



This document is scheduled to be published in the Federal Register on 12/23/2015 and available online at <http://federalregister.gov/a/2015-32309>, and on FDsys.gov

[Billing Code 7709-02-P]

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4233

RIN 1212-AB29

Partitions of Eligible Multiemployer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: On June 19, 2015, PBGC published an interim final rule to implement the application process and notice requirements for partitions of eligible multiemployer plans under title IV of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Reform Act of 2014 (MPRA). PBGC is making minor changes to the interim final regulation in response to public comments received on the interim final rule.

DATES: Effective [Insert date 30 days after date of publication in the Federal Register]. See Applicability in SUPPLEMENTARY INFORMATION.

FOR FURTHER INFORMATION CONTACT: Joseph J. Shelton

(shelton.joseph@pbgc.gov), Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington DC 20005-4026; 202-326-4400, ext. 6559.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

This final rule makes minor changes to part 4233 of PBGC's regulations, which was added by PBGC's interim final rule on Partitions of Eligible Multiemployer Plans (80 FR 35220, June 19, 2015). Many of the changes respond to public comments.¹

PBGC's legal authority for this action comes from section 4002(b)(3) of ERISA, which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, and section 4233 of ERISA, as amended by MPRA, which requires that the partition process be conducted in accordance with regulations prescribed by PBGC.

Major Provisions of the Regulatory Action

Part 4233 prescribes the statutory conditions and the information and notice requirements that must be met before PBGC may partition an eligible multiemployer plan under section 4233 of ERISA. This final rule makes minor revisions to part 4233 with respect to information requirements, the time period for PBGC's initial review of an application for partition, and the coordinated application process for partition and benefit suspension.

Background

In December 2014, Congress enacted and the President signed the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113-235 (128 Stat. 2130 (2014)), of which MPRA is a part. MPRA contains a number of statutory reforms intended to help financially troubled multiemployer plans and to improve the financial condition of PBGC's multiemployer insurance program. In addition to increasing PBGC premiums, sections 121 and 122 of MPRA provide PBGC with new statutory authority to assist financially troubled

¹ The interim final rule and comments available at <http://www.pbgc.gov/prac/pg/other/guidance/final-rules.html>.

multiemployer plans under certain conditions if doing so would reduce potential future costs to PBGC and PBGC can certify that its ability to meet existing financial assistance to other plans will not be impaired.²

Section 122 of MPRA replaced the existing partition rules with a new framework of rules. As amended by MPRA, section 4233(a)(1) of ERISA provides that, upon application by the plan sponsor of an eligible multiemployer plan, PBGC may order a partition of the plan in accordance with that section. As under prior law, PBGC's decision to order a partition is discretionary.³ Unlike prior law, however, MPRA requires PBGC to make a determination on a partition application not later than 270 days after the date such application was filed (or, if later, the date such application was completed), in accordance with regulations promulgated by PBGC.

In addition, section 4233(a)(2) states that not later than 30 days after submitting an application for partition, the plan sponsor shall notify the participants and beneficiaries of such application in the form and manner prescribed by regulations issued by PBGC.

Eligibility criteria for partition

Section 4233(b) of ERISA contains five statutory conditions that must be satisfied before PBGC may order a partition:

Critical and declining status. In accordance with section 4233(b)(1), the plan must be in critical and declining status as defined in section 305(b)(6) of ERISA.⁴

² This final rule implements section 122 of MPRA. PBGC expects to publish a proposed rule on facilitated mergers involving critical and declining status plans under section 121 of MPRA in a separate rulemaking.

³ For additional background on the statutory rules governing multiemployer plans under title IV of ERISA, including the statutory rule for partitions under section 4233 of ERISA before MPRA's changes, see the preamble to the interim final rule.

⁴ Section 305(b)(6) provides that a plan is in critical and declining status if (1) it satisfies the criteria for critical status under section 305(b)(2), and (2) it is projected to become insolvent within the meaning of section 4245 during the current plan year or any of the 14 succeeding plan years (or 19 succeeding plan years if the plan has a ratio of

PBGC determination on reasonable measures. Under section 4233(b)(2) of ERISA, PBGC must determine, after consultation with the Participant and Plan Sponsor Advocate (Advocate), that the plan sponsor has taken (or is taking concurrently with an application for partition) all reasonable measures to avoid insolvency, including maximum benefit suspensions under section 305(e)(9) of ERISA, if applicable.

Long-term loss and plan solvency. In accordance with section 4233(b)(3) of ERISA, PBGC must reasonably expect that—

- Partition will reduce PBGC’s expected long-term loss with respect to the plan; and
- Partition is necessary for the plan to remain solvent.

Certification to Congress. In accordance with section 4233(b)(4) of ERISA, PBGC must certify to Congress that its ability to meet existing financial assistance obligations to other plans (including any liabilities associated with multiemployer plans that are insolvent or that are projected to become insolvent within 10 years) will not be impaired by the partition.

Source of funding. In accordance with section 4233(b)(5) of ERISA, the cost to PBGC arising from the partition must be paid exclusively from the PBGC fund for basic benefits guaranteed for multiemployer plans.

