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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4233

RIN 1212-AB29

Partitions of Eligible Multiemployer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Interim final rule

SUMMARY: This document contains an interim final rule prescribing 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”). The interim final rule is published pursuant to section 122 of MPRA in order to carry out the provisions of section 4233 of ERISA. PBGC is soliciting public comments on the interim final regulation.

Effective Date: Upon publication in the Federal Register. Comments must be submitted on or before [insert date 60 days after date of publication in the Federal Register].

ADDRESSES: Comments, identified by Regulation Identifier Number (RIN) 1212-AB29, may be submitted by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the Web site instructions for submitting comments.
- E-mail: reg.comments@pbgc.gov.
- Fax: 202-326-4112.
- Mail or Hand Delivery: Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW, Washington, DC 20005-4026.

All submissions must include the Regulation Identifier Number for this rulemaking (RIN 1212-AB29). Comments received, including personal information provided, will be posted to www.pbgc.gov. Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington DC 20005-4026, or calling 202-326-4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

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; Kimberly J. Duplechain (duplechain.kimberly@pbgc.gov), Deputy Assistant General Counsel, Office of the General Counsel, 202-326-4400, ext. 3028.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

This interim final rule implements provisions of the Multiemployer Pension Reform Act of 2014 (MPRA)¹ that prescribe the statutory conditions and notice requirements that must be met before PBGC may partition an eligible multiemployer plan under section 4233 of ERISA.

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.

¹ Division O of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law No. 113-235 (128 Stat. 2130 (2014)).

Major Provisions of the Regulatory Action

This rule adds a new part 4233 to PBGC's regulations. Part 4233 prescribes the application process to ensure the timely processing of applications for partition and related notice requirements.

Background

PBGC and the multiemployer insurance program

This interim final rule provides necessary guidance to plan sponsors on the application and notice requirements under section 4233 of ERISA for partitions of eligible multiemployer plans. To understand the effect of a partition of a multiemployer plan under MPRA, however, it is first helpful to understand the structure and operation of PBGC's multiemployer insurance program.

PBGC is a Federal corporation created under title IV of ERISA to guarantee the payment of pension benefits earned by more than 41 million American workers and retirees in nearly 24,000 private-sector defined benefit pension plans. The purpose of PBGC and the title IV insurance program is (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants; (2) to provide for the timely and uninterrupted payment of pension benefits under insured plans; and (3) to maintain premiums at the lowest level consistent with PBGC's obligations.

PBGC administers two insurance programs—one for single-employer defined benefit pension plans and a second for multiemployer defined benefit pension plans. This interim final rule applies only to the multiemployer program. The multiemployer program protects the benefits of approximately 10 million workers and retirees in approximately 1,400 plans. A multiemployer plan is a collectively bargained pension arrangement involving two or more

unrelated employers, usually in a common industry, such as construction or trucking.

Multiemployer plans pay an annual premium to PBGC. Under MPRA, the annual premium for 2015 increased from \$13 to \$26 per participant. For plan years beginning after 2015, the annual premium will increase based on increases in the national average wage index.

In general, a multiemployer plan may be terminated in one of two ways: (1) by plan amendment that “freezes” the accrual and vesting of benefits after a specified date, or that converts the plan into a defined contribution plan; or (2) every employer withdraws from the plan or ceases to have an obligation to contribute to the plan. In contrast to the single-employer program, however, plan termination is *not* an insurable event. In other words, plan termination does *not* trigger the payment of PBGC-insured, guaranteed benefits to participants and beneficiaries. The insurable event under the multiemployer program is plan insolvency, which generally occurs when a plan is unable to pay benefits at the level promised for the plan year.

The PBGC guarantee for multiemployer plans is lower than the guarantee for single-employer plans, and is based on a participant’s credited service and accrual rate, as defined in section 4022A. The maximum monthly benefit payable by PBGC under the multiemployer program is equal to a participant’s years of service multiplied by the sum of—

- 100 percent of the first \$11 of the accrual rate, and
- 75 percent of the next \$33 of the accrual rate.

Under this formula, benefits in excess of \$3,960 per year are only partially guaranteed, and the maximum guarantee amount payable per year is capped at \$12,870 (applicable to a participant with 30 years of service and with an annual benefit in excess of \$15,840).²

² The guarantee amount will exceed this amount if the participant has more than 30 years of service.

Another important difference between the single-employer program and the multiemployer program is the manner in which PBGC pays guaranteed benefits. Under the multiemployer program, PBGC does *not* pay guaranteed benefit amounts directly to participants and beneficiaries. Rather, when a multiemployer plan becomes insolvent, PBGC provides financial assistance in the form of loans to the insolvent *plan* sufficient to pay guaranteed benefit amounts to participants and beneficiaries. Despite this difference, the receipt of guaranteed benefit amounts from an insolvent multiemployer plan receiving financial assistance from PBGC is considered the receipt of benefits guaranteed by PBGC under title IV of ERISA.

MPRA Changes to Partition Rules

Although many multiemployer plans are healthy, a significant minority of financially troubled plans are projected to become insolvent over the next two decades.³ PBGC's multiemployer insurance program is also projected to become insolvent within that timeframe. During 2013 and 2014, congressional committees held several hearings on the problems facing these plans and PBGC. Those challenges include, among other things, investment market declines, employer withdrawals, and demographic changes.

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 increased premiums, sections 121 and 122 of MPRA provide PBGC with new statutory authority to assist financially troubled multiemployer plans under certain conditions, if doing so would reduce potential future costs to PBGC.

³ See FY 2013 PBGC Projections Report at <http://www.pbgc.gov/documents/Projections-report-2013.pdf>.

In addition, section 201 of MPRA amended the funding rules under section 305 of ERISA to add a new “critical and declining” status for financially troubled multiemployer plans. Under section 305(b)(6) of ERISA, a plan is in critical and declining status if it satisfies the criteria for critical status under section 305(b)(2), and is projected to become insolvent within the meaning of section 4245 of ERISA during the current plan year or any of the 14 succeeding plan years (19 succeeding plan years if the plan has a ratio of inactive participants to active participants that exceeds two to one or if the funded percentage of the plan is less than 80 percent). Section 305(e)(9) of ERISA, as added by MPRA, prescribes new benefit suspension rules for multiemployer defined benefit plans in critical and declining status. The Department of the Treasury (Treasury) has interpretative jurisdiction over the subject matter in section 305 of ERISA and today is issuing regulatory guidance in this area.⁴

As noted above, the purpose of this rule is to implement application and notice requirements under section 122 of MPRA, which prescribes the statutory conditions and notice requirements that must be met before PBGC may partition an eligible multiemployer plan. 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.

Multiemployer plan partitions – prior law

Before MPRA, PBGC could partition a multiemployer plan likely to become insolvent on its own accord or upon application by a plan sponsor. In either case, partition was only available in certain limited circumstances involving employer bankruptcies, and the liabilities transferred were restricted to the nonforfeitable benefits directly attributable to service with bankrupt employers, along with an equitable share of assets. The new plan created by the partition order

⁴ See Rev. Proc. 2015-xx [XXXX-XX] [Insert cites to Temp. and Proposed Rules]. ***[If these are to be issued the same day as the rule is published, we won't have the cites to send to the Federal Register]***

was a successor plan under section 4022A, and a terminated multiemployer plan to which section 4041A(d) applies.⁵ In addition, if the new plan did not have sufficient assets to pay the transferred benefits as of the date of the partition order, which generally was the case, it would be insolvent within the meaning of section 4245(b)(1) of ERISA. In such a case, participants whose benefits had been transferred to the new plan would receive their benefits, but reduced to the PBGC guarantee level. In contrast, participants in the ongoing plan would continue to receive unreduced plan benefits. Due in part to the eligibility limitations for partition, PBGC had partitioned only a few plans prior to the enactment of MPRA.

Multiemployer plan partitions – MPRA

Section 122 of MPRA replaced the rules for partition with a new framework of rules. One of the most obvious changes is that PBGC may approve a partition without requiring an employer bankruptcy and, therefore, the benefits subject to transfer in a partition are no longer limited to those attributable to service with a bankrupt employer. The statute imposes a number of new eligibility requirements, however, such as a requirement that the plan be in critical and declining status as defined in section 305 of ERISA, and new statutory conditions and obligations that apply both before and after a partition, including a new, ongoing benefit payment obligation that applies to the eligible multiemployer plan that requested the partition.

