

# Mergers and Transfers Between Multiemployer Plans

**NCCMP Annual Meeting**

*Theresa Anderson, Deputy Assistant General Counsel*

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The opinions of Ms. Anderson do not necessarily  
reflect the views of PBGC.

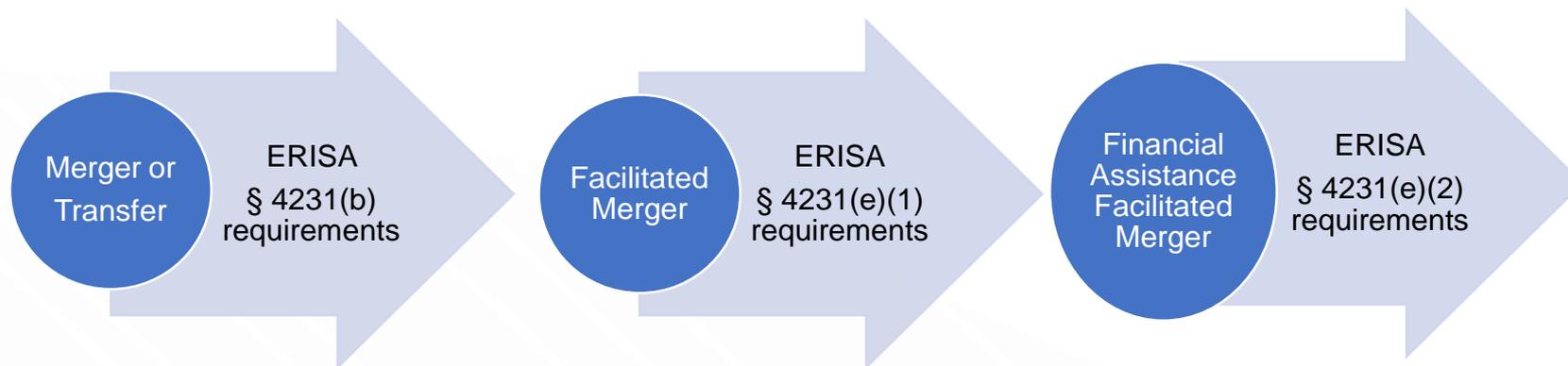


- Final rule published in Federal Register on Sept. 14, 2018 (83 FR 46642); effective Oct. 15, 2018.
- Amends regulation (29 CFR 4231) to implement facilitated merger provisions of the Multiemployer Pension Reform Act of 2014 (MPRA).
- Provides procedural and informational requirements for facilitated merger requests.
- Proposed changes to certain plan solvency requirements for mergers and transfers not adopted—to allow more consideration of public comments.

# ERISA § 4231 and MPRA

- ERISA § 4231 provides requirements for a merger or transfer between multiemployer plans.
- MPRA amended ERISA § 4231 to provide that multiemployer plans may request PBGC facilitation of a merger (effective January 1, 2015).
- Multiemployer plans can request general facilitation or facilitation with financial assistance.
- To be facilitated by PBGC, a merger must satisfy additional requirements.

# Additional Requirements for Facilitated Merger



- Facilitated mergers must satisfy the general merger requirements.
- Mergers facilitated with financial assistance must also satisfy general facilitation requirements.

# Merger/Transfer Requirements

## ERISA § 4231(b)

- Multiemployer plans may not merge or engage in a transfer unless—
  - The plans notify PBGC at least 120 days in advance.
  - No participant's or beneficiary's accrued benefit will be lower immediately after the merger or transfer.
  - The benefits of participants and beneficiaries aren't reasonably expected to be suspended because of plan insolvency (under ERISA § 4245).
  - An actuarial valuation was performed for the preceding plan year.

## Mergers or Transfers

- If PBGC determines that the merger/transfer complies with the requirements in ERISA § 4231(b), the merger/transfer is deemed not to be a prohibited transaction under ERISA § 406(a) or (b)(2) (transactions with party in interest).
- PBGC may vary the merger/transfer requirements by regulation.

# MPRA Facilitated Merger

- Under ERISA § 4231(e)(1), PBGC may facilitate a merger if it determines, after consultation with the Participant and Plan Sponsor Advocate, that –
  - the merger is in the interests of participants and beneficiaries of at least one of the plans, and is not reasonably expected to be adverse to the overall interests of participants and beneficiaries of any of the plans.
- Facilitation may include training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies.

## Financial Assistance

Under ERISA § 4231(e)(2), PBGC may provide financial assistance (within the meaning of ERISA § 4261) to facilitate a merger it determines necessary to enable one or more of the plans involved to avoid or postpone insolvency if –

- (a) one or more of the plans involved is in critical and declining status;
- (b) PBGC reasonably expects that –
  - (i) the financial assistance will reduce PBGC's expected long-term loss with respect to the plans involved; and
  - (ii) the financial assistance is necessary for the merged plan to become or remain solvent.

## Financial Assistance

ERISA § 4231(e)(2) goes on to state that PBGC may provide financial assistance if –

(c) PBGC certifies that its ability to meet existing financial assistance obligations to other plans will not be impaired by the financial assistance; and

(d) the financial assistance is paid exclusively from the fund for basic benefits guaranteed for multiemployer plans.

## Financial Assistance

Under ERISA § 4231(e)(2), no later than 14 days after providing financial assistance, PBGC must notify:

- 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, and
- The Committee on Health, Education, Labor, and Pensions of the Senate.