PBGC partition order

Upon PBGC’s approval of an application for partition, section 4233(c) of ERISA provides that PBGC’s partition order shall provide for a transfer to the plan created by the partition order (the successor plan) the minimum amount of the original plan’s liabilities necessary for the original plan to remain solvent.

inactive participants to active participants that exceeds two to one, or if the funded percentage of the plan is less than 80 percent). Treasury has interpretative jurisdiction over the subject matter in section 305 of ERISA.

Sections 4233(d)(1) and (2) of ERISA describe the nature of the successor plan, and assign responsibility for its management. Specifically, section 4233(d)(1) provides that the plan created by the partition order is a successor plan to which section 4022A applies. Section 4233(d)(2) provides that the plan sponsor of the original plan and the administrator of such plan shall be the plan sponsor and administrator, respectively, of the successor plan.

Partition withdrawal liability rule

Section 4233(d)(3) of ERISA prescribes a new withdrawal liability rule that applies for 10 years following the date of the partition order. Under the new rule, if an employer withdraws from the original plan within 10 years following the date of the partition, withdrawal liability is computed under section 4201 with respect to the original plan and the successor plan. If, however, the withdrawal occurs more than 10 years after the date of the partition order, withdrawal liability is computed under section 4201 only with respect to the original plan (and not with respect to the successor plan). In either case, withdrawal liability is payable to the original plan (and not the successor plan).

Continuing payment obligation

Section 4233(e)(1) imposes an ongoing benefit payment obligation on the original plan with respect to each participant or beneficiary of the original plan whose guarantee amount was transferred to the successor plan pursuant to a partition order. With respect to these individuals, the original plan must pay a monthly benefit for each month in which such benefit is in pay status following the effective date of the partition in an amount equal to the excess of—

- The monthly benefit that would be paid to such participant or beneficiary for such month under the terms of the plan (taking into account benefit suspensions under

section 305(e)(9) and any plan amendments following the effective date of such partition) if the partition had not occurred, over

- The monthly benefit for such participant or beneficiary that is guaranteed under section 4022A.⁵

Benefit improvement premium payments to PBGC

Section 4233(e)(2) of ERISA provides that in any case in which a plan provides a benefit improvement, as defined in section 305(e)(9)(E)(vi), that takes effect after the effective date of the partition, the original plan shall pay to PBGC for each year during the 10-year period following the partition effective date, an annual amount equal to the lesser of—

- The total value of the increase in benefit payments for such [plan] year that is attributable to the benefit improvement, or
- The total benefit payments from the successor plan for such [plan] year.

This payment must be made at the time of, and in addition to, any other premium imposed by PBGC under title IV of ERISA.⁶

Special premium rule

Section 4233(e)(3) of ERISA imposes a special premium rule on the original plan, which requires it to pay the premiums for participants whose guarantee amounts were transferred to the successor plan for each year during the 10-year period following the partition effective date.

⁵ Because the benefit payment obligation under section 4233(e)(1) is based, in part, on the monthly benefit that is guaranteed under section 4022A, the amount of this benefit payment obligation is subject to change under section 4022A(f)(2)(C).

⁶ Section 305(e)(9)(E)(vi) defines the term “benefit improvement” as a resumption of suspended benefits, an increase in benefits, an increase at the rate at which benefits accrue, or an increase in the rate at which benefits become nonforfeitable under the plan. As previously noted, Treasury has interpretative jurisdiction over the subject matter in section 305 of ERISA.

Notice of partition order

In addition to the initial notice requirement under section 4233(a)(2) of ERISA, which applies to the plan sponsor, section 4233(f) imposes a notice requirement on PBGC. It states that not later than 14 days after the issuance of a partition order, PBGC must provide notice of the order to the Committee on Education and the Workforce of the House of Representatives; the Committee on Ways and Means of the House of Representatives; the Committee on Finance of the Senate; the Committee on Health, Education, Labor, and Pensions of the Senate; and any affected participants or beneficiaries.

Interim Final Rule and Regulatory Changes

As noted above, on June 19, 2015, PBGC published an interim final rule on Partitions of Eligible Multiemployer Plans. PBGC had earlier published a Request for Information (RFI) to solicit information on issues PBGC should consider in the rulemaking; PBGC received 20 comments in response to the RFI.⁷

The regulatory provisions in the interim final rule were effective upon publication. PBGC provided a 60-day comment period and received nine comments, four from organizations (Pension Rights Center, U.S. Chamber of Commerce, National Coordinating Committee for Multiemployer Plans, and AARP), and five from individuals. The comments, PBGC's responses to the comments, and a summary of changes made to the interim final rule are discussed below. For a summary of the rules that remain unchanged, see the preamble to the interim final rule.

⁷ 80 FR 8712, Feb. 18, 2015. The RFI and comments are available at <http://www.pbgc.gov/prac/pg/other/guidance/multiemployer-notices.html>.

Discussion of Public Comments

Application Requirements

Section 4233.4 of the interim final rule provides guidance on the information needed to determine whether an application for partition is complete, and states that an application will not be considered complete unless the application includes the information specified in §§ 4233.5 (plan information), 4233.6 (partition information), 4233.7 (actuarial and financial information), 4233.8 (participant census data), 4233.9 (financial assistance information).