Another important change under MPRA is the relationship between the partition rules under section 4233 and the suspension of benefits rules under section 305(e)(9) of ERISA.⁶

Section 305(e)(9) permits critical and declining status plans to apply to Treasury for approval to

⁵ Section 4041A(d) of ERISA provides that the plan sponsor of a plan which terminates under section 4041A(a)(2) (termination by mass withdrawal) shall reduce benefits and suspend benefit payments in accordance with section 4281 of ERISA.

⁶ Section 305(e)(9)(B) defines the term “suspension of benefits” as the temporary or permanent reduction of any current or future payment obligation of the plan to any participant or beneficiary under the plan, whether or not in pay status at the time of the suspension of benefits.

suspend certain benefits following the provision of specified notice, consideration of comments, Treasury review and approval, and satisfaction of other specified conditions (including a participant vote). One example of the interplay between an application for partition and an application for suspension of benefits is that before Treasury can approve an application for suspension, the plan actuary must certify that, taking into account a proposed suspension of benefits and, if applicable, a proposed partition under section 4233, the plan is projected to avoid insolvency within the meaning of section 4245, assuming the suspension of benefits continues until the suspension expires by its own terms or, if no such expiration date is set, indefinitely.

Another example of the interplay between an application for partition and an application for suspension of benefits is that before PBGC may order a partition, it must first determine, in consultation with the Participant and Plan Sponsor Advocate,⁷ 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), if applicable. In addition, section 305(e)(9)(D)(iv) provides that any suspension of benefits, in the aggregate (and, if applicable, in combination with a partition), must be reasonably estimated to achieve, but not materially exceed, the level that is necessary to avoid insolvency. Finally, section 305(e)(9)(D)(v) requires that in any case in which an application for suspension of benefits to Treasury is made in combination with an application for partition to PBGC, the suspension of benefits may *not* take effect prior to the effective date of the partition.

Given the interplay between MPRA's partition and suspension of benefits provisions, PBGC staff has consulted with staff of Treasury, the Internal Revenue Service, and the Department of Labor in developing this interim final rule. PBGC will continue to work closely

⁷ The Participant and Plan Sponsor Advocate position was created in 2012 by the Moving Ahead for Progress in the 21st Century Act (MAP-21). See section 4004 of ERISA for the rules governing this position.

with these agencies as part of the interagency consultative process required under section 305(e)(9) of ERISA.

The following is a summary of the new statutory framework for partitions under MPRA.

Partition application and notice requirements

Section 4233(a)(1) of ERISA states 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. Unlike prior law, however, the statute requires PBGC to make a determination 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. They are discussed below:

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. As noted above, a plan is in critical and declining status if the plan satisfies the criteria for critical status under section 305(b)(2), and 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 inactive participants to active participants that exceeds two to one or if the funded percentage of the plan is less than 80 percent). Section 305(b)(3)(A)(i) requires an annual

certification from the plan actuary on whether a plan is or will be in critical and declining status for such plan year. Treasury has interpretative jurisdiction over the subject matter in section 305 of ERISA.

PBGC determination on reasonable measures. 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.

The term “maximum benefit suspensions” is not defined in section 305(e)(9) of ERISA.⁸ However, based on the structure and operation of section 305(e)(9)—specifically, the statutorily defined limitations and protections contained in section 305(e)(9)(D), which limits the maximum amount of a suspension so that the post-suspension benefit is no less than 110 percent of the PBGC guarantee under section 4022A, exempts certain categories of individuals based on their age, and exempts benefits based on disability—PBGC interprets the term “maximum benefit suspensions” in section 4233(b)(2) of ERISA to mean the maximum benefit suspension permissible under section 305(e)(9). For example, 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)(D)(iii).

The requirement under section 4233(b)(2) that a plan sponsor has taken (or is currently taking) all reasonable measures to avoid insolvency is similar to the demonstration that a plan sponsor must make under section 305(e)(9)(C)(ii) relating to an application for suspension of benefits. Under that provision, the plan sponsor must maintain a written record demonstrating

⁸ The term “maximum benefit suspensions” in section 4233(a)(1) of ERISA should not to be confused with the term “maximum suspendable benefits” under section 305(e)(9)(D)(ii)(II).

that the plan is projected to become insolvent unless benefits are suspended, although all reasonable measures have been taken (and continue to be taken during the period of the benefit suspension).

Although it is possible for a plan to file *only* an application for partition (and not an application for suspension of benefits under section 305(e)(9) of ERISA), the only instance in which that may occur would be if all participants and beneficiaries are older than 80, and/or receive benefits based on disability, or have accrued benefits not greater than 110 percent of the monthly benefit guaranteed by PBGC under section 4022A. Therefore, PBGC expects that most applicants for partition will also apply to Treasury for a suspension of benefits.

While the statute does not require a plan sponsor to file concurrent applications for partition and suspension of benefits, PBGC strongly encourages plan sponsors to do so because of the interplay between these provisions. For example, under section 305(e)(9) of ERISA, it is necessary for Treasury to review whether a proposed suspension of benefits and partition combined will allow the plan to avoid insolvency, and both PBGC and Treasury must make overlapping findings for each application. Furthermore, participant communications may be simplified if participants and beneficiaries receive a notice of partition concurrently with that of suspension. Finally, applications for partition and suspension that are not closely coordinated may also make it difficult for the agencies to comply with the statutory timeframes.

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.

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

As noted above, unlike the partition rule under prior law, MPRA imposes a number of ongoing statutory obligations on the solvent, original plan and its contributing employers. For example, 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 withdrawal liability 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.⁹

As a result of this continuing payment obligation, PBGC expects that participants and beneficiaries whose guarantee amounts are transferred to a successor plan, and who had a plan benefit that exceeded the PBGC guarantee (*e.g.*, 110 percent of the PBGC guarantee amount,

⁹ 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).

benefit based on disability, etc.), will continue to participate in, and retain a right to receive a benefit payment from, the original plan after the effective date of a partition order.

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.¹⁰

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.

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

¹⁰ 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 noted above, Treasury has interpretative jurisdiction over the subject matter in section 305 of ERISA.

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.

PBGC Request for Information

On February 18, 2015, PBGC published in the Federal Register a request for information (RFI) to solicit information from interested parties on issues PBGC should consider in implementing sections 4231 and 4233 of ERISA, and received 20 comments in response to the RFI.¹¹ PBGC has reviewed these comments and this interim final rule reflects a number of the suggestions contained in those comments.¹²

In general, commenters supported the implementation of section 4233 of ERISA and urged PBGC to issue guidance in a timely manner. Most commenters emphasized a need for clear guidance from PBGC on the types of information, documents, data, and actuarial projections needed to complete an application for partition. A number of commenters suggested that whenever possible and consistent with statutory requirements, the application should be based on information that plans are already required to prepare, or information that plans could easily develop. Consistent with these comments, PBGC believes that the interim final rule strikes an appropriate balance between providing clear and detailed guidance on the required content of an application for partition and not being unduly burdensome.

A number of commenters requested guidance on PBGC's evaluation criteria and standards for approval. PBGC considered these comments, but concluded that given the nature

¹¹ The RFI and comments are accessible at <http://www.pbgc.gov/prac/pg/other/guidance/multiemployer-notices.html>.

¹² Treasury issued an RFI seeking comments on certain matters related to the suspension of benefit rules under section 432(e)(9) of the Internal Revenue Code (section 305(e)(9) of ERISA). The Treasury RFI and comments are accessible at <http://www.regulations.gov/#!docketDetail;D=IRS-2015-0004>.

of the analysis and determinations required under section 4233(b) of ERISA with respect to both the plan applicant and PBGC, it is not able to provide guidance in those areas at this time. As a result, PBGC will review each application for partition on a case-by-case basis in accordance with the statutory criteria in section 4233(b).

There were also differing views on a number of other issues, including the required showing of solvency under ERISA section 4233, and whether there is a need for additional post-partition oversight by PBGC. As discussed below, PBGC interprets the term “remain solvent” to have the same meaning as “avoid insolvency” in Treas. Reg. § 1.432(d)(5)(ii). PBGC agrees with those commenters who suggested a need for post-partition oversight. In PBGC’s view, additional oversight is necessary to ensure compliance with the partition order, statutory post-partition obligations of the original plan, and proper stewardship of PBGC financial assistance provided to the successor plan. A more detailed discussion of the regulatory changes and the RFI comments follows.

