Pension Benefit Guaranty Corporation Issues Proposed Rule for Multiemployer Plan Mergers and Transfers

ROBERT F. SCHWARTZ
AND ALEX E. TRABOLSI

On June 6, 2016, the Pension Benefit Guaranty Corporation ("PBGC") issued a new proposed rule clarifying the agency's authority to facilitate the merger of multiemployer pension plans. The rule would implement some of the statutory changes made by the Multiemployer Pension Reform Act of 2014 ("MPRA").

Background

PBGC is a Federal corporation created under Title IV of ERISA to guarantee the payment of pension benefits earned by over 40 million American workers and retirees in nearly 24,000 private sector pension benefit plans. PBGC administers two insurance programs for defined benefit plans, one for single-employer plans and one for multiemployer plans. The proposed rule applies only to the multiemployer plans.

Most multiemployer plans are not in danger of running out of money. However, more than 10% of all participants in multiemployer plans — over one million people — are covered by troubled plans that are projected to run out of money before paying out all benefits. Mergers are a way for some multiemployer plans to preserve and protect benefits earned by workers and retirees when the plan is at risk of becoming insolvent. Mergers can stabilize or increase the base of contributing employers, combine plan assets for more efficient investing, and reduce plan administrative costs.

Facilitating Mergers

The proposed rule clarifies PBGC's authority to facilitate the merger of multiemployer plans under section 4231 of ERISA. Facilitation may include training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies. To facilitate a merger, PBGC must determine, in consultation with the PBGC's Participant and Plan Sponsor Advocate, that merger is in the best interest of the participants and the beneficiaries of at least one of the plans involved in the merger. Further, PBGC must determine the merger is

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

not reasonably expected to be adverse to the overall interests of the participants or beneficiaries of any of the plans.

Financial Assistance

PBGC may also provide financial assistance to facilitate a merger determined necessary to enable one or more of the plans involved to avoid or postpone insolvency, subject to the requirements of section 4231(e)(2) of ERISA. To qualify for financial assistance, one or more of the plans involved must be in "critical and declining" status (essentially, a "red zone" plan that is projected to become insolvent during the ensuing 14 to 19 years). Financial assistance must come directly from the fund established within PBGC and must not hinder any other existing PBGC financial obligations. Most importantly, the PBGC must reasonably conclude that the requested assistance will reduce PBGC's expected long-term loss with respect to the plans involved — in other words, it will pay out less in financial assistance than it expects to pay in guaranteed benefits if the troubled plan fails — and that such assistance is necessary for the merged plan to become or remain solvent.

New Merger Requirements

The proposed rule presents noteworthy changes to the actuarial valuation requirements for mergers and plan solvency tests. First, the proposed rule would amend the definition of "significantly affected plan" in section 4231.2 of ERISA to include endangered and critical status plans engaging in any non-de minimis transfer of assets or receiving a non-de minimis transfer of unfunded accrued benefits. Previously, "a significantly affected plan" meant a plan that: (i) transferred 15% or more of its assets, (ii) received a transfer of unfunded accrued benefits equaling 15% or more of its assets, (iii) was created by a spinoff of another plan, (iv) engaged in a non-de minimis transfer after such a plan was terminated by mass withdrawal under section 4041A(a)(2) of ERISA, or (v) engaged in a non-de minimis transfer with another plan terminated by mass withdrawal under section 4041A(a)(2) of ERISA.

Second, the proposed rule would require an actuarial valuation be performed within the previous plan year. While the original rule required an actuarial valuation within the three previous plan years, the new requirement aligns with ERISA section 304(c)(7) requiring an actuarial valuation each year.

Third, the proposed rule would require the expected fair market value of the plan after transfer or merger to exceed ten times the benefit payments for the last plan year (as opposed to five under the existing rule), or would require, in each of the ten years (increased from five) following the transfer or merger, that the expected plan assets plus expected contributions and investments would exceed expected expenses and benefit payments for that year.

Submitting a Request for Facilitation of a Merger

The proposed rule provides guidance on the process of submitting a notice of merger or transfer and a request for a compliance determination or facilitated merger. Under the proposed rule, a plan sponsor seeking a facilitated merger must file a notice with the PBGC not less than 270 days prior to the proposed effective date of the merger.

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Along with notice of the merger, the plan sponsor must also file a request for facilitation. The request must include (i) a copy of the merger or transfer agreement, (ii) copies of all actuarial valuations performed within the five years preceding the date of the filing, and (iii) a detailed description (alongside supporting documentation) explaining how the proposed merger is in the interests of participants and beneficiaries of at least one of the involved plans and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans.

Submitting a Request for Financial Assistance

If the plan sponsor is also seeking financial assistance, PBGC requires additional information, including (as applicable): the most recent trust agreement; the most recent plan document; the most recent summary plan description; the most recent rehabilitation or funding improvement plan and the percentage of total contributions received under each schedule of the plan for the most recent plan year; the most recent Internal Revenue Service determination letter; the most recent Form 5500; a current listing of employers who have an obligation to contribute to the plan and the approximate number of participants for whom each employer is currently making contributions; a schedule of withdrawal liability payments collected in each of the most recent five plan years; and a copy of the plan sponsor's application for suspension of benefits (if any).

Requests for financial assistance must also include a detailed proposal of the merger, the amount of financial assistance being requested, and a description of any risks and assumptions related to the proposal. Additionally, the requesting party must provide actuarial valuations and annual actuarial certifications. Further, an actuary must certify that the merger is necessary to avoid or postpone insolvency of one or more of the plans, with supporting data, calculations, assumptions, and a description of the methodology. For each critical and declining status plan involved in the merger, long-term projections of benefit disbursements by type without reflecting the merger must be included in the application. An actuary must also certify that the financial assistance requested is necessary for the merged plan to become or remain solvent. Lastly, a request for financial assistance must include a detailed participant census that includes information about credited service, forms of payment, and benefit amounts.

PBGC's ability to provide aid is limited since the agency's multiemployer program is badly underfunded. The program is operating at a substantial deficit (known liabilities far exceed the fund's assets) and is projected to become insolvent by 2025. A recent PBGC report disclosed that enormous premium increases will be necessary to avoid insolvency, but increasing premiums too quickly may only accelerate the deteriorating condition of some multiemployer plans.

The Role and Response of PBGC

The proposed rule provides guidance on the notification process for PBGC decisions regarding requests for facilitated mergers. Determinations to approve or deny a request are considered a final agency action for the purposes of judicial review.

Additionally, the proposed rule clarifies the scope of PBGC's jurisdiction over a merged plan that receives financial assistance. PBGC retains jurisdiction over a financial assistance merger for the purposes, terms, and conditions of the financial assistance merger and the financial assistance agreement.

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Moving Forward

The proposed rule does not change PBGC's ability to assist with mergers; instead the proposed rule makes the requirements for requests of merger and financial assistance more clear. While the requirements are extensive, the intent is to make mergers more accessible for appropriate multi-employer plans and prevent the loss of benefits for a significant number of workers and retirees.

Importantly, the proposed rule does not preclude a plan sponsor from contacting PBGC on an informal basis to discuss a potential merger or transfer if any of the requirements listed in the rule are unclear. Comments on the proposed rule may be submitted until August 5, 2016. PBGC specifically requests comments on the following topics: methods to determine if a merged plan is in critical status and alternative approaches to demonstrate plan insolvency.

The proposed rule can be accessed on the *Federal Register* at the following link:

https://www.federalregister.gov/articles/2016/06/06/2016-13083/mergers-and-transfers-between-multiemployer-plans

JUNE 2016

ROBERT F. SCHWARTZ

Copyright © 2016 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.