive, and perhaps angry about the benefit reductions that likely will accompany the partition. Participants and beneficiaries, however, should be advised of the need to weigh the effects of a partition against the effects of plan insolvency, in which their benefits would be subject to even greater reductions and, for example, without special protection for those age 75 or older or disability pensioners. It would be helpful if the PBGC issued guidance describing the potential consequences of plan insolvency on plan participants and beneficiaries. Although plan sponsors could craft such language, it will have greater weight and import to the participants and beneficiaries if it comes from the PBGC. In addition, such guidance will assist plan sponsors in effectively communicating with participants and beneficiaries regarding how their benefits could be affected in the future.

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 ensures 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)?**

A model notice to participants and beneficiaries would be helpful if it consists of the following:

- No more than 1-2 pages in length.
- Written in a manner to be understood by an average plan participant.
- Includes a statement that the plan is in Critical and Declining status and that a partition is an option created by federal law to enable the plan to avoid insolvency.
- Includes a statement that the plan's actuary has determined that a partition is necessary for the plan to avoid insolvency.
- Summarizes the classes of participant and beneficiaries who would be partitioned if the application is granted—e.g., beneficiaries whose former employer is not contributing to the plan or whose former employer withdrew without paying its full withdrawal liability.
- Includes a sentence from Section 4233(e)(1) of ERISA stating: "After the partition is effective, the Plan's affected participants and beneficiaries will not receive less of a benefit from the Plan than they would have received if the partition had not occurred, but taking into account the Plan's benefit suspensions under Section 305(e)(9) of ERISA and any future Plan amendments following the effective date of such partition."

- Summarizes the consequences if the plan becomes insolvent—e.g., benefits could be reduced to all participants and beneficiaries; benefits reduced to the PBGC guarantee; no protection for retirees age 75 and older; no protection for disability pensioners, etc.
 - Includes a statement that Congress recognized that time is of the essence for plans in Critical and Declining status, and that the longer plan sponsors wait to take action, the more severe the benefit reductions likely will be.
 - Includes a statement that the PBGC must make a determination on the application within 270 days.
- 6. *PBGC Determination:* For purposes of the requirement under section 4233(b) that the 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?**

Section 4233(b)(2) of ERISA now requires a plan sponsor to demonstrate the plan is an “eligible multiemployer plan” and has taken (or is concurrently with an application for a partition) all reasonable measures to avoid a plan insolvency, including the maximum benefit suspensions under Section 305(e)(9) of ERISA.

The plan sponsor should be able to rely on any relevant economic, industry, or actuarial data that supports its application. Among other things, this could include governing plan documents, plan amendments, previous benefit adjustments, meeting minutes, Rehabilitation Plans, actuarial studies and reports, and funding status certifications. Any actuarial reports must be based on reasonable actuarial estimates, assumptions, and methods. The PBGC should review the plan’s sponsor’s supporting materials under a standard of reasonableness and should avoid a lengthy discovery-like request for information from the plan sponsor. The PBGC should limit the data it requests from the plan sponsor and avoid erecting procedural barriers or overly burdensome paperwork requirements that are inconsistent with the intent of Congress to timely address the severe financial problems facing plans in Critical and Declining status. The PBGC’s

determination should be decided on a case-by-case basis, considering all relevant facts and circumstances surrounding the plan in question.

With respect to the role of the Participant and Plan Sponsor Advocate during the partition application process, it should raise issues or other specific participant situations to be sure they are considered in the application, but the Advocate should avoid becoming a partisan voice in favor of or against the proposed partition. The Advocate should help facilitate the process and assist in the ultimate goal of avoiding a plan insolvency.

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.

Time is of the essence for plans in Critical and Declining status. Where a plan sponsor has submitted concurrent applications for partition and benefit suspensions, it is essential for the PBGC and Treasury to work closely together and communicate with one another during the application review period. It might be useful for there to be an interagency taskforce that would jointly manage such concurrent applications. Delays in suspending benefits could jeopardize that plan's solvency. Delays could also jeopardize the plan sponsor's ability to find a suitable merger partner. If benefit suspensions may not become effective prior to the partition, the

Treasury and PBGC should act to ensure that suspensions and partitions become effective at the same time and on the earliest possible date.

With respect to funds to be transferred in a partition for a plan to remain solvent, we recommend that the amount be sufficient to enable the plan to remain solvent for no less than 15 years and no more than 30 years. Any shorter period would not “reform” a plan. It would constitute only a short-term fix and likely require repeat applications from the same plan sponsors. We do not think this was the intent of Congress in enacting MPRA.