Regulatory changes

Overview

To implement MPRA’s changes to section 4233 of ERISA, PBGC is adding a new part 4233, Partitions of Eligible Multiemployer Plans, to its regulations. Part 4233 provides guidance to multiemployer plan sponsors on the process for submitting an application for partition, the information required to be included in an application, notice requirements under section 4233(a)(2), including the form and manner of the notice, the notification process for PBGC decisions on applications for partition, the content of a partition order, and the scope of PBGC’s continuing jurisdiction under a partition order.

Section-by-section discussion

Section 4233.1 of the regulation describes the purpose and scope of part 4233, which is to prescribe application and notice requirements for partition under section 4233 of ERISA. The procedures set forth in the regulation represent the exclusive means by which PBGC will review an application for partition under section 4233 of ERISA.

Section 4233.2 of the regulation defines key terms used in the regulation. The statute uses the terms “eligible multiemployer plan,” the “eligible multiemployer plan prior to the partition,” and the “plan that was partitioned,” to refer to the multiemployer plan that is the subject of the partition application under section 4233(a) of ERISA. To avoid confusion, the regulation uses the term “original plan” to refer to the eligible multiemployer plan under section 4233(b) of ERISA, and “successor plan” to refer to the plan created by the partition order under section 4233(d)(1) of ERISA.

The term “successor plan benefit” is the portion of the accrued nonforfeitable monthly benefit which would be guaranteed under section 4022A as of the effective date of the partition, calculated under the terms of the original plan without reflecting any changes related to a benefit suspension under section 305(e)(9) of ERISA. Because the payment of a successor plan benefit from a plan receiving financial assistance is the payment of a guaranteed benefit under title IV of ERISA, the definition of successor plan benefit makes clear that the payment of such benefits is subject to the limitations and conditions contained in sections 4022A(a)-(f) of ERISA.

The term “residual benefit” is the monthly benefit payable from the original plan to a participant or beneficiary whose benefit was transferred to a successor plan pursuant to a partition order. The residual benefit is the difference between the monthly benefit defined in

section 4233(e)(1)(A) of ERISA and the successor plan benefit. The residual benefit is not subject to a separate guarantee under section 4022A of ERISA.

The term “remain solvent” has the same meaning as “avoid insolvency” in section 305(e)(9)(D)(iv) of ERISA, and is determined in the same manner and using the same methodology as is required under section 305(e)(9) and the Treasury regulations thereunder. This is based on the requirement under MPRA that Treasury make a finding that a plan is reasonably estimated to avoid insolvency taking into account both suspension and partition in the case of a plan that requires both to avoid insolvency.

Application requirements

Section 4233.3 of the regulation provides general information on the application filing requirements, including the method of filing, who may file, and where to file an application for partition under section 4233 of ERISA.

Section 4233.4 of the regulation summarizes the information needed for PBGC to make a determination on whether an application is complete. It 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), and § 4233.9 (financial assistance information). It also states that PBGC may require additional information it deems necessary to review an application, including information needed to calculate or verify the amount of financial assistance that would be necessary for a partition. Finally, section 4233.4 of the regulation also imposes an affirmative obligation on the plan sponsor to promptly notify PBGC in writing if the plan sponsor discovers that any material fact or representation contained in or relating to an application for partition, or in any supporting document, is no longer accurate, or has been omitted.

Section 4233.5 of the regulation identifies the various categories of plan-related information required for an application to be complete, such as formal plan documents, trust agreements, summary plan descriptions, summaries of material modifications, rehabilitation plans, Forms 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. PBGC expects that most, if not all, of the information required under this subsection should be readily available and accessible by plan sponsors, an issue also identified by several commenters.

Section 4233.6 of the regulation identifies information needed to evaluate the partition as proposed by the plan sponsor, such as the proposed structure, effective date, and a detailed description of any larger integrated transaction of which the proposed partition is a part. If applicable, it also requires the plan sponsor to submit a copy of its application for suspension of benefits under section 305(e)(9)(G) of ERISA (including all attachments and exhibits). In addition, consistent with section 4233(b)(2) of ERISA, the regulation requires the plan sponsor to provide 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 taking but did not take, including the factor(s) the plan sponsor considered in making these determinations.¹³

Finally, without limiting PBGC's ability to determine the final structure and amounts involved in a partition, § 4233.6 requires the plan sponsor to provide a detailed description of the estimated minimum amount of guaranteed benefit amounts the plan sponsor proposes to transfer in a partition, including:

¹³ PBGC is not defining the Participant and Plan Sponsor Advocate's consultative role in determining if the plan sponsor has taken all reasonable measures, but will let that role evolve on a case-by-case basis.

- The estimated number of participants and beneficiaries (and, if applicable, alternate payees) whose benefits (or any portion thereof) would be transferred, including the number of retirees receiving payments (if any), terminated vested participants (if any), and active participants (if any).
- All supporting data, calculations, assumptions, and methods used to determine the estimated minimum amount of benefit liabilities.
- If applicable, a description of any classifications or specific group(s) of participants and beneficiaries whose benefits the plan sponsor proposes to transfer, and the plan sponsor's rationale or basis for selecting those classifications or groups.

Section 4233.7 of the regulation identifies actuarial and financial information requirements. The first two information requirements relate to plan actuarial reports and an actuarial certification, which should ordinarily be within the possession of the plan sponsor or plan actuary. Sections 4233.7(a)(3)-(8) of the regulation require the submission of certain actuarial and financial information specific to the proposed partition, which are necessary for PBGC to evaluate whether a partition is necessary for the plan to remain solvent.

Section 4233.8 of the regulation identifies the types of participant census data to include with an application for partition.

Section 4233.9 of the regulation requires the submission of certain information relevant to an application for financial assistance.

Initial review process

Section 4233.10 of the regulation prescribes an initial review process for the purpose of determining whether an application is complete under section 4233(a)(1) of ERISA. An application will not be deemed complete until PBGC has made an initial determination under the

regulation. One of the commenters to the RFI noted that it would be helpful if guidance called for the trustees to be notified at the time an application is complete. Consistent with that comment, § 4233.10(c) provides that upon making a determination that an application is complete, PBGC will issue a written notice to the plan sponsor. Similarly, if PBGC determines that an application is incomplete, it will issue a written notice to the plan sponsor describing the information missing from the application.

Because PBGC's determination on whether an application is complete marks the beginning of the 270-day statutory review period under section 4233(a)(1) of ERISA and the 30-day notice period under section 4233(a)(2), § 4233.10(c) provides that the date of PBGC's written notice to a plan sponsor that an application is complete 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 section 4233(a)(2) of ERISA.

Section 4233.10(d) of the regulation provides that for a plan sponsor that is coordinating applications for partition and benefit suspension, an initial determination that a partition application is complete will be conditioned on filing an application for benefit suspensions with Treasury within 30 days after receipt of written notice of the initial determination. Because a multiemployer plan must suspend benefits to the maximum extent possible to be eligible for a partition, the effect of a suspension on the plan is integral to PBGC's evaluation of the partition. Moreover, this rule will ensure that participants and other interested parties receive notice of the plan's proposed suspension, which must be given concurrently with an application for suspension, in advance of—or at the same time as—they receive notice of application for partition, assisting in their understanding of the integrated transaction. Section 4233.13 facilitates the provision of a combined notice of application for benefit suspension and partition.

A copy of the completed application for benefit suspensions must be provided to PBGC under § 4233.6.

Finally, recognizing the importance of early PBGC engagement on partitions, § 4233.10(e) states that the initial review process is not intended to preclude a plan sponsor from contacting PBGC on an informal basis to discuss a potential partition application. Allowing for such discussions in advance of an application for partition is consistent with a number of the comments received in response to the RFI. For example, in discussing the difficulties faced by severely distressed plans that will require both a partition and maximum benefit suspensions to remain solvent, one commenter noted that in light of the time and costs involved in the benefit suspension process, it is not in the interests of anyone involved for trustees to apply for a suspension without preliminary feedback from PBGC on the feasibility of partition.

Similarly, another commenter noted that guidance should encourage plans to contact PBGC before making any substantive decisions on how to approach a potential partition application. Given the many complexities and uncertainties involved in a partition, including the fact that PBGC's authority to order a partition will depend, in part, on whether the proposed partition would impair PBGC's ability to meet existing financial assistance obligations to other plans, PBGC agrees with these comments and encourages plans to contact PBGC and engage in informal discussions on these and other issues before making a formal application.

