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MEMORANDUM

To: Pension Benefit Guaranty Corporation

From: Jane P. Ewers and Careleta A. Ellerson

Re: Comment Regarding Section 121 of MPRA; Facilitated Mergers

Date: April 3, 2015

ISSUE

This comment is in response to the PBGC RFI regarding sections 4231 and 4233 of ERISA, Issue 3 requesting comments regarding the special concerns small multiemployer plans and their sponsors have regarding partition and facilitated mergers.

Section 121 of MPRA allows for the PBGC to offer financial assistance in the facilitation of a merger under certain circumstances. However, the language of Section 121, if interpreted narrowly, may be too restrictive to effectively apply to small pension plans that are in critical and declining status.

BACKGROUND

Section of 121 of MPRA states that the PBGC, when requested, may facilitate a merger between two or more multiemployer pension plans so long as (i) the merger will benefit the participants and beneficiaries of at least one plan; and (ii) is not reasonably expected to be adverse to the participants or beneficiaries of any of the plans. This facilitation includes training, technical assistance, mediation, communication with stakeholders and support with related requests to other government agencies.

Additionally, the PBGC may offer financial assistance in order to facilitate a merger when it determines that such assistance is necessary for a plan to avoid or postpone insolvency so long as (i) one or more of the multiemployer plans is in critical and declining status; (ii) the financial assistance will reduce the PBGC's long-term loss; and (iii) the financial assistance is necessary for the merged plan to become or remain solvent.

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EXPLANATION

The language of Section 121, if narrowly interpreted, would not allow for small pension plans which are in critical and declining status to take advantage of PBGC facilitated merger financial assistance when the Plan seeks to merge with a healthier plan, unless the resulting merged plan is expected to become insolvent.

Under a narrow interpretation, the PBGC would only be allowed to provide financial situations in limited cases. One case would be two critical and declining status plans merging together. However, in this case, it is not clear why the merger would be the precipitating event to trigger PBGC financial assistance, since both plans were headed towards insolvency prior to the merger as well. Another case would be where a critical and declining status plan merged with a healthy plan, only to drag the healthy plan towards insolvency. It is not clear that a healthy plan would agree to this, even if the PBGC offered financial assistance sufficient to stave off insolvency. As a result of this narrow interpretation, in many cases, the PBGC would not be able to offer financial assistance, and this would not appear to be the intent of Congress.

As an alternative, the phrase "such financial assistance is necessary for the merged plan to become or remain solvent" could be interpreted to mean that in the *absence* of a merger, a critical and declining status plan would become insolvent, and therefore, financial assistance is necessary for the merged plan (meaning *both* the critical and declining status plan and the plan with which it merges) to remain solvent. Put another way, because in the absence of financial assistance, insolvency would await a component of the would-be merged plan; financial assistance is necessary for the merged plan to become or remain solvent. Under this interpretation, the PBGC would have authority to provide financial assistance in a significantly broader range of situations.

CASE STUDY

We have a client small construction industry plan in critical and declining status, seeking to merge with a larger, healthier plan. In the view of its trustees, the small plan has taken all reasonable measures to forestall insolvency. For example, more than 90% of contributions go towards funding past benefits instead of future accruals. Accrued benefits are small enough that remaining benefit adjustments and suspensions would not provide a meaningful improvement in the plan’s funded status, and could come at the cost of loss of support for the plan from the remaining participants and employers. Withdrawal liability options are limited in a construction industry setting. As a result, a merger appears to be the primary means for the plan to avoid insolvency.

However, a merger is not likely to occur unless the funded status of the small plan does not adversely affect the participants in the resulting merged plan. A merger would be harmful to the participants of the large healthy plan, but not so harmful that it would cause the merged plan to become insolvent without financial assistance since the funding deficit absorbed by the large plan would be relatively

small. Given these circumstances, trustees of the large plan could be in breach of their fiduciary duties to plan participants and beneficiaries if they accepted the merger with the critical and declining status plan. The merger may not be eligible for financial assistance from the PBGC since such assistance would not be necessary in order for the merged plan (narrowly interpreted) to become or remain solvent.

<u>Example</u>: *Plan S is a multiemployer pension plan which has $10 million in market value of assets and a $24 million present value of accrued benefits, leaving the plan 42% funded. This plan is expected to become insolvent within 20 years and is therefore considered to be in critical and declining status. In order for the plan to avoid insolvency it would need to merge with a larger healthy plan called Plan L. Plan L has over $1 billion in assets and is 85% funded on a market value basis. Plan L's funded percentage and credit balance are expected to rise in future years. This merger scenario satisfies the first two prongs of determining eligibility for PBGC financial assistance, but not the third prong, if narrowly construed.*

If Plan L and Plan S merge, the new merged plan would not be in danger of insolvency. However, the merger creates a question of fiduciary breach by the trustees of Plan L, as that Trust's acceptance of Plan S will adversely affect funding in Plan L. Since the merger would be harmful, even though only slightly, the merger would not be attractive for Plan L. Plan S, by itself, will then fall into insolvency, leaving the PBGC to pay the benefits. Even if the PBGC's ability to facilitate mergers could address the fiduciary breach issue, Plan L still has a financial disincentive to assume an unfunded liability that Plan S participants stand little chance of paying off.

The potential requirement that financial assistance is necessary for the merged plan to remain or become solvent, could prevent funding necessary to facilitate a merger which would otherwise prevent a long-term burden on the PBGC, and most importantly, which would preserve retirement benefits for hundreds of retirees in this smaller plan. If the PBGC were to interpret the offer of financial assistance to facilitate a merger to include assisting a plan which is in critical and declining status to the extent needed to allow a merger with a healthier plan, a merger facilitated by PBGC financial assistance would be possible. If merging with the small plan comes with financial assistance, a merger would not trigger a breach of fiduciary duties by or otherwise offer significant financial disincentives to the trustees of the large healthy plan. Under these circumstances, the merged plan would be healthy, the small plan would avoid insolvency and the long-term loss to the PBGC could be significantly reduced.
This comment does not address the many complicated issues that the PBGC would need to consider as to under what conditions it might offer financial assistance, and how it would apply the offer of financial assistance in an equitable fashion to the many plans that might be interested. For now, we are making a case for the PBGC's authority to provide such financial assistance, and we believe that is a reasonable interpretation of Section 121 of MPRA.

CONCLUSION

We respectfully request that the PBGC consider guidance regarding the third requirement for PBGC financial assistance eligibility under MPRA Section 121, specifically regarding smaller critical and declining status plans attempting a merger with a larger, healthier plan, to allow for financial assistance for small plans sufficient to facilitate mergers, so long as all other statutory requirements are met. In many cases, this may be the best opportunity for smaller plans to preserve retiree benefits without triggering long-term funding from the PBGC.