One commenter stated that the rule on completeness in § 4233.4 is “inappropriately strict,” and that “[t]here may be instances where not every document listed is required for PBGC to make a determination.” The commenter noted, as an example, the requirement under § 4233.5(g) for the most recent IRS determination letter for the plan. The commenter expressed the view that determination letters may become increasingly difficult to obtain due to recently announced changes to the IRS determination letter program for qualified plans,⁸ and that “the lack of a determination letter would undo the entire application even though it has little direct impact on the partition itself.” The same commenter suggested that rather than stating that an application for partition will not be considered complete if the information required under §§ 4233.5-4233.9 is not included with the application, § 4233.4(a) should instead provide that an application with missing information may require additional time for PBGC to determine if the application is complete.

PBGC believes that the regulation’s information requirements are reasonable, necessary, and, in most instances, based on information that plans are already required to prepare and retain under ERISA and the Internal Revenue Code (“Code”). Turning to the commenter’s concern about IRS determination letters, PBGC notes that to be covered under title IV of ERISA, a plan

⁸ See IRS Announcement 2015-19, available at <https://www.irs.gov/pub/irs-drop/a-15-19.pdf>.

must either have received a favorable determination letter from the IRS, or have otherwise met the tax-qualification requirements under the Code. Because the requirement in § 4233.5(g) is limited to the plan's *most recent* IRS determination letter (regardless of the date), IRS Announcement 2015-19 should not impact this requirement.

In the case of a multiemployer plan that had never in its history obtained a determination letter (which is rare in PBGC's experience) but, in practice, operated in accordance with the qualification rules under the Code, the failure to submit a determination letter under § 4233.5(g) would not, as the commenter suggested, "undo the entire partition application." Under that scenario, the inability to submit the plan's most recent determination letter is not due to an oversight or a refusal to provide the information. Rather, the document simply does not exist. In that case, nothing in the regulation would constrain PBGC from exercising its discretion to determine that the application was nevertheless complete.

PBGC is amending § 4233.4(a) to clarify this point by substituting the word "may" in place of "will." Therefore, as revised, § 4233.4(a) will provide that if any of the information required under part 4233 is not included with an application for partition, "the application may not be considered complete."

Plan information

Section 4233.5 of the regulation identifies plan-related information items that must be submitted for an application to be complete, including a requirement under § 4233.5(i) to provide a current listing of contributing employers to the plan and the approximate number of participants for whom each employer is required to contribute.

One commenter suggested that in addition to the information required under § 4233.5(i), plan sponsors should be required to submit information on the specific dollar amount contributed

by each employer, whether the employer is current or delinquent in making its contributions to the plan, and if delinquent, the specific dollar amount of the delinquency. Finally, the commenter suggested that PBGC should “look back at least ten years, especially given that the economic crisis from 2008 through 2013 may not be an accurate measure, and sufficient pre- and post-crisis data is needed to fairly evaluate a plan and its funding capabilities.”

For a number of reasons, PBGC did not adopt the commenter’s suggestions. First, based on its partition experience under prior law, PBGC decided that § 4233.5(i) already provides PBGC with all of the employer contribution information it needs to make a determination on an application for partition.

Second, if, based on the facts of a particular case, PBGC determines that additional information relating to a plan’s contribution base is needed to make a determination on partition, PBGC retains the discretion to request such information under § 4233.4(b).⁹

Third, in addition to the employer contribution information already required under the interim final rule, § 4233.5(h) requires a copy of the most recent Form 5500 and schedules for the plan. Schedule R of the Form 5500 requires, among other things, information on any employer that contributed more than five percent of the plan’s total contributions for the plan year. In addition, § 4233.7(a)(1) requires a plan sponsor to submit the most recent actuarial report for the plan and those for the two preceding plan years. These actuarial reports generally include information on actual contributions received for the plan year, and expected contributions for the following plan year.

In sum, PBGC has determined that the existing information requirements under the regulation provide PBGC with the information it needs relating to employer contributions to

⁹ Section 4233.4(b) of the regulation provides that PBGC may require a plan sponsor to submit additional information necessary to make a determination on an application under this part, and any information PBGC may need to calculate or verify the amount of financial assistance necessary for partition.

make a determination on an application for partition. Furthermore, as previously stated, if additional information relating to employer contributions is needed to make a determination in a particular case, PBGC retains the discretion to request that information under § 4233.4(b). Accordingly, for the reasons stated above, PBGC did not make any changes to § 4233.5(i).

PBGC determination on reasonable measures

Under section 4233(b)(2) of ERISA, PBGC must determine, after consultation with the Advocate, that the plan sponsor has taken (or is taking concurrently with an application for partition) all reasonable measures to avoid insolvency, including maximum benefit suspensions under section 305(e)(9) of ERISA, if applicable.

Consistent with this requirement, § 4233.6(e) requires a detailed description of all measures the plan sponsor has taken (or is taking) to avoid insolvency, as well as those measures the plan sponsor considered but did not take. The regulation also requires the plan sponsor to identify the factor(s) it considered in making those determinations, and to submit all relevant documentation relating to the determinations.

One commenter expressed concern that the interim final rule did not require “objective factual evidence” and predicted that PBGC (and plan participants) would be “treated to self-serving platitudes.” The commenter suggested that plan sponsors should be required to “document the efforts they have taken, and should likewise document why they have not taken other steps...to remedy the plan’s financial situation.”

As a preliminary matter, PBGC agrees that unsupported assertions concerning the measures a plan sponsor has taken (or is taking) to avoid insolvency would not provide a sufficient basis for PBGC, in consultation with the Advocate, to make a determination under

section 4233(b)(2) of ERISA. PBGC disagrees, however, that unsupported assertions would satisfy the requirements of § 4233.6(e).