Notice requirements

Section 4233.11 describes the timing requirements applicable to furnishing the notice to interested parties under section 4233(b) of ERISA, and the information that must be included in the notice. Section 4233.11(a) of the regulation requires the plan sponsor to send the notice to interested parties not later than 30 days after receipt of an initial determination under

§ 4233.10(c), and provides a cross-reference to filing rules in PBGC's regulation on Filing, Issuance, Computation of Time, and Record Retention (29 CFR Part 4000).

Section 4233.11(b) of the regulation prescribes content requirements for the notice of application for partition. The information required to be included in the notice is necessary to ensure that it provides adequate notice to interested parties on the meaning of a partition; the condition of the plan; and the effect of a partition on the plan, participants and beneficiaries, the plan sponsor, and contributing employers. In addition, the notice must include contact information for the plan sponsor, PBGC, and the Participant and Plan Sponsor Advocate.

PBGC is providing model notices that may be used by a plan sponsor. The model notices, which can be found in Appendix A of the regulation, may be used or adapted by plan sponsors to meet the notice requirements under section 4233(a)(2) of ERISA. Use of the model notices is not required, but will be deemed to satisfy the requirements of section 4233(a)(2) of ERISA and this part. PBGC specifically requests comments on the form and content of the model notices, including what, if any, additional information should be included in the model notices.

Determination process

Section 4233.12 of the regulation describes the timing and manner in which PBGC will notify a plan sponsor of PBGC's decision on an application for partition. As noted above in the discussion of the initial review process, PBGC will approve or deny an application in accordance with the standards set forth in section 4233(b) of ERISA within 270 days after issuing notice to the plan sponsor of the completed application under § 4233.10(c).¹⁴ If PBGC denies the

¹⁴ As noted above, section 4233(b) sets forth five statutory conditions that must be satisfied before PBGC may order a partition. PBGC will review each application for partition on a case-by-case basis in accordance with the statutory criteria in section 4233(b). PBGC's determination under section 4233(b)(2) will be made in consultation with the Participant and Plan Sponsor Advocate.

application, PBGC's written decision will state the reason(s) for the denial. If PBGC approves the application, PBGC will issue a partition order in accordance with § 4233.14 and section 4233(c) of ERISA. The decision to approve or deny an application for partition under section 4233 of ERISA is within PBGC's discretion, and is a final agency action not subject to PBGC's rules for reconsideration or administrative appeal.

Section 4233.12(c) describes an optional conditional determination process for plan sponsors who file applications for partition and a suspension of benefits. This provision is in response to those commenters who urged PBGC to create a conditional, or accelerated, approval process. With respect to this issue, one commenter noted that a multiemployer plan that needs a partition and suspension to become solvent should not have to go through a suspension of benefits vote by participants only to have its application for partition denied by PBGC, and consequently have to inform its participants that although they voted for the suspension of benefits, the plan cannot proceed with the suspension because PBGC denied the application for partition.

Similarly, noting that the suspension process is likely to be long and costly, another commenter stated that because an approved suspension cannot be implemented before the effective date of the related partition, and because the magnitude of any needed partition typically increases with time, guidance (and any related internal procedures) should permit PBGC to issue a partition order prior to, but conditioned upon approval and implementation of, the suspension.

Consistent with these and other comments, § 4233.12(c) provides that, at the request of a plan sponsor, PBGC may, in its discretion, issue a preliminary approval of an application conditioned on Treasury's approval of an application for a suspension of benefits under section

305(e)(9) of ERISA. The regulation requires that the conditional approval include a written statement of preliminary findings, conclusions, and conditions. A partition will only become effective, however, upon satisfaction of the required conditions, and the issuance of an order of partition under section 4233(c) of ERISA.

Coordinated application process for partition and benefit suspension

Section 4233.13 of the regulation provides special rules for plan sponsors who file applications for partition under section 4233 of ERISA with PBGC, and benefit suspensions under section 305(e)(9) of ERISA with Treasury. Section 4233.13(a) describes the interagency coordination process applicable to such plans.

In response to comments on the RFI urging PBGC and Treasury to allow for a combined notice of application for benefit suspension and partition, § 4233.13(b) provides that a plan sponsor may combine the model notice provided at Appendix A with the model notice contained in Rev. Proc. 2015-xx [XXXX-XX] to satisfy the notice requirements of this part.

Partition order

Section 4233.14 of the regulation describes the content of a PBGC partition order. It provides that the partition order will describe the liabilities to be transferred to the successor plan, and the manner in which financial assistance will be provided to the successor plan by PBGC. Section 4233.14(a) states that the partition order shall set forth PBGC's findings and conclusions on an application for partition, the effective date of partition, the obligations and responsibilities of the plan sponsor of the original plan and the successor plan, and such other information as PBGC may deem appropriate.

Section 4233.14(b) provides that the partition order will set forth the terms and conditions of the partition, and will incorporate by reference the applicable requirements under sections

4233(d) and 4233(e) of ERISA. Finally, § 4233.14(b) requires that the plan sponsor of the original plan and the successor plan amend the original plan and successor plan, respectively, to reflect the benefits payable to participants and beneficiaries resulting from the partition order. While the regulation does not require a plan sponsor to submit a draft amendment to the original plan or a draft successor plan document with an application for partition, PBGC will require the submission of these and other related documents pursuant to §4233.4(b) before it will issue a partition order.

Nature and operation of successor plan

Section 4233.15 of the regulation describes the nature and operation of the successor plan created by the partition order. Section 4233(d)(1) of ERISA states that the plan created by the partition order is a successor plan to which section 4022A of ERISA applies. The statutory cross-reference to section 4022A of ERISA makes clear that the portion of a participant's or beneficiary's benefit transferred to a successor plan is subject to and limited by section 4022A of ERISA. The aggregate amount of benefits subject to transfer is further limited by section 4233(c) of ERISA, which states that PBGC's partition order shall provide for a transfer of the "minimum amount of the [original] plan's liabilities necessary for the [original] plan to remain solvent." The statutory reference to successor plan status under section 4233(d)(1) is relevant under title IV for purposes of coverage determinations under section 4021 of ERISA, and for determining the period of time for which a benefit or a benefit increase has been in effect under section 4022A(b)(1) of ERISA.

Consistent with the statute, § 4233.15(a) of the regulation provides that the plan created by the partition order is a successor plan to which section 4022A applies. Although the statute does not reference section 4245 of ERISA or the solvency of the successor plan, § 4233.15(a)

also states that the successor plan is an insolvent plan under section 4245 of ERISA. A successor plan is insolvent as of the effective date of a partition order because the order will provide for a transfer of guaranteed benefit amounts (the minimum amount of the original plan's liabilities necessary for it to remain solvent) but no corresponding transfer of assets. Therefore, as of the effective date of the partition order, the successor plan will be insolvent within the meaning of section 4245 of ERISA because it will not have sufficient available resources to pay benefits under the plan when due for the plan year. The guaranteed benefit amounts transferred to the successor plan will be paid with PBGC financial assistance in an amount sufficient to enable the plan to pay such benefits under section 4261 of ERISA.

Section 4233.15(b) states that the successor plan is also treated as a terminated multiemployer plan to which section 4041A(d) of ERISA applies because there will be no contributing employers with an obligation to contribute to the successor plan as of the effective date of the partition order. The treatment of the successor plan as a terminated plan under section 4041A(a)(2), however, is not taken into account for purposes of determining withdrawal liability of any contributing employer to the *original plan*. Under section 4233(d)(3) of ERISA, in the event an employer withdraws from the original plan within 10 years following the effective date of the partition order, withdrawal liability shall be computed under section 4201 with respect to both the original plan and the plan created by the partition order.

Consistent with section 4233(d)(2) of ERISA, § 4233.15(c) provides that the plan sponsor of an eligible multiemployer plan prior to the partition and the administrator of such plan shall be the plan sponsor and the administrator, respectively, of the successor plan. PBGC retains the right to remove and replace the plan sponsor of the successor plan pursuant to section 4042(b)(2) of ERISA.

