

Supporting Statement for Paperwork Reduction Act Submission

AGENCY: Pension Benefit Guaranty Corporation

TITLE: Procedures for Election of Multiemployer Plan Status

STATUS: Request for OMB approval of new collection of information

CONTACT: Constance Markakis (326-4223, ext. 6779) or Catherine B. Klion (326 4223, ext. 3041)

1. Need for collection. Pension Benefit Guaranty Corporation (PBGC) administers the multiemployer plan insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Section 1106 of the Pension Protection Act of 2006, Pub.L. 109-280 (“PPA 2006”) amends the definition of a “multiemployer plan” in section 3(37)(G) of ERISA and section 414(f)(6) of the Internal Revenue Code of 1986 to allow certain single-employer plans to elect to be multiemployer plans, no later than August 17, 2007, pursuant to procedures prescribed by PBGC. Generally, these are plans sponsored by tax-exempt organizations (mostly union staff plans) to which more than one employer is required to contribute and that are maintained pursuant to collective bargaining agreements. To implement this provision, PBGC intends to publish a notice of election procedures that includes specific information that plans must submit to PBGC to show that they meet the statutory eligibility requirements, the process for issuing a PBGC decision, and the effect of such a decision on a plan’s request for approval.

On April 13, 2007 (72 FR 18692), PBGC published a notice informing the public that it intended to request OMB approval of the procedures and soliciting public comment prior to the OMB submission. On May 25, 2007, supplemental spending legislation (Pub. L. 110-028) that

contained an amendment modifying the PPA 2006 provision for multiemployer elections (“Amendment”) was signed into law. PBGC received four comment letters on the draft procedures that were the subject of the April 13, 2007, notice (“April draft procedures”). Three of the comment letters focused largely on needed changes to the April draft procedures to conform to the Amendment in Pub. L. 110-028. PBGC has revised the April draft procedures to reflect the statutory changes in the Amendment and to take into account the public comments.

The most significant difference between the April draft procedures and the revised procedures submitted to OMB relates to the definition of a plan “maintained pursuant to collective bargaining agreements.” Prior to the Amendment, section 3(37)(G) of ERISA referenced the existing criterion of a multiemployer plan “maintained pursuant to collective bargaining agreements,” which is generally a plan that was created or established as a result of collective bargaining and that is maintained or controlled through collective bargaining. The Amendment eased this criterion for an election under PPA 2006 by providing that a plan shall be treated as “maintained pursuant to a collective bargaining agreement” if a collective bargaining agreement “provides for or permits employer contributions to the plan by one or more employers . . . or participation in the plan by one or more employees . . . regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.”

To apply the original definition, the April draft procedures provided a safe harbor (or “automatic pass”) for plans that could certify that, in three prior plan years, at least 50 percent of active participants were covered under the plan pursuant to collective bargaining agreements, and at least 50 percent of contributions arose under collective bargaining agreements. For

substantiation, plans were required to submit collective bargaining agreements for all contributing employers and indicate the number of participants and contributions made to the plan under these collective bargaining agreements (in relation to the total participants and contributions to the plan).

Three of the public comment letters received by PBGC were written on behalf of plans (and a union-employer sponsor) that intend to make a multiemployer election under PPA 2006. These letters stated that the Amendment made by P.L. 110-028 negates the extensive fact-gathering data requested by PBGC under the April draft procedures, rendering many of the required items of information unnecessary, but particularly the submission of collective bargaining agreements by all employers and information about the numbers of participants and contributions to the plan under collective bargaining agreements.

Consistent with these public comments and the Amendment, the revised procedures submitted to OMB substantially scale back the required information and documentation. They eliminate the requirement for submitting collective bargaining agreements from all contributing employers and strike any requirement for information on the numbers of participants or contributions under collective bargaining agreements maintaining the plan. They also eliminate the 50 percent safe harbor for a plan maintained pursuant to collective bargaining, as the Amendment precludes any threshold for such a demonstration. Section 3 of the revised procedures now requires only the submission of identifying information on the employers required to contribute to the plan, and whether any of these employers are under common control. This section also requires copies of collective bargaining agreements from the three largest signatory employers (in terms of contributions) to the plan.