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?**
- **What administrative or operational issues (e.g., recordkeeping, benefit processing, allocation of expenses) arise in connection with this change?**
- **Are there additional issues that arise with respect to the transfer of the plan’s liabilities for particular groups of individuals?**

MPRA removed the prior restrictions on which plan liabilities (i.e., those directly attributable to bankrupt employers) could be transferred to a partitioned plan. The PBGC therefore should not attempt to create or impose any such restriction as it would be contrary to the intent of the statute.

In determining the plan’s liability that should be transferred to enable the plan to remain solvent, the PBGC should rely on the analysis and actuarial data in the plan sponsor’s application, provided that the data is based on reasonable actuarial estimates, assumptions, and methods. MPRA provides plan sponsors with substantial flexibility and discretion in determining the extent to which plan liabilities should be transferred to avoid insolvency. The plan’s showing must be evaluated by the PBGC on a case-by-case basis.

The PBGC should not add additional recordkeeping requirements for the plan sponsors. We believe plan sponsors have access to most, if not all, of the administrative and actuarial information the PBGC would need to analyze whether the plan sponsors have partitioned the

proper amount of liabilities for the plan to remain solvent. We believe the amount transferred should be sufficient to enable the plan to remain solvent for 15-30 years, depending on the specific facts and circumstances.

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?**
- **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?**
- **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?**
- **Is there a need for additional post-partition oversight by PBGC to ensure compliance with MPRA's post-partition requirements, and if so, in what areas?**

We do not anticipate specific administrative or operational issues resulting from the partition of a plan under MPRA's rules. If a partition combined with benefit suspensions keeps contribution rates reasonable and enables the plan to avoid insolvency, we would not anticipate substantial employer withdrawals from the plan. Of course, the extent of any future withdrawals will depend on the particular facts and circumstances present at the time and likely will vary from plan to plan.

We are confident the plan sponsors will be able to monitor, administer, and operate their plans post-partition without extensive government oversight. The trustees of the plans will continue to be fiduciaries with an obligation to act in the best interests of the plan's participants and beneficiaries. Any oversight by the PBGC could be accomplished by an annual reporting requirement whereby the plan sponsors of the original and successor plans would summarize the plans' financial condition, funding status, and actuarial projections of solvency for the period of the partition.

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?**

Many plans are searching for suitable merger partners and these plans likely will request both financial and non-financial assistance from the PBGC in the coming months. It would be helpful if the PBGC issued guidance to clearly inform plan sponsors of the various types of assistance that are available, how to apply for the assistance, and the name of a contact person at the PBGC responsible for follow-up. In light of the unique nature of every potential merger, the PBGC should consider an interactive process that might involve an initial conference with the plan sponsor and a “facilitator” for each merger case file.

- 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?**

Each facilitated merger under Section 4231(e)(1) of ERISA will require an individualistic approach. In light of every plan’s unique situation and the differences in industries and economic factors affecting each plan, the PBGC should avoid requiring a standardized list of actuarial, economic, industry or other information as part of the facilitated merger process. Rather, the PBGC should consider an interactive process, whereby the Agency, and potentially the Advocate, meet with the plan sponsors to understand the merger opportunity, and based on this input, develop the information necessary to evaluate the merger.

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?

Often, for a plan to find a suitable and willing merger partner, the plan sponsor seeking the merger likely will need to suspend benefits prior to the merger. If a plan sponsor files concurrent applications for a suspension of benefits and a merger, the PBGC and the Treasury must work closely together and communicate regularly with each other and the plan sponsor. This communication is vital to the potential success of MPRA's reforms and facilitating plan solvency.

Procedures should be established by the relevant agencies to ensure that concurrent applications to the PBGC and Treasury do not unduly delay a plan sponsor's ability to suspend benefits under Section 432(e)(9) of the Code. For plans in Critical and Declining status that need both benefit suspensions and a merger to avoid insolvency, a timely and coordinated response by the government will be essential.

III. Conclusion

For most multiemployer pension plans in Critical and Declining status, MPRA offers their only hope for survival. The responses of the PBGC and the Treasury to forthcoming applications for benefit suspensions, partitions, and mergers likely will determine whether MPRA can reform troubled plans or whether MPRA is a well-intentioned but futile law.

Morgan Lewis appreciates the opportunity to submit these comments. If you have questions concerning our comments, or if we can be of further assistance, please contact Steve Spencer at (215) 963-5714 or John Ring at (202) 739-5096.

Sincerely,

MORGAN, LEWIS & BOCKIUS LLP

JFR/dpo