PENSION RIGHTS CENTER
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Submitted electronically to reg.comments@pbgc.gov

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
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Attn: Joseph J. Shelton and Kimberly J. Duplechain

Re: Comments on Partitions of Eligible Multiemployer Plans, 29 CFR Part 4233
RIN 1212-AB29

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. The Center has long been involved with legislative and regulatory proposals dealing with the special problems faced by collectively-bargained multiemployer plans, beginning with the Multiemployer Pension Plan Amendments Act of 1980 and continuing through the Multiemployer Pension Reform Act of 2014 (MPRA).[1]

We acknowledge the hard work and effort reflected in the interim final rule. The preamble summarizes the new statutory requirements of the proposed rule as clearly and simply as could be given the technical subject matter. In addition, we are pleased that model language has been included for all of the participant notices required by MPRA. However, there are provisions in the text of the rule and notices that we believe warrant further consideration.

The statute specifies that only a plan "in critical and declining" status (as defined in ERISA §305) is allowed to seek partition relief. By definition, therefore, the participants in any plan that requests partition is at risk of benefit losses, including possible suspension of benefits in pay status. The Center is particularly concerned that the PBGC and Treasury regulations that deal with the new benefit suspension provisions of MPRA assure that retirees and workers receive complete, accurate and timely information about the status of their plan and any proposed benefits cutbacks. In addition, if benefit suspensions are indeed necessary, plan sponsors should be required to minimize, to the extent possible, financial loss to retirees and their families.

To that end, our comments will focus on five issues that bear directly on participants: (1) the content of the participant notices; (2) deficiencies in the required elements of the plan application; (3) the need for the PBGC to provide adequate technical and financial resources to

[1] Public Law 113-235, 128 Stat. Ann. 2130 et seq. (2014)

the Participant and Plan Sponsor Advocate; (4) whether the statute makes benefit suspensions an absolute prerequisite for partition; and (5) how Title I of ERISA interacts with new §4233.

Discussion

(1) Participant Notices (§4233.6(g), .11(b)-(c)). The interim final rule does not require use of the PBGC Model Notice: sponsors are free to alter, amend, or even discard the Model in favor of their own text. This gives altogether too much latitude to plan trustees or professionals who may well have steered the plan into "critical and declining" status in the first place. Accordingly, we suggest that the draft plan notice lodged with the PBGC must "highlight" and explain any deviations from the Model Notice text, and the PBGC should allow use of that text only with the approval of the PBGC's Participant and Plan Sponsor Advocate.

(2) Application Information (§4233.6-7). The interim rule requires a "detailed description" of the steps the plan has taken, or considered but not taken, to avoid insolvency. While the regulation states that the sponsor must "include all relevant documentation," it does not actually require the sponsor to produce objective factual evidence to back up its "description." Thus, it is likely that PBGC (and plan participants: see §4233.11(c)(6)) will be treated to self-serving platitudes such as "it is not feasible to increase the rate of employer contributions" or "the plan is unable to reduce administrative expenses" and the like. ***Mere assertions are not enough to justify benefit reductions***.

    Plan sponsors should be required to document the efforts that they have taken, and should likewise document why they have not taken other steps—increased contribution rates, adoption of other funding relief measures authorized by MPRA and the Pension Protection Act of 2006 (such as plan mergers and elimination of subsidized benefits), alliances, elimination of 13th checks, and reductions in investment management fees, trustees' fees, and administrative and professional expenses—to remedy the plan's financial situation. See Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 113th Congress* at 95-97, JCT-1-15 (March 2015).

(3) Test and verify. MPRA acknowledges that plan sponsors suffer from a conflict of interest with plan participants. Plan trustees are appointed by and usually come from union and employer groups, and it is often in the interest of those groups to reduce their own financial burdens by reducing the benefits of retirees, who no longer serve the employer and typically do not vote in union elections. The PBGC, moreover, has its own conflict of interest: it will approve a partition—which may involve benefit cuts—only if the partition reduces PBGC's guaranty payments, either in the short- or long-term.