In addition to requiring a detailed description of the measures taken to avoid insolvency, including the measures the plan sponsor considered but did not take, § 4233.6(e) requires the plan sponsor to submit “all relevant documentation” relating to those determinations.

Furthermore, to the extent the information and documentation provided under § 4233.6(e) is not sufficient to reach a determination, PBGC has the authority under § 4233.4(b) to require a plan sponsor to submit any additional information necessary to make a determination under section 4233 of ERISA.

Finally, it is also important to note that § 4233.3(b) requires that an application for partition must be signed and dated by an authorized trustee and must include a statement under penalties of perjury that the “application contains all the relevant facts relating to the application, and such facts are true, correct, and complete.”

Based on the foregoing, PBGC believes that the existing information and certification requirements under the regulation address the concerns raised by the commenter relating to unsupported assertions, and that no additional changes are required.

Actuarial and financial information

Section 4233.7 of the interim final rule identifies the actuarial and financial information requirements for an application for partition. Although there were no comments from the public on § 4233.7, PBGC is amending the regulation to clarify that the benefit payment information required under §§ 4233.7(a)(3)(iii), (a)(5)(iii), and (a)(8) must be organized by participant status (*e.g.*, active, retiree, terminated vested, beneficiary). PBGC determined that organizing benefit payment information in this manner is necessary to determine the aggregate amount of benefits

subject to transfer under section 4233(c) of ERISA. PBGC is also amending the information requirements under § 4233.7 to require long-term projections of pre-partition benefit disbursements at the PBGC-guarantee level and, if applicable, maximum benefit suspensions under section 305(e)(9) of ERISA.

Participant census data

Section 4233.8 of the interim final rule identifies the types of participant census data to include with an application for partition. PBGC has determined that information about gender is needed to accurately determine the present value of plan liabilities and is, therefore, amending the regulation to clarify that gender must be included in the census data elements under § 4233.8.

Initial review process

Section 4233.10 of the interim final rule prescribes an initial review process for the purpose of determining whether an application is complete under section 4233(a)(1) of ERISA.¹⁰ PBGC received two comments expressing concern that the interim final rule does not impose a time limit on PBGC for making an initial determination on whether an application is complete. One commenter stated that while it understood PBGC may need time to ensure it has the necessary information to make a determination, it was concerned that the 270-day review period could be unreasonably extended if there were no time limit for making a determination on completeness. Expressing a similar view, another commenter stated that the regulation “provides no time frame for this initial determination which could go on indefinitely.” Both commenters suggested that PBGC include a time limit on its completeness review, with one commenter suggesting that PBGC adopt the two business day limit that applies to Treasury for benefit suspensions under Treas. Temp. Reg. § 1.432(e)(9)-1T(g)(1)(ii).

¹⁰ Section 4233(a)(1) of ERISA provides, in relevant part, that PBGC shall make a determination regarding an application for partition not later than 270 days after the date such application was filed (or, if later, the date such application was completed) in accordance with regulations promulgated by PBGC.

PBGC notes that although the partition rule under section 4233 of ERISA and the suspension of benefits rule under section 305(e)(9) work in tandem, there are important differences. One difference relates to the commencement of the review period. Unlike the suspension of benefit rule, which requires Treasury, in consultation with PBGC and the Department of Labor, to approve or deny an application for suspension of benefits within *225 days after the submission of such application*, section 4233(a)(1) requires PBGC to issue a determination on partition not later than 270 days after the date such application was filed (or, if later, *the date such application was completed*). Thus, section 4233 provides that the 270-day review period does not begin on the date of submission, but rather on the date the application for partition was filed or, if later, *the date such application was completed*.

Another important difference is that under section 305(e)(9), notice of the proposed suspension must be given concurrently with the submission of an application for suspension of benefits.¹¹ In contrast, under section 4233(a)(2) of ERISA, the plan sponsor must provide notice not later than 30 days after submitting an application for partition.¹²

Given these differences, PBGC is not adopting the two-business-day review period under Treas. Temp. Reg. § 1.432(e)(9)-1T(g)(1)(ii). However, having considered the concerns raised by commenters relating to the lack of a specified time limit on PBGC's initial review process, PBGC believes that a 14 calendar day review period provides sufficient time to complete the initial review of an application under § 4233.10. Importantly, this addition will provide plan

¹¹ The temporary Treasury regulation provides that such notice must be given no earlier than four business days before the date on which an application is submitted, and no later than two business days after Treasury notifies the plan sponsor that it has submitted a complete application. Temp. Treas. Reg. § 1.432(e)(9)-1T(f)(3)(i)(A).

¹² The interim final rule states that the date of PBGC's written notice of completeness under § 4233.10 will mark the beginning of PBGC's 270-day review period under section 4233(a)(1), and the plan sponsor's 30-day notice period under section 4233(a)(2) of ERISA.

sponsors, participants, and beneficiaries with more certainty on when the 270-day statutory review period under section 4233(a)(1) of ERISA, and the 30-day notice period under section 4233(a)(2) will begin.¹³

Notice requirements

Section 4233.11 of the interim final rule describes the notice requirements for an application for partition, and provides optional model notices. Section 4233.11(d) of the regulation states that the purpose of the model notices is to assist plan sponsors in discharging their notice obligations under section 4233(a)(2) of ERISA. The regulation does not require use of the model notices, but states that a properly completed model notice will be deemed to satisfy the notice requirements under the regulation.