Coordination of benefits under original plan and successor plan

Section 4233.16 of the regulation describes the relationship and interaction between the residual benefit and the successor plan benefit, and the treatment of such benefits under section 4022A of ERISA. Section 4233.16(a) provides that subject to the limitations contained in section 4022A of ERISA, the only benefits payable under a successor plan are successor plan benefits as defined in § 4233.2. While the only benefits payable under a successor plan are successor plan benefits, which are subject to the limitations and conditions contained in section 4022A, participants and beneficiaries whose guaranteed benefit amounts are transferred to a successor plan will also generally retain a right to receive a residual benefit under the original plan pursuant to section 4233(e)(1) of ERISA.¹⁵ Section 4233.2 of the regulation defines the term “residual benefit” to mean the difference between the monthly benefit under section 4233(e)(1)(A) of ERISA and the successor plan benefit. The following example illustrates the benefit payment responsibilities of an original plan and a successor plan in a partition:

Assume Plan X has \$200 million in accrued liabilities and \$75 million in assets. Annual benefit payments total \$15 million under the Plan. Plan X is projected to become insolvent within 10 years. The actuary for Plan X advises the Board of Trustees of Plan X that maximum benefit suspensions under section 305(e)(9) of ERISA would reduce liabilities to \$130 million and reduce benefit payments in the years following a partition to \$10 million per year.

The actuary for Plan X estimates that a partition under section 4233 of ERISA transferring \$50 million of guarantee-liabilities payable by PBGC, and corresponding benefit

¹⁵ Section 4233(e)(1) requires the original plan to 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 of such participant or beneficiary which is guaranteed under section 4022A.

payments of \$4 million per year, to a successor plan, in combination with maximum benefit suspensions, would enable Plan X to avoid insolvency within the meaning of section 4245. PBGC financial assistance payable to the successor plan would cover \$4 million in annual guaranteed payments under the successor plan. Plan X would pay a total of \$6 million in benefits in the year following partition, consisting of—

- The additional residual benefit amounts necessary to raise the benefit level for participants and beneficiaries with benefits under the successor plan to the same amount they would have received under Plan X if the partition had not occurred, plus
- Benefit payments for the participants and beneficiaries whose benefits were *not* transferred to the successor plan.

Assume that before the partition, Participant A, a retired participant with 25 years of service, received a Plan X benefit of \$1,500 per month at normal retirement age payable as a single life annuity. Plan X proposes to transfer the guarantee portion of Participant A's benefit to the successor plan. Since Participant A's monthly accrual rate exceeds \$44 ($\$1,500 \div 25 = \60), the guarantee amount (applying the guarantee formula under section 4022A(c)) is \$893.75 ($\35.75×25 years of service = \$893.75). If maximum benefit suspensions are approved, Participant A's benefit would be reduced to 110 percent of his monthly guaranteed benefit amount (Participant A is not protected by the age limitations or the limitations on suspension of benefits based on disability under section 305(e)(9)(D) of ERISA). Upon the effective date of the partition, Participant A would receive an \$893.75 PBGC-guaranteed monthly benefit from the successor plan (the successor plan benefit), funded by PBGC financial assistance, and an \$89.38 monthly residual benefit funded by Plan X.¹⁶

¹⁶ Participant A's residual benefit of \$89.38 is the portion of Participant A's monthly benefit (taking into account benefit suspensions) that is not transferred to the successor plan as part of the guarantee amount payable by PBGC. As such, it would not be subject to a separate guarantee under section 4022A of ERISA.

Section 4233.16(c) of the regulation provides that when a participant's or beneficiary's benefit is partially or wholly transferred to a successor plan, the PBGC guarantee applicable to such benefit is transferred to, and becomes payable under, the successor plan. The benefit remaining in the original plan as of the effective date of the partition (the residual benefit), if any, is not subject to a separate guarantee, and any increase in the PBGC guarantee amount payable under the original plan will arise solely, if at all, due to an increase in the accrued benefit under a plan amendment following the effective date of the partition, or an additional accrual attributable to service after the effective date of the partition.

Section 4233.16(d) provides that subject to the conditions contained in section 4261 of ERISA, PBGC shall provide financial assistance to the successor plan in an amount sufficient to enable the successor plan to pay only the portion of the PBGC-guaranteed benefits transferred to the successor plan pursuant to the partition order, and reasonable and necessary administrative expenses if approved by PBGC. The receipt of benefits under a multiemployer plan receiving financial assistance from PBGC shall be considered the receipt of amounts from PBGC of guaranteed benefits.

Finally, section 4233.16(e) provides that the plan sponsors of an original plan and a successor plan may, but are not required to, pay monthly benefits payable under the original plan and successor plan, respectively, in a single monthly payment pursuant to a written cost sharing or expense allocation agreement between the plans.

Continuing jurisdiction

Section 4233.17 of the regulation describes PBGC's continuing jurisdiction over the original plan and the successor plan. As noted above in the discussion of the RFI comments, while there were differing views on the need for additional post-partition oversight by PBGC to

ensure compliance with MPRA’s post-partition requirements, PBGC has determined that additional oversight is necessary to ensure compliance with the partition order, statutory post-partition payment obligations, and proper stewardship of PBGC financial assistance. Consistent with this view, § 4233.16(a) provides that PBGC shall continue to have jurisdiction over the original plan and the successor plan to carry out the purposes, terms, and conditions of the partition order, section 4233 of ERISA, and the regulations thereunder. Section 4233.16(b) states that PBGC may, upon notice to the plan sponsor, make changes to the partition order in response to changed circumstances as consistent with section 4233 of ERISA and Part 4233.

Request for Comments

In addition to the specific requests for comments identified above, PBGC encourages all interested parties to submit their comments, suggestions, and views concerning the provisions of this interim final rule, including the model notices. In particular, PBGC is interested in any area in which additional guidance may be needed.

Applicability

The amendments in this interim final rule are applicable to applications for partition submitted to PBGC on or after [insert 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”

PBGC has determined that this rulemaking is a “significant regulatory action” under Executive Order 12866. The Office of Management and Budget has therefore reviewed this proposed 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 interim 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." PBGC has determined that this interim final rule does not cross the \$100 million threshold for economic significance and is not otherwise economically significant.

PBGC expects that fewer than 20 plans will apply 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.

Administrative Procedure Act

The Administrative Procedure Act (5 U.S.C. 553(b)) provides that notice and comment requirements do not apply when an agency, for good cause, finds that they are impracticable, unnecessary, or contrary to the public interest. MPRA was signed into law on December 16, 2014, and with respect to the amendments to section 4233 of ERISA, is effective for plan years beginning after December 31, 2014.

MPRA did not impose a deadline to issue regulations under section 4233 of ERISA. However, as explained above under *PBGC determination on reasonable measures*, the partition rule under section 4233 is inextricably linked to the benefit suspension rule under section 305(e)(9) of ERISA, which requires the Treasury Secretary, in consultation with PBGC and the Secretary of Labor, to publish appropriate guidance not later than 180 days after the date of the enactment of MPRA (June 15, 2015). While neither section 4233 nor section 305(e)(9) expressly requires a plan sponsor to file concurrent applications for partition and benefit suspensions, the statutory provisions were designed to act in tandem with one another.

Under section 305(e)(9)(D)(v) of ERISA, in 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 of ERISA, the suspension of benefits may *not* take effect prior to the effective date of such partition. In other words, for a plan that requires both benefit suspensions and partition to remain solvent, the benefit suspension cannot take effect prior to the effective date of the partition.

Similarly, the actuarial certification under section 305(e)(9)(C)(i) requires a plan actuary to take into account the proposed suspensions of benefits (and if applicable, a proposed partition of the plan under section 4233 of ERISA), for purposes of certifying that a plan is projected to avoid insolvency within the meaning of section 4245 of ERISA.

Finally, section 305(e)(9)(D)(iv) of ERISA provides that any suspensions of benefits, in the aggregate (and, if applicable, considered in combination with a partition of the plan under section 4233 of ERISA), shall be reasonably estimated to achieve, but not materially exceed, the level that is necessary to avoid insolvency.

Most plans that will require a partition will also require a benefit suspension. The longer the delay, the more expensive the partition and the less likely that PBGC will be able to afford to provide assistance, resulting in greater harm to the public and the pension insurance system.