In addition, the following additional changes were made to the April draft procedures pursuant to the Amendment and three of the public comment letters representing plans intending to make an election under PPA 2006:

- A filing is now considered timely if it is “substantially” complete. In addition, the revised procedures permit a filing to be supplemented after the election deadline if an omission is minor and the plan sponsor reasonably believed the submission was complete, or the sponsor can show good cause for the omission.
- To comply with the statutory changes in the Amendment, the definition of a collective bargaining agreement is now revised.
- The revised procedures require a listing of only those trades or businesses required to contribute to the plan that are under common control, as opposed to all the trades or businesses of a contributing employer.
- In response to comment letters, an 85 percent safe harbor is added for a showing that “substantially all” employer contributions are made by tax-exempt organizations; evidence of an employer’s status is not required once the 85 percent threshold is met.
- Evidence of an employer’s tax-exempt status is now limited to the first page of the DOL Form LM-2, or the first and last pages of IRS Form 990, as opposed to the entire document.
- A summary checklist of required information and documents is provided.

- Pursuant to the Amendment, which made elections retroactive (any plan year beginning on or after January 1, 1999 and ending before January 1, 2008, as specified by the plan), the test years for meeting multiemployer criteria are the three plan years ending before the effective date. The revised procedures also add an exemption from the current year requirement if there was a reduction to fewer than two employers between the test years and the current year.
- Because plans may now make elections retroactively, the revised procedures eliminate the requirement for evidence of withdrawal liability rules for plans that changed their filing status before the enactment of PPA 2006.
- For evidence of a plan's existence before September 2, 1974, if contemporaneous evidence is unavailable, the plan may submit documentation from a later date that provides substantial evidence of its existence before September 2, 1974.

The procedures were not changed with respect to the request in three of the comment letters to make explicit that an election is effective for all purposes under ERISA and the Code, as provided under section 3(37)(G) of ERISA, and to require concurrence by the Department of Labor (DOL) and IRS with an election approved by PBGC. Although DOL and IRS have told PBGC that they agree to follow the 85 percent safe harbor for establishing that “substantially all” employer contributions are made by tax-exempt employers, the procedures provide that PBGC approval has no effect on the authority of other Federal agencies. It would not be reasonable to bind the ERISA agencies to PBGC's approval of a multiemployer election, as these agencies must be allowed to exercise their enforcement authority. For example, a plan may represent in

its submission that certain employers are not under common control, but IRS (and only IRS) would have the authority to audit the plan to ensure that it has properly applied the common control rules.

The procedures also were not changed to reflect the view in three of the comment letters that an election is effectively self-executing and may be made regardless of PBGC approval. This concern appears to relate to the bulk of the data and information previously required to establish that a plan is “maintained pursuant to collective bargaining agreements,” and should no longer be a significant concern under the simplified eligibility requirements of the Amendment. In any case, PBGC interprets the statutory provision that a plan “may, pursuant to procedures prescribed by the PBGC, elect to be a multiemployer plan” as requiring a written notice of election to PBGC that conforms with the requirements of PBGC’s procedures, including the requirement for approval.

Finally, the procedures were not changed with respect to a comment letter sent on behalf of two unions representing active employees and retirees of affiliated employers of a nonprofit membership organization. This comment letter expressed concern with the safe harbor under the April draft procedures that permitted a plan sponsor to certify that the plan was maintained pursuant to collective bargaining agreements by more than one unrelated employer, stating that affiliated employers do not maintain or control the plan. The Amendment eliminated the requirement that a multiemployer plan be maintained pursuant to collective bargaining agreements by “more than one employer,” and replaced it with a requirement that the plan be maintained pursuant to collective bargaining agreements by “one or more employers.” The procedures conform to this provision in the Amendment.

The procedures will be posted on PBGC's website, www.pbgc.gov, and published in the Federal Register after OMB approval.

The PBGC is requesting that OMB approve this collection of information for three years. (Although plans must make an election by August 17, 2007, PBGC may request additional information necessary to review the election after that date.)