One commenter expressed concern that plan sponsors would be free to alter, amend, or even discard the text in the model notices in favor of their own, which, in the commenter's view, would provide "too much latitude to plan trustees and professionals who may well have steered the plan into 'critical and declining' status in the first place." The commenter suggested that PBGC require a plan sponsor to "highlight" and explain any deviations from the model notice text. The same commenter also suggested that deviations from the model notices should require advance approval from PBGC and the Advocate.

PBGC considered the commenter's suggestions but did not incorporate them into the final regulation. In PBGC's view, requiring plan sponsors to highlight and explain any deviations from the model notice (which is not required under section 4233(a)(2))¹⁴ would be inconsistent

¹³ As noted in the preamble to the interim final rule, PBGC's determination on whether an application is complete under § 4233.10(c) will mark the beginning of the 270-day statutory review period under section 4233(a)(1) and the 30-day notice period under 4233(a)(2).

¹⁴ In contrast, section 305(e)(9)(F)(v) requires that Treasury "establish a model notice that a plan sponsor may use to meet the [form and notice] requirements." Importantly, even where Congress required a model notice, it did not require use of that notice by plan sponsors.

with the purpose of the notice—to assist plan sponsors in meeting their notice obligations under section 4233(a)(2) of ERISA. Furthermore, PBGC believes that § 4233.6(g) addresses the commenter’s concern about incorrect or misleading notices by requiring the plan sponsor to include a copy of the draft notice at the same time it submits its application for partition to PBGC. Submission of a notice that fails to satisfy the content requirements set forth in § 4233.11(c) may result in a determination that the application is incomplete under § 4233.4(a). For these reasons, PBGC did not make any changes to § 4233.11.

Conditional determination process

Section 4233.13 of the interim final rule describes a conditional approval process for plan sponsors who file applications for partition and suspension of benefits. Under the special rule, PBGC may, in its discretion, approve an application for partition conditioned on Treasury’s final authorization to suspend benefits under section 305(e)(9) of ERISA. As noted in § 4233.12(c), however, a partition will only become effective upon satisfaction of the required conditions and the issuance of a partition order.

PBGC received one comment on the conditional approval process. The commenter stated that it was not clear if a conditional approval under § 4233.12(c) would satisfy the requirement in Temp. Treas. Reg. § 1.432(e)(9)-1T(d)(7), which states that in order to satisfy the requirement that a suspension of benefits not take effect prior to the effective date of a partition, *the partition order* must be provided to the Secretary of Treasury by the last day of the 225-day period described in Temp. Treas. Reg. § 1.432(e)(9)-1T(g)(3)(i). The commenter suggested that PBGC and Treasury clarify this point in the agencies’ respective regulations.

Having consulted with Treasury on this comment, PBGC agrees that additional clarification relating to the effect of a conditional approval of partition under the agencies’

regulations is needed. First, with respect to part 4233, PBGC is amending §§ 4233.6 and 4233.13 to clarify that in any case in which an application for partition is made in combination with a suspension of benefits, the effective date of the proposed partition must satisfy the requirements of ERISA section 305(e)(9)(D)(v).¹⁵ Second, with respect to the effect of a conditional approval of a partition under the Treasury rule, PBGC has been advised by Treasury that PBGC's issuance of a conditional approval within the 225-day period under section 305(e)(9)(G) will be deemed to satisfy the requirement set forth in Temp. Treas. Reg. § 1.432(e)(9)-1T(d)(7).

Nature and operation of successor plan

PBGC received one comment on § 4233.15, which describes the nature and operation of the successor plan created by the partition order. The commenter asked whether certain legal requirements under title I and the Code would apply to a successor plan in a partition.

While a discussion of the legal requirements under title I and the Code is not within PBGC's jurisdiction and, therefore, beyond the scope of this rulemaking, all title I and Code requirements that would otherwise apply to a terminated, insolvent multiemployer plan apply to a successor plan in a partition absent a statutory, regulatory, or administrative exemption.

Continuing jurisdiction

Section 4233.17 of the interim final rule describes PBGC's continuing jurisdiction over the original plan and the successor plan. In the preamble to the interim final rule, PBGC explained that although commenters on the RFI expressed differing views on the need for additional post-partition oversight, PBGC determined that additional oversight is necessary to

¹⁵ Section 305(e)(9)(D)(v) states, in relevant part, that “[i]n any case in which a suspension of benefits with respect to a plan is made in combination with a partition of the plan under section 4233, the suspension of benefits may not take effect prior to the effective date of such partition.” Treasury has interpretative jurisdiction over the subject matter in section 305 of ERISA.

ensure compliance with the post-partition requirements under MPRA and proper stewardship of PBGC financial assistance.

PBGC received one comment that did not specifically refer to § 4233.17 but did relate to post-partition oversight. The commenter suggested that when a plan is insolvent, regulating and assessing administrative costs (including salaries and professional fees) should be the first priority, and that in some cases it may be appropriate to appoint an independent legal representative and trustee to administer the plan. Finally, the commenter suggested that the trustees, employees, and service providers of an insolvent plan should be required to disclose sources of income and conflicts of interest.