Accordingly, because regulatory guidance is required to implement section 4233, including the procedure for the plan sponsor to submit an application for partition and to provide notice to participants and beneficiaries, and because section 4233 is inextricably linked to the suspension of benefit rules under section 305(e)(9), which require Treasury, in consultation with PBGC and the Secretary of Labor, to publish appropriate guidance under section 201 not later than 180 days after the date of the enactment of MPRA (June 15, 2015), PBGC has determined that, under these circumstances, prior notice and comment through the issuance of a notice of proposed rulemaking is impracticable and that the public interest is best served by making this interim final rule effective on June 15, 2015. However, PBGC is requesting comments on this interim final rule and may make changes to the interim final rule in response to those comments.

For the same reasons, pursuant to section 553(d)(3) of the Administrative Procedure Act (5 U.S.C. 553(d)(3)), PBGC is making this rule effective upon publication.

Regulatory Flexibility Act

Because PBGC is not publishing a general notice proposed rulemaking under 5 U.S.C. 553, the regulatory flexibility analysis requirements of the Regulatory Flexibility Act do not apply. See 5 U.S.C. 601(2).

Paperwork Reduction Act

The information requirements under this interim final rule — information to be reported to PBGC and information to be disclosed to participants — have been approved by the OMB under the Paperwork Reduction Act (OMB control number 1212-xxxx)¹⁷.

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.

Comments on the information requirements under this interim final rule should be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at OIRA_DOCKET@omb.eop.gov or by fax to (202) 395-6974. Comments may be submitted through [insert date 60 days after publication in the Federal Register]. Comments may address (among other things) —

- Whether the collection of information is needed for the proper performance of PBGC's functions and will have practical utility;
- The accuracy of PBGC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancement of the quality, utility, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

List of Subjects

¹⁷ The OMB control number will be activated upon publication of this interim final rule.

29 CFR Part 4233

For the reasons given above, PBGC is adding part 4233 to read as follows:

The Regulation

1. A new part 4233 is added to read as follows:

Part 4233—Partitions of Eligible Multiemployer Plans.

Sec.

- 4233.1 Purpose and scope.
- 4233.2 Definitions.
- 4233.3 Application filing requirements.
- 4233.4 Information to be filed.
- 4233.5 Plan information.
- 4233.6 Partition information.
- 4233.7 Actuarial and financial information.
- 4233.8 Participant census data.
- 4233.9 Financial assistance information.
- 4233.10 Initial review.
- 4233.11 Notice of application for partition.
- 4233.12 PBGC action on application for partition.
- 4233.13 Combined notice for coordinated applications for partition and benefit suspension.
- 4233.14 Partition order.
- 4233.15 Nature and operation of successor plan.
- 4233.16 Coordination of benefits under original plan and successor plan.
- 4233.17 Continuing jurisdiction.

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

§ 4233.1 Purpose and scope.

The purpose of this part is to prescribe rules governing applications for partition under section 4233 of ERISA, and related notice requirements.

§ 4233.2 Definitions.

The following terms are defined in § 4001.2 of this chapter: ERISA, IRS, multiemployer plan, PBGC, plan, and plan sponsor. In addition, the following terms are defined for purposes of this part:

Advocate means the Participant and Plan Sponsor Advocate under section 4004 of ERISA.

Application for partition means a plan sponsor's application for partition under section 4233 of ERISA and this part.

Application for a suspension of benefits means a plan sponsor's application for a suspension of benefits to the Secretary of the Treasury (Treasury) under section 305(e)(9)(G) of ERISA.

Completed application means an application for partition for which PBGC has made an initial determination under § 4233.10 that the application contains all required information and satisfies the requirements described in §§ 4233.4 through 4233.9.

Effective date of partition means the date upon which a partition is effective and which is set forth in a partition order.

Financial assistance means financial assistance from PBGC under section 4261 of ERISA.

Insolvent has the same meaning as insolvent under section 4245(b) of ERISA.

Interested party means, with respect to a plan—

- (1) Each participant in the plan;
- (2) Each beneficiary of a deceased participant;
- (3) Each alternate payee under an applicable qualified domestic relations order, as defined in section 206(d)(3) of ERISA;
- (4) Each employer that has an obligation to contribute under the plan; and
- (5) Each employee organization that currently represents any group of participants.

Original plan means an eligible multiemployer plan under 4233(b) of ERISA that is partitioned upon the issuance of a partition order under section 4233(c) of ERISA.

Partition order means a formal PBGC order of partition under section 4233 of ERISA and § 4233.14 of this part.

Proposed partition means a proposed partition as structured and described by the plan sponsor in an application for partition.

Remain solvent has the same meaning as “avoid insolvency” in section 305(e)(9)(C) of ERISA with respect to the determinations made by PBGC under sections 4233(b)(3) and 4233(c) of ERISA.

Residual benefit means, with respect to a participant or beneficiary whose benefit was partially transferred to a successor plan pursuant to a partition order, the portion of the benefit payable under the original plan, the amount of which is equal to the difference between the benefit defined in section 4233(e)(1)(A) of ERISA, and the successor plan benefit. The residual benefit as of the effective date of the partition is not subject to a separate guarantee under section 4022A of ERISA.

Successor plan means the plan created by a partition order under section 4233(c) of ERISA.

Successor plan benefit means, with respect to a participant or beneficiary whose benefit was wholly or partially transferred from an original plan to a successor plan, the portion of the accrued nonforfeitable monthly benefit which would be guaranteed under section 4022A as of the effective date of the partition, calculated under the terms of the original plan without reflecting any changes relating to a benefit suspension under section 305(e)(9) of ERISA. The

payment of a successor plan benefit is subject to the limitations and conditions contained in sections 4022A(a)-(f) of ERISA.

§ 4233.3 Application filing requirements.

(a) *Method of filing.* The PBGC applies the rules in part 4000, subpart A of this chapter to determine permissible methods of filing with PBGC under this part, and the rules in part 4000, subpart D of this chapter to determine the computation of time.

(b) *Who may file.* An application for partition under section 4233 of ERISA must be submitted by the plan sponsor. The application must be signed and dated by an authorized trustee who is a current member of the board of trustees, and must include the following statement under penalties of perjury: “Under penalties of perjury, I declare that I have examined this application, including accompanying documents, and, to the best of my knowledge and belief, the application contains all the relevant facts relating to the application, and such facts are true, correct, and complete.” A stamped signature or faxed signature is not permitted.

(c) *Where to file.* See § 4000.4 of this chapter for information on where to file.

§ 4233.4 Information to be filed.

(a) *General.* An application for partition must include the information specified in § 4233.5 (plan information), § 4233.6 (partition information), § 4233.7 (actuarial and financial information), § 4233.8 (participant census data), and § 4233.9 (financial assistance information). If any of the information is not included, the application will not be considered complete.

(b) *Additional information.*

(1) 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 a partition. Any additional information must be submitted by the date specified in PBGC's request.

(2) PBGC may suspend the running of the 270-day review period (described in § 4233.10) pending the submission of any additional information requested by PBGC, or upon the issuance of a conditional determination under § 4233.12(c).

(c) *Duty to amend and supplement application.* During any time in which an application is pending final action by PBGC, the plan sponsor must promptly notify PBGC in writing of any material fact or representation contained in or relating to the application, or in any supporting documents, that is no longer accurate, or any material fact or representation omitted from the application or supporting documents, that the plan sponsor discovers.

§ 4233.5 Plan information.

(a) *Required information.* An application for partition must include the following information with respect to the plan:

(1) The name of the plan, Employer Identification Number (EIN), and three-digit Plan Number (PN).

(2) The name, address, and telephone number of the plan sponsor and the plan sponsor's duly authorized representative, if any.

(3) The most recent trust agreement, including all amendments adopted since the last restatement.

(4) The most recent plan document, including all amendments adopted since the last restatement.

(5) The most recent summary plan description (SPD), and all summaries of material modification (SMM) issued since the effective date of the most recent SPD.

(6) The most recent rehabilitation plan, including all subsequent amendments and updates, and the percentage of total contributions received under each schedule of the rehabilitation plan for the most recent plan year available.

(7) A copy of the plan's most recent IRS determination letter.

(8) A copy of the plan's most recent Form 5500 (Annual Report Form) and all schedules and attachments (including the audited financial statement).

(9) 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.

(10) A schedule of withdrawal liability payments collected in each of the most recent five plan years.

§ 4233.6 Partition information.

An application for partition must include the following information with respect to the proposed partition:

(1) A detailed description of the proposed partition, including the proposed structure, proposed effective date, and any larger integrated transaction of which the proposed partition is a part (including, but not limited to, an application for suspension of benefits under section 305(e)(9)(G), or a merger under section 4231 of ERISA).