# Existing Regulation – Part 4231

- Requirements for notice to PBGC of a multiemployer merger/transfer or request for compliance determination.
- Safe-harbor solvency tests to demonstrate that benefits of participants/beneficiaries aren't reasonably expected to be suspended because of plan insolvency.
- Timeframe for performance of actuarial valuation.
- Special rules for *de minimis* mergers/transfers (assets transferred/liabilities received less than 3% of assets).

- Published June 6, 2016.
- To amend existing regulation to implement MPRA. PBGC also proposed changes for general mergers or transfers.
- Comment period ended August 5, 2016.
- Ten comments received.

# Overview of Final Rule

- Subpart A – existing regulation on mergers or transfers
- Subpart B – additional requirements for facilitated merger

# Major Changes from Proposed Rule

## Existing Regulation on Mergers or Transfers

To allow more consideration of comments, PBGC's proposed changes to the plan solvency requirements in the existing regulation were not adopted but may be addressed in future guidance.

# Plan Solvency Requirements

## Mergers or Transfers

- PBGC's regulation provides safe-harbor solvency tests to demonstrate the plan solvency requirement in ERISA § 4231(b)(3).
- These tests are divided into 2 categories:
  - Non-significantly affected plans
  - Significantly affected plans (greater risk)

## Non-significantly Affected Plan

- Non-significantly affected plan test:
  - FMV of assets immediately after merger or transfer  $\geq$  **5 times** the benefit payments for the preceding year; or
  - Assets, contributions, investment earnings  $\geq$  expenses and benefit payments for each of the **5 years** after the merger or transfer.

*PBGC proposed 10x/10-year demonstrations instead of 5x/5 years.*

# Safe-Harbor Solvency Tests

## Significantly Affected Plan

- Significantly affected plan test:
  - Contributions  $\geq$  amount to satisfy minimum funding for **5 years** after merger or transfer;
  - FMV of assets immediately after merger or transfer  $\geq$  total benefit payments for **5 years** after;
  - Contributions  $\geq$  benefit payments for first year after merger or transfer; and
  - Contributions for amortization period  $\geq$  unfunded accrued benefits and normal costs. The amortization period is **25 years** or the period for the resulting base when the combined charge and credit base are offset.

*PBGC proposed 10-year demonstrations instead of 5 years, and a 15-year amortization period instead of 25 years.*

# Plan Solvency Requirements

## Mergers or Transfers

A plan is significantly affected if it:

- Transfers assets  $\geq 15\%$  of its assets before the transfer,
- Receives a transfer of unfunded accrued benefits  $\geq 15\%$  of its assets before the transfer,
- Is created by a spinoff from another plan, or
- Engages in a non-*de minimis* merger or transfer after it terminated by mass withdrawal or with another plan terminated by mass withdrawal.

*PBGC proposed to include non-de minimis transfers by endangered or critical plans to the definition of significantly affected plan.*

# Major Changes from Proposed Rule

## Existing Regulation on Mergers or Transfers

- ERISA § 4231(b)(2) requires that no participant's or beneficiary's accrued benefit will be lower immediately after a merger or transfer.
- Final rule adds that PBGC may waive this requirement in the event of a contemporaneous benefit suspension under MPRA.

## Major Changes to Existing Regulation

- Informal consultation added.
- Notice must include supporting data, assumptions for safe-harbor solvency test for non-significantly affected plans (existing regulation requires if request compliance determination).
- Waiver added for requirement that no participant's or beneficiary's accrued benefit will be lower immediately after, if contemporaneous benefit suspension under MPRA.

## Major Changes to Existing Regulation

- Rules for safe-harbor solvency tests require withdrawal liability payments listed separately.
- Actuarial valuation requirement changed for non-significantly affected plans from within 3 years to most recent year (same as significantly affected plans).
- Updated requirements for actuarial calculations and assumptions.

## Additional Requirements for Facilitated Merger

- Advance notice of 270 days.
- Information requirements for requests (about the plans and merger, including actuarial and financial information).
- Limits of financial assistance (ERISA § 4261 – guaranteed benefits of critical and declining plan).
- PBGC's decision (final agency action).
- Jurisdiction over merged plan that receives financial assistance.

# Solvency Tests for Facilitated Merger

## Financial Assistance

To satisfy MPRA's requirement that financial assistance is necessary for the merged plan to become or remain solvent, there are differentiated solvency tests based on whether the merged plan would be in critical status (without financial assistance).

# Solvency Tests for Facilitated Merger

## Financial Assistance

- If the merged plan would be critical (without financial assistance):
  - must submit actuary's statement that merged plan will "avoid insolvency" as defined for MPRA benefit suspensions (ERISA § 305(e)(9)(D)(iv) and its implementing regulations), excluding stochastic projections (at least 30-year cash flow).

# Solvency Tests for Facilitated Merger

## Financial Assistance

- If the merged plan would NOT be critical (without financial assistance), must submit actuary's statement that:
  - the merged plan is projected to be solvent through 20-year cash flow projection; or
  - if 20-year cash flow doesn't require full amount of financial assistance, financial assistance is necessary to mitigate adverse effects of the merger on the merged plan's ability to remain solvent.

# Major Changes from Proposed Rule

## Mergers Facilitated with Financial Assistance

- Final rule adds an alternative, supported by commenters, to determine whether merged plan would be critical using status certifications from preceding year.
- Final rule permits consideration of unfavorable future experience for the demonstration that financial assistance is necessary to mitigate adverse effects on the merged plan's ability to remain solvent, as suggested by commenters.
- PBGC's proposed information requirements about maximum benefit suspensions under MPRA will not be adopted (per comment).

**THANK YOU**