The commenter did not suggest any changes to § 4233.17, and PBGC determined that none are necessary. Nevertheless, in response to the comment, PBGC notes that it will retain continuing jurisdiction over the original plan and successor plan in a partition to ensure compliance with the post-partition requirements under MPRA and proper stewardship of PBGC financial assistance.

In addition, although section 4233(d)(2) of ERISA assigns responsibility for the management of the successor plan to the plan sponsor and administrator of the original plan, PBGC continues to have authority under sections 4041A and 4281 to prescribe such rules and standards for the administration of terminated multiemployer plans (and authority under section 4042 to institute proceedings for the appointment of a new trustee to administer the plan) that PBGC considers appropriate to protect the interests of plan participants and beneficiaries, or to prevent unreasonable loss to PBGC.

Finally, as noted above, absent a statutory, regulatory, or administrative exemption, all of the title I requirements that would otherwise apply to a terminated, insolvent multiemployer plan

(e.g., the fiduciary rules under section 404 and the prohibited transaction rules under section 406) would also apply to the successor plan in a partition under section 4233 of ERISA.

Other Comments

In addition to comments on specific sections of the interim final rule, PBGC received two comments objecting to PBGC's interpretation of the term "maximum benefit suspensions" in section 4233(b)(2) of ERISA.¹⁶ As noted in the preamble to the interim final rule, the term "maximum benefit suspensions" is not defined in sections 305(e)(9) and 4233 of ERISA. The statute, however, limits the maximum amount of a suspension so that a post-suspension benefit can be no less than 110 percent of the PBGC guarantee under section 4022A, limits or exempts suspensions for certain categories of individuals based on their age, and exempts pension benefits based on disability from any reductions. Based on the structure and operation of these provisions, PBGC interprets the term "maximum benefit suspensions" in section 4233(b)(2) to mean the maximum benefit suspensions permissible under section 305(e)(9).

One commenter stated that it "does not believe plans should have to apply for maximum benefit suspensions to be eligible for partition" and that "[i]f PBGC believes it has no flexibility on the level of retiree cuts, it should ask Congress to modify this element of MPRA." Expressing a similar view, the other commenter stated that PBGC's interpretation is "not consistent with the full text of section 4233" and that "the statute does not require trustees to impose *unreasonable* cutbacks, and absolutely disallows some categories of benefits (e.g., disability) even if the cutback would be otherwise reasonable." That same commenter asked a number of hypothetical questions relating to the maximum benefit suspension requirement, such as whether the

¹⁶ Under section 4233(b)(2) of ERISA, PBGC must determine, 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 maximum benefit suspensions under section 305(e)(9) of ERISA, if applicable.

requirement would apply to a plan that had only a few participants with suspendable benefits, or a plan in which maximum benefit suspensions were rejected by a vote of participants and beneficiaries under section 432(e)(9)(H). The commenter suggested that 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.”

As a preliminary matter, PBGC disagrees that a partition would only be available in situations in which maximum benefit suspensions were sufficient to meet the plan’s long-term solvency. In fact, if maximum benefit suspensions were sufficient to meet a plan’s long-term solvency, partition would not be available because it would not be necessary for the plan to remain solvent, which is a statutory requirement under section 4233(b)(3)(B). In other words, partition is only an option when maximum benefit suspensions are *not* sufficient to ensure long-term solvency.

In those situations where partition would be needed, PBGC’s interpretation of maximum benefit suspension reflects the statutory and regulatory limitations on suspensions under section 305(e)(9)(D). For example, as explained in the preamble to the interim final rule, the maximum benefit suspension permissible for an individual with a plan benefit based on disability would be zero, because benefits based on disability may not be suspended under section 305(e)(9)(iii). The same would be true for a participant older than age 80.

The commenter’s hypothetical questions regarding a plan with a *de minimis* number of participants whose benefits would be subject to suspension under 305(e)(9)(D) and a plan in which participants and beneficiaries vote to reject benefit suspensions are beyond the scope of this rulemaking. However, PBGC notes that each application for partition will be decided on a case-by-case basis in accordance with the statutory criteria in section 4233(b).

PBGC's interpretation of section 4233(b)(2) of ERISA is also consistent with the other conditions for partition under section 4233, which show Congress's intent to balance the need to protect multiemployer plans from insolvency with the need to improve the financial health of the title IV multiemployer insurance program. Section 4233(b)(3)(A) of ERISA, for example, provides that PBGC must reasonably expect that a partition of the plan will reduce PBGC's expected long-term loss with respect to the plan, and under section 4233(b)(4), PBGC must certify to Congress that its ability to meet existing financial assistance obligations to other plans (including any liabilities associated with multiemployer plans that are insolvent or that are projected to become insolvent within 10 years) will not be impaired by a partition. Finally, because a partition results in the creation of a newly insolvent successor plan that will require financial assistance under section 4261 of ERISA, the amount of liabilities that can be transferred to the successor plan is limited under section 4233(c) to the *minimum amount of liabilities necessary* for the original plan to remain solvent.