(2) A narrative description of the events that led to the plan sponsor's decision to submit an application for partition (and, if applicable, application for suspension of benefits).

(3) A narrative description of significant risks and assumptions relating to the proposed partition and the projections provided in support of the application.

(4) If applicable, a copy of the plan sponsor's application for suspension of benefits (including all attachments and exhibits). If the plan sponsor intends to apply for a suspension of benefits with Treasury, but has not yet submitted an application to Treasury, a draft of the application may be filed, which must be supplemented by filing a copy of the completed application within the timeframe established in §4233.10(d).

(5) A detailed description of all measures the plan sponsor has taken (or is taking) to avoid insolvency, and any measures the plan sponsor considered taking but did not take, including the factor(s) the plan sponsor considered in making these determinations. Include all relevant documentation relating to the plan sponsor's determination that it has taken (or is taking) measures to avoid insolvency.

(6) A detailed description of the estimated benefit amounts the plan sponsor has determined are necessary to be partitioned for the plan to remain solvent, including the following information:

(i) The estimated number of participants and beneficiaries whose benefits (or any portion thereof) would be transferred, including the number of retirees receiving payments (if any), terminated vested participants (if any), and active participants (if any).

(ii) Supporting data, calculations, assumptions, and a description of the methodology used to determine the estimated benefit amounts.

(iii) If applicable, a description of any classifications or specific group(s) of participants and beneficiaries whose benefits (or any portion thereof) the plan sponsor proposes to transfer, and the plan sponsor's rationale or basis for selecting those classifications or groups.

(7) A copy of the draft notice of application for partition described in § 4233.11.

§ 4233.7 Actuarial and financial information.

(a) *Required information.* An application for partition must include the following plan actuarial and financial information:

(1) A copy of the plan's most recent actuarial report and copies of the actuarial reports for the two preceding plan years.

(2) A copy of the plan actuary's most recent certification of critical and declining status, including a detailed description of the assumptions used in the certification, the basis for the projection of future contributions, withdrawal liability payments, investment return assumptions, and any other assumption that may have a material effect on projections.

(3) A detailed statement of the basis for the conclusion that the plan will not remain solvent without a partition and, if applicable, suspension of benefits, including supporting data, calculations, assumptions, and a description of the methodology. Include as an exhibit annual cash flow projections for the plan without partition (or suspension, if applicable) through the projected date of insolvency. Annual cash flow projections must reflect the following information:

(i) Market value of assets as of the beginning of the year.

(ii) Contributions and withdrawal liability payments.

(iii) Benefit payments.

(iv) Administrative expenses.

(v) Market value of assets at year end.

(4) A long-term projection reflecting reduced benefit disbursements at the PBGC-guarantee level after insolvency, and a statement of the present value of all future financial

assistance without a partition (using the interest and mortality assumptions applicable to the valuation of plans terminated by mass withdrawal as specified in §4281.13 and other reasonable actuarial assumptions, including retirement age, form of benefit payment, and administrative expenses, certified by an enrolled actuary).

(5) A detailed statement of the basis for the conclusion that the original plan will remain solvent if the application for partition, and, if applicable, the application for suspension of benefits, is granted, including supporting data, calculations, assumptions, and a description of the methodology, which must be consistent with section 305(e)(9)(D)(iv) and the regulations thereunder (including any adjustment to the cash flows in the initial year to incorporate recent actual fund activity required to be included under that section). Annual cash flow projections for the original plan with partition (and suspension, if applicable) must be included as an exhibit and must reflect the following information:

- (i) Market value of assets as of the beginning of the year.
- (ii) Contributions and withdrawal liability payments.
- (iii) Benefit payments.
- (iv) Administrative expenses.
- (v) Market value of assets at year end.

(6) If applicable, a copy of the plan actuary's certification under section 305(e)(9)(C)(i) of ERISA.

(7) The plan's projected insolvency date with benefit suspension alone (if applicable), including supporting data.

(8) A long-term projection reflecting benefit disbursements from the successor plan, and a statement of the present value of all future financial assistance with a partition (using the

interest and mortality assumptions applicable to the valuation of plans terminated by mass withdrawal as specified in § 4281.13 and other reasonable actuarial assumptions, including retirement age, form of benefit payment, and administrative expenses, certified by an enrolled actuary).

(b) *Additional projections.* PBGC may ask the plan for additional projections based on assumptions that it specifies.

(c) *Actuarial calculations and assumptions.*

(1) *General.* All calculations required by this part must be performed by an enrolled actuary.

(2) *Assumptions.* All calculations required by this part must be consistent with calculations used for purposes of an application for suspension of benefits under section 305(e) (9), and based on methods and assumptions each of which is reasonable (taking into account the experience of the plan and reasonable expectations), and which, in combination, offer the actuary's best estimate of anticipated experience under the plan. Any change(s) in assumptions from the most recent actuarial valuation, and critical and declining status certification pursuant to section 305(b)(3)(B)(iv), must be disclosed and must be accompanied by a statement explaining the reason(s) for any change(s) in assumptions.

(3) *Updates.* PBGC may, in its discretion, require updated calculations and representations based on the actual effective date of a partition, revised actuarial assumptions, or for other good cause.

§ 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 (a)(5) above, including:

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

(i) 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.

§ 4233.9 Financial assistance information.

(a) *Required information.* An application for partition must include the estimated amount of annual financial assistance requested from PBGC for the first year the plan receives financial assistance if partition is approved.

(b) *Additional information.* PBGC may ask the plan for additional information in accordance with § 4233.4(b)(1).

§ 4233.10 Initial review.

(a) *Determination on complete application.* PBGC will make a determination on an application not later than 270 days after the date such application is deemed completed.

(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.

(c) *Complete application.* Upon making an initial 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. 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.

(d) *Special rule for coordinated applications for partition and benefit suspension.* For a plan requiring both partition and benefit suspensions to remain solvent, PBGC's initial determination that a partition application is complete will be conditioned on the plan sponsor's filing of an application for benefit suspensions with Treasury within 30 days after receiving

written notice from PBGC under subsection (c). Such a plan is permitted, but not required, to issue a combined notice under § 4233.13(b).

(e) *Informal consultation.* Nothing in this subsection precludes a plan sponsor from contacting PBGC on an informal basis to discuss a potential partition application.

§ 4233.11 Notice of application for partition.

(a) *When to file.* Not later than 30 days after receipt of the written notice described in § 4233.10(c) that an application for partition is complete, the plan sponsor must provide notice of such application to each interested party and PBGC, in accordance with the rules in part 4000, subpart B of this chapter.

(b) *Form of notice.* The notice must be readable and written in a matter calculated to be understood by the average plan participant. The Model Participant Notices in Appendix A to this part (when properly completed) are examples of notices meeting the requirements of this section.

(c) *Information required.* A notice of completed application for partition must include the following information:

(1) *Identifying information.* The name of the plan, the name, address, and phone number of the plan sponsor, the Employer Identification Number (EIN), and three-digit Plan Number (PN).

(2) *Relevant partition application dates.* A brief statement that the plan sponsor has submitted an application for partition to PBGC, the date of the completed application under § 4233.10(c), and a statement that that PBGC must issue its decision not later than 270 days after the date on which PBGC notified the plan sponsor that the application was complete.

(3) *Application for suspension of benefits.* If applicable, a statement of whether the plan sponsor has submitted an application for suspension of benefits under section 305(e)(9)(G) of

ERISA, and, if so, information on how to obtain a copy of the application and notice required by section 305(e)(9)(F) of ERISA.

(4) *Description of statutory partition provisions.* A brief description of the requirements under section 4233 of ERISA, and other related statutory requirements, including:

(i) The interrelationship between the partition rules under section 4233 of ERISA and suspensions of benefits under section 305(e)(9) of ERISA (if applicable).

(ii) The multiemployer guarantee under section 4022A of ERISA.

(iii) The eligibility requirements for a partition under section 4233(b) of ERISA, including the Advocate consultation requirement.

(5) *Impact of partition on interested parties.* A brief description of how the proposed partition will impact certain interested parties, including:

(i) A statement describing the benefit payment obligations of the original plan and the successor plan.

(ii) A statement explaining that the Board of Trustees of the original plan will also administer the successor plan, but the successor plan will be funded solely by PBGC financial assistance payments.