    These inherent conflicts underscore the importance of the role of the Participant and Plan Sponsor Advocate, who is the only party who reaps no financial advantage from imposing benefit cuts on retirees. However, the Advocate cannot perform the role of "devil's advocate" unless the interim rule clarifies that, in a partition situation, she is responsible solely for representing the plan's retirees and deferred vested participants, and is offered the opportunity to participate in all meetings between the plan sponsor and the PBGC.

In addition the final rule should specify that (1) the PBGC must provide the Advocate with adequate accounting, actuarial, and legal resources; and (2) the plan must allow the Advocate unfettered, timely access to all plan records, actuarial worksheets, and databases.

(4) Does the statute always require suspension before partition? The interim rule takes the position that a plan cannot qualify for partition assistance unless the plan has first suspended benefits to the maximum extent allowed by law but is nevertheless projected to become insolvent without PBGC assistance. As we noted in our RFI filing, this "no suspension, no partition" reading is not consistent with the full text of section 4233. In addition, the absolutist approach would tie PBGC's hands and prevent the agency from reducing its own losses in many cases. First, we note that ERISA § 4233(b)(2) allows partition if "the corporation determines...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*." (emphasis added). Thus, the statute does not require trustees to impose *unreasonable* cutbacks, and absolutely disallows suspending some categories of benefits (e.g. disability) even if the cutback would be otherwise reasonable. To like effect, the legislative history emphasizes any benefit suspensions must be "equitably distributed" (*see* JCT *General Explanation* at 95).

If maximum benefit cuts are required, partition would only be available in situations in which "maximum" benefit suspensions were sufficient to meet the plan's long-term solvency. It is unlikely that Congress intended to tie PBGC's hands in this fashion. What if, for example, the plan has so few participants with suspendable benefits (or lots of participants with de minimis suspendable benefits) that the administrative, legal, and actuarial costs of implementing a suspension exceed the savings? What if the participants in a plan vote down suspensions? What if a relatively modest amount of financial assistance to a smaller plan that is projected to become insolvent in 20 years (to partially cover benefit costs of participants whose employers are no longer contributing to the plan), would enable the plan to minimize benefit suspensions now while allowing the PBGC to reduce its insolvency-related costs in the future. If the PBGC can save itself from guarantee losses by partitioning such plans, the "if applicable" subclause of 4233(b)(2) gives the agency good grounds to do so.[2]

(5) Title I and the successor plan. The interim rule exposes an interesting technical issue that arguably requires legislative clarification. The statute and Section 4233.15 of the rule specify that the spun-off plan is both (a) a successor plan to the original plan and (b) a plan that has terminated under ERISA §4041A(d).[3] Under Title I of ERISA and the Internal Revenue Code, the original and successor plans would seem to be separate plans,

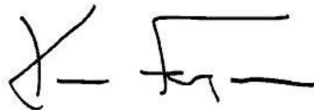
[2] The 2010 partition of the Chicago Truck Drivers Plan (under prior law) illustrates how PBGC saved a larger plan from insolvency by assuming a great deal of the liability attributable to "orphan" participants with relatively low benefits: PBGC and the original plan participants were manifestly better off, while benefit losses to partitioned participants were minimized. See PBGC News Release 10-25.

[3] We are pleased that the interim rule clarifies that participants in the successor plan retain their participant status under the original plan, a point raised in our RFI comments.

because all assets of the two plans are NOT available to pay all benefits of all participants. This may not matter much for purposes of the Code: the minimum funding rules do not apply to terminated plans, and, even if they did, the rules would be toothless, because there are no contributing employers who would be subject to an excise tax for a funding deficiency. But the "separate status" of the successor plan does matter, and matters very much, for purposes of Title I. Will the successor plan need to file Form 5500s? Will it need audited financial statements? Will the trustees of the original plan need to obtain a second bond and duplicate fiduciary insurance in their capacity as trustees of a second plan? And will the successor plan need separate legal counsel? The uncertain status of the plan will also impose burdens and expenses for the PBGC. If past experience is a guide, it is likely that PBGC's Inspector General, as part of the agency's annual audit, will insist that computation of PBGC's benefit liabilities will require successor plans to have separate accounting systems and annual actuarial valuations.

For questions about these comments, please feel free to contact Terrence Deneen at 773-687-9426, terrydeneen640@yahoo.com, or Karen Ferguson at 202-296-3776, kferguson@pensionrights.org.

Sincerely,



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