Role of the Participant and Plan Sponsor Advocate

As previously discussed, under section 4233(b)(2) of ERISA, PBGC must determine, after consultation with the Advocate, that the plan sponsor has taken (or is taking concurrently with an application for partition) all reasonable measures to avoid insolvency, including maximum benefit suspensions under section 305(e)(9) of ERISA, if applicable. In the preamble to the interim final rule, PBGC stated that it would not define by regulation the Advocate's consultative role under section 4233(b)(2); rather, the Advocate's role under the new law would be allowed to develop on a case-by-case basis.

PBGC received one comment on the Advocate's role under section 4233(b)(2). The commenter asserted that plan sponsors and PBGC suffer from conflicts of interest—plan

sponsors due to the composition of boards of trustees, and PBGC because it will only approve a partition if, among other things, it reduces PBGC's expected long-term loss—and that the Advocate “is the only party who reaps no financial advantage from imposing benefit cuts on retirees.” Based on this view, the commenter stated that the final rule should clarify that the Advocate is “responsible solely for representing the plan’s retirees and deferred vested participants,” and that the Advocate should be “offered the opportunity to participate in all meetings between the plan sponsor and PBGC.” The commenter also suggested that the rule should require PBGC to provide the Advocate with adequate accounting, actuarial, and legal resources, and that the Advocate should have unfettered access to all plan records, actuarial worksheets, and databases.

PBGC disagrees with the commenter's assertion relating to conflicts of interest. With respect to multiemployer plan sponsors, the Taft-Hartley Act, 29 U.S.C. § 141 *et seq.*, requires that employer and employees be equally represented in the administration of such plans. With respect to PBGC, MPRA requires, among other things, that PBGC analyze the impact of partition on PBGC's long term loss, and certify to Congress that its ability to meet existing financial assistance obligations to other plans will not be impaired by a partition. These requirements are imposed by statute.

Although PBGC carefully considered the commenter's suggestions about defining the Advocate's consultative role, it decided not to make any changes in response. Given that the Advocate's consultative role in a partition is new, PBGC continues to believe that the better approach is to allow that role to evolve on a case-by-case basis. Finally, it is important to note that the role of the Advocate is defined by statute in section 4004(b) of ERISA, and while MPRA

created additional duties, it did not change or modify the Advocate’s existing duties under the statute.

Applicability

The amendments in this final rule will apply to applications for partition submitted to PBGC on or after [insert date 30 days after date of publication in the Federal Register].

Compliance with Rulemaking Guidelines

Executive Orders 12866 “Regulatory Planning and Review” and 13563 “Improving Regulation and Regulatory Review”

Having determined that this rulemaking is a “significant regulatory action” under Executive Order 12866, the Office of Management and Budget has reviewed this final rule under Executive Order 12866.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Orders 12866 and 13563 require a comprehensive regulatory impact analysis be performed for any economically significant regulatory action, defined as an action that would result in an annual effect of \$100 million or more on the national economy or which would have other substantial impacts.

Pursuant to section 1(b)(1) of Executive Order 12866 (as amended by Executive Order 13422), PBGC has determined that regulatory action is required in this area. Principally, this regulatory action is necessary to implement the application and notice requirements under section 4233 of ERISA as amended and restated by MPRA. In accordance with OMB Circular

A-4, PBGC also has examined the economic and policy implications of this final rule and has concluded that the action's benefits justify its costs.

Under Section 3(f)(1) of Executive Order 12866, a regulatory action is economically significant if “it is likely to result in a rule that may * * * [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” OMB has determined that this final rule does not cross the \$100 million threshold for economic significance and is not otherwise economically significant. Most of the economic effect relating to partitions will be attributable to benefit suspensions.

Based on a review of financial resources available for partition, PBGC expects that fewer than 20 plans would be approved for partition over the next three years (about six plans per year), and that the total financial assistance PBGC will provide to those plans will be less than \$60 million per year.

Regulatory Flexibility Act

Because PBGC did not publish a general notice of proposed rulemaking under 5 U.S.C. 553, the regulatory flexibility analysis requirements of the Regulatory Flexibility Act do not apply.

Paperwork Reduction Act

The information requirements under this final regulation—information to be reported to PBGC and information to be disclosed to participants—are being submitted to OMB under the Paperwork Reduction Act (OMB control number 1212-0068, expires December 31, 2015). An

agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC estimates that over the next three years about six plans per year will apply for partition and that the total annual burden of this information collection will be about 78 hours and \$58,800.

List of Subjects in 29 CFR Part 4233

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

For the reasons given above, the interim rule amending 29 CFR Part 4233 published at 80 FR 35220 on June 19, 2015, is adopted as a final rule with the following changes:

PART 4233—PARTITIONS OF ELIGIBLE MULTIEMPLOYER PLANS

1. The authority citation for part 4233 continues to read as follows:

29 U.S.C. 1302(b)(3), 1413.

§ 4233.4 [Amended]

- 2. In § 4233.4, the last sentence in paragraph (a) is amended by removing the word “will” and adding in its place the word “may”.

- 3. In § 4233.6, a sentence is added to the end of paragraph (a) to read as follows:

§ 4233.6 Partition information.

* * * * *

(a) * * * With respect to coordinated applications for partition and suspension of benefits, proposed effective dates for both transactions must satisfy the requirements of section 305(e)(9)(D)(v) of ERISA.

* * * * *

- 4. In § 4233.7, paragraphs (a)(3)(iii), (a)(5)(iii), and (a)(8) are revised and paragraphs

(a)(9) and (10) are added to read as follows:

§ 4233.7 Actuarial and financial information.