2. Use of information. PBGC will use the information submitted by plans to evaluate whether the eligibility requirements in section 3(37)(G) of ERISA have been met and whether a plan's request for election should be approved. The information and representations made in the submission will be retained and used for audit purposes.

3. Information technology. PBGC has not developed information technology applications to deal with multiemployer elections. The volume of filings is not expected to be high enough to justify development of an electronic filing method.

4. Duplicate or similar information. Most of the information required by the procedures is not routinely filed with, and available from, any other Federal Government agency, and there is no similar information that can be used "as is" instead. Although the revised procedures call for submission of copies of IRS Forms 990 or 990-EZ, or DOL Forms LM-2 or LM-3, the information in these forms relates to a key statutory requirement for making an election (i.e., that substantially all employer contributions to the plan come from entities exempt from tax under Code section 501). Further, the revised procedures require only the first page (or first and last pages) of these forms for the statutorily-designated test years.

5. Reducing the burden on small entities. The information requirement for making an election will not affect a substantial number of entities of any size.

6. Consequence of reduced collection. PBGC is required by statute to prescribe procedures for implementing the multiemployer election provisions under PPA 2006. This is a one-time submission. The information requirements in the revised procedures relate directly to the eligibility requirements for making an election. In addition, the information collected is essential to the proper administration of PBGC's multiemployer insurance program, and failure to collect would seriously impair PBGC's program operations. For example, plan and employer information requirements, including copies of collective bargaining agreements for the three largest contributing employers, assist PBGC in assessing the financial health of the plan and in tracking those employers whose withdrawal from the plan would most adversely affect the plan's contribution base.

7. Special circumstances. Under section 1106 of PPA 2006, all elections under the procedures must be made by August 17, 2007. Depending on when the procedures are cleared by OMB, respondents may have less than 30 days to comply with the information requirements. However, draft procedures that reflect the statutory provision have been publicly available since June 15, 2007, which is more than two months before elections are due.

8. Outside input. PBGC published Federal Register notices soliciting public comment on this collection of information on April 13, 2006, at 72 FR 18692, and on June 15, 2007, at 72 FR 33260. Four public comments were received in response to the April draft procedures (the comments are discussed in item 1 above). The comment period for the June 2007 notice expires July 16, 2007.

9. Payment to respondents. PBGC provides no payments or gifts to respondents in connection with this collection of information.

10. Confidentiality. Confidentiality of information is that afforded by the Freedom of Information Act and the Privacy Act. PBGC's rules that provide and restrict access to its records are set forth in 29 CFR Part 4901.

11. Personal questions. The collection of information does not call for submission of information of a sensitive or private nature.

12. Hour burden on the public. Based on its experience, PBGC anticipates that approximately 35 single-employer plans, covering some 58,000 participants, may elect multiemployer status under the PPA 2006 provisions. PBGC estimates that plan filings will be largely prepared in-house. Most of the filing burden will be associated with assembling current and historical plan documents, as well as identifying information on contributing employers and information from employers evidencing their tax-exempt status. Plans will also have to determine the portion of total contributions received for each of three prior plan years from tax-exempt employers. PBGC estimates that the average hour burden to respondents will be 2.5 hours and that the cost to respondents for these burden hours will be \$687.00 per plan, or \$24,062 for 35 plans (based on an average hourly rate of \$275).

13. Cost burden on the public. PBGC estimates the cost burden on the public for the average of five hours of professional services expected to be contracted out to attorneys and other professionals for purposes of ensuring compliance with the required procedures will be \$1,875 per plan, or \$65,625 for 35 plans (based on an average hourly rate of \$375).

14. Costs to the Federal government. PBGC estimates that the cost to the Federal Government of processing this collection of information will be \$22,000.

15. Change in burden. This is a new collection.

16. Publication plans. PBGC does not plan to publish the results of this collection of information.

17. Display of expiration date. PBGC is not requesting approval to omit from the procedures the date OMB's paperwork approval expires.

18. Exceptions to certification statement. There are no exceptions to the certification statement for this submission.