(a) * * *

(3) * * *

(iii) Benefit payments organized by participant status (*e.g.*, active, retiree, terminated vested, beneficiary).

* * * * *

(5) * * *

(iii) Benefit payments organized by participant status (*e.g.*, active, retiree, terminated vested, beneficiary).

* * * * *

(8) A long-term projection reflecting benefit disbursements from the successor plan (organized by participant status (*e.g.*, active, retiree, terminated vested, beneficiary)), and a statement of the present value of all future financial assistance to be paid as a result of a partition (using the interest and mortality assumptions applicable to the valuation of plans terminated by mass withdrawal as specified in § 4281.13 of this chapter and other reasonable actuarial assumptions, including retirement age, form of benefit payment, and administrative expenses, certified by an enrolled actuary).

(9) A long-term projection of pre-partition benefit disbursements from the original plan reflecting reduced benefit disbursements at the PBGC-guarantee level beginning on the proposed effective date of the partition (using a closed group valuation and no accruals after the proposed effective date of partition, and organized separately by participant status groupings (*e.g.*, active, retiree, terminated vested, beneficiary)).

(10) A long-term projection of pre-partition benefit disbursements from the original plan reflecting the maximum benefit suspensions permissible under section 305(e)(9) of ERISA beginning on the proposed effective date of the partition (using an open group valuation and organized separately by participant status groupings (*e.g.*, active, retiree, terminated vested, beneficiary)).

* * * * *

- 5. Section 4233.8 is revised to read as follows:

§ 4233.8 Participant census data.

An application for partition must include a copy of the census data used for the projections described in §4233.7(a)(3) and (5), including:

- (a) Participant type (retiree, beneficiary, disabled, terminated vested, active, alternate payee).
- (b) Date of birth.
- (c) Gender.
- (d) Credited service for guarantee calculation (*i.e.*, number of years of participation).
- (e) Vested accrued monthly benefit before benefit suspension under section 305(e)(9) of ERISA.
- (f) Vested accrued monthly benefit after benefit suspension under section 305(e)(9) of ERISA.
- (g) Monthly benefit guaranteed by PBGC (determined under the terms of the original plan without respect to benefit suspensions).
- (h) Benefit commencement date (for participants in pay status and others for which the reported benefit is not payable at Normal Retirement Date).

(i) For each participant in pay status—

(1) Form of payment, and

(2) Data relevant to the form of payment, including:

(i) For a joint and survivor benefit, the beneficiary's benefit amount (before and after suspension) and the beneficiary's date of birth;

(ii) For a Social Security level income benefit, the date of any change in the benefit amount, and the benefit amount after such change;

(iii) For a 5-year certain or 10-year certain benefit (or similar benefit), the relevant defined period.

(iv) For a form of payment not otherwise described in this section, the data necessary for the valuation of the form of payment, including the benefit amount before and after suspension.

(j) If an actuarial increase for postponed retirement applies or if the form of annuity is a Social Security level income option, the monthly vested benefit payable at normal retirement age in normal form of annuity.

- 6. In § 4233.10, paragraphs (b) and (c) are revised to read as follows:

§ 4233.10 Initial review.

* * * * *

(b) *Incomplete application.* If the application is incomplete, PBGC will issue a written notice to the plan sponsor describing the information missing from the application no later than 14 calendar days after the submission of such application.

(c) *Complete application.* Upon making a determination that an application is complete (*i.e.*, the application includes all the information specified in §§ 4233.5 through 4233.9), PBGC will issue a written notice to the plan sponsor no later than 14 calendar days after the submission

of such application. The date of the written notice will mark the beginning of PBGC's 270-day review period under section 4233(a)(1) of ERISA, and the plan sponsor's 30-day notice period under 4233(a)(2) of ERISA.

* * * * *

- 7. In § 4233.12, paragraph (c) is revised to read as follows:

§ 4233.12 PBGC action on application for partition.

* * * * *

(c) *Conditional determination on application.* At the request of a plan sponsor, PBGC may, in its discretion, issue an approval of an application conditioned on Treasury issuing a final authorization to suspend under section 305(e)(9)(H)(vi) of ERISA and any other terms and conditions set forth in the conditional approval. The conditional approval will include a written statement of preliminary findings, conclusions, and conditions. The conditional approval is not a final agency action. The proposed partition will only become effective upon satisfaction of the required conditions, and the issuance of an order of partition under section 4233(c) of ERISA.

* * * * *

- 8. In § 4233.13, paragraphs (a)(3) and (4) are revised to read as follows:

§ 4233.13 Coordinated application process for partition and benefit suspension.

(a) * * *

(3) If Treasury does not issue the final authorization to suspend, PBGC's conditional approval under § 4233.12(c) will be null and void.

(4) If Treasury issues a final authorization to suspend, PBGC will issue a final partition order under § 4233.14 and section 4233(c) of ERISA. The effective date of a final partition order must satisfy the requirements of section 305(e)(9)(D)(v) of ERISA.

* * * * *

Issued in Washington, DC, this 18th_ day of December, 2015.

W. Thomas Reeder
Director, Pension Benefit Guaranty Corporation

[FR Doc. 2015-32309 Filed: 12/22/2015 8:45 am; Publication Date: 12/23/2015]