(6) *Partition application contents summary.* A brief summary of the content of the plan sponsor's application for partition, including the following information:

(i) The plan's critical and declining status and projected insolvency date.

(ii) A statement that the plan sponsor has taken (or is taking) all reasonable measures to avoid insolvency, including the maximum benefit suspensions under section 305(e)(9), if applicable.

(iii) If known, a brief statement on the proposed total estimated amount of liabilities to be partitioned.

(iv) If known, a brief statement summarizing the proposed class or classes of participants whose benefits would be partially or wholly transferred if the application for partition is granted, including a summary of the factors considered by the plan sponsor in preparing its application.

(7) *Contact information for plan sponsor.* The name, address, and telephone number of the plan sponsor or other person designated by the plan sponsor to answer inquiries concerning the application for partition.

(8) *Contact information for PBGC.* [PBGC contact information].

(9) *Contact information for Participant and Plan Sponsor Advocate* [insert contact information].

(d) *Model notice.* The appendix to this section contains two model notices—one for plan sponsors that submit coordinated applications for partition with PBGC and for benefit suspensions with Treasury, and one for plans sponsors who apply for partition only. The model notices are intended to help plan sponsors in discharging their notice obligations under section 4233(a)(2) of ERISA and this part. Use of the model notices is not mandatory, but will be deemed to satisfy the requirements of section 4233(a)(2) of ERISA and this part.

(e) *Foreign languages.* The plan sponsor of a plan that (as of the [insert date]) covers the numbers or percentages in § 2520.104b-10(e) of this title of participants literate only in the same non-English language must, for any notice to interested parties—

(i) Include a prominent legend in that common non-English language advising them how to obtain assistance in understanding the notice; or

(ii) Provide the notice in that common non-English language to those interested parties literate only in that language.

§ 4233.12 PBGC action on application for partition.

(a) *Review period.* Except as provided in paragraph (c) of this section, PBGC will approve or deny an application for partition submitted to it under this part within 270 days after the date it issued a notice to the plan sponsor of the completed application under § 4233.10(c).

(b) *Determination on application.* PBGC may approve or deny an application at its discretion. PBGC will notify the plan sponsor in writing of PBGC's decision on an application. If PBGC denies the application, PBGC's written decision will state the reason(s) for the denial. If PBGC approves the application, PBGC will issue a partition order under section 4233(c) of ERISA and § 4233.13.

(c) *Conditional determination on application.* At the request of a plan sponsor, PBGC may, in its discretion, issue a preliminary approval of an application conditioned on Treasury issuing a final authorization to suspend under section 305(e)(9)(H)(vi) of ERISA. The conditional approval will include a written statement of preliminary findings, conclusions, and conditions. The conditional approval is not 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.

(d) *Final agency action.* Except as provided in subsection (c), PBGC's decision on an application for partition under this section is a final agency action for purposes of judicial review under the Administrative Procedure Act (5 U.S.C. § 701 *et seq.*).

§ 4233.13 Coordinated application process for partition and benefit suspension.

(a) *Interagency coordination.* For a plan sponsor that has requested a conditional approval of a partition pursuant to § 4233.12(c), PBGC may render either a conditional approval or a final denial of the application on an expedited basis, provided that the plan sponsor has submitted a completed application to PBGC as prescribed by § 4233.10. PBGC will consult with Treasury or the Department of Labor in the course of reviewing an application for partition.

(1) If PBGC denies the application for partition, it will notify the plan sponsor in writing of PBGC's decision in accordance with § 4233.12(b), and will notify Treasury to allow it to take appropriate action on the benefit suspension application.

(2) If PBGC grants a preliminary and conditional approval of partition, it will notify the plan sponsor in writing of PBGC's decision in accordance with § 4233.12(c), and will provide Treasury with a copy of PBGC's decision along with PBGC's record of the decision.

(3) If Treasury does not approve the suspension application, PBGC's preliminary and 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.

(b) *Combined notice.* A plan sponsor submitting an application for benefit suspensions under section 305(e)(9) of ERISA with Treasury, and a partition under section 4233 of ERISA with PBGC, may combine the PBGC model notice for coordinated applications provided at Appendix A with the Treasury model notice in Appendix A of Rev. Proc. 2015-xx [XXXX-XX] in satisfaction of the notice requirement of this part and the [the Treasury guidance].

§ 4233.14 Partition order.

(a) *General Provisions.* The partition order will describe the liabilities to be transferred to the successor plan under section 4233(c) of ERISA, and the manner in which financial

assistance will be provided by PBGC under section 4261 of ERISA. The partition order will also set forth PBGC's findings and conclusions on an application for partition, the effective date of partition, the obligations and responsibilities of the plan sponsor to the original plan and successor plan, and such other information as PBGC may deem appropriate.

(b) *Terms and conditions.* The partition order will set forth the terms and conditions of the partition and will incorporate by reference the applicable requirements under sections 4233(d) and 4233(e) of ERISA.

(1) The plan sponsors of the original plan and the successor plan must amend the original plan and successor plan, respectively, to reflect the benefits payable to participants and beneficiaries as a result of the partition order.

(2) The plan sponsors of the original plan and successor plan must also maintain a written record of the respective plans' compliance with the terms of the partition order, section 4233 of ERISA, and this part.

§ 4233.15 Nature and operation of successor plan.

(a) *Nature of plan.* The plan created by the partition order is a successor plan to which section 4022A applies, and an insolvent plan under section 4245 of ERISA.

(b) *Treatment of plan.* The successor plan will be treated as a terminated multiemployer plan to which section 4041A(d) of ERISA applies because there are no contributing employers with an obligation to contribute within the meaning of section 4212 of ERISA as of the effective date of the partition. The treatment of the successor plan as a terminated plan under this

paragraph will not be taken into account for purposes of determining the withdrawal liability of contributing employers to the original plan under sections 4201 and 4233(d)(3) of ERISA.

(c) *Administration of plan.* The plan sponsor of the original plan and the administrator of such plan will be the plan sponsor and the administrator, respectively, of the successor plan. PBGC will retain the right to remove and replace the plan sponsor of the successor plan pursuant to section 4042(b)(2) of ERISA.

§ 4233.16 Coordination of benefits under original plan and successor plan.

(a) *Successor plan benefits.* Subject to the limitations contained in section 4022A of ERISA, the only benefit amounts payable under a successor plan are successor plan benefits as defined in § 4233.2.

(b) *Guarantee of successor plan benefit.* When a participant's or beneficiary's benefit is partially or wholly transferred to a successor plan, the PBGC guarantee applicable to such benefit becomes payable under the successor plan. The benefit remaining in the original plan as of the effective date of the partition, if any, is not subject to a new guarantee, and any increase in the PBGC guarantee amount payable under the original plan will arise solely, if at all, due to an increase in the accrued benefit under a plan amendment following the effective date of the partition, or an additional accrual attributable to service after the effective date of the partition.

(c) *PBGC financial assistance.* Subject to the conditions contained in section 4261 of ERISA, PBGC will provide financial assistance to the successor plan in an amount sufficient to enable the successor plan to pay only the PBGC-guaranteed amount transferred to the successor plan pursuant to the partition order, and reasonable and necessary administrative expenses if approved by PBGC. The receipt of benefits payable under a successor plan receiving financial assistance from PBGC will be treated as the receipt of guaranteed benefits under section 4022A.

(d) *Payment of monthly benefits.* The plan sponsors of an original plan and a successor plan may, but are not required to, pay monthly benefits payable under the original plan and successor plan, respectively, in a single monthly payment pursuant to a written cost-sharing or expense allocation agreement between the plans.

§ 4233.17 Continuing jurisdiction.

(a) PBGC will continue to have jurisdiction over the original plan and the successor plan to carry out the purposes, terms, and conditions of the partition order, section 4233 of ERISA, and this part.

(b) PBGC may, upon providing notice to the plan sponsor, make changes to the partition order in response to changed circumstances as consistent with section 4233 and this part.

Appendix A to Part 4233—Model Notices

**NOTICE OF APPLICATION FOR PARTITION FOR
[INSERT PLAN NAME]
[For plans filing an application for partition only]**

[Insert Date]

This notice is to inform you that, on [insert Date], [insert Plan Sponsor's Name] ("Board of Trustees") filed a complete application with the Pension Benefit Guaranty Corporation ("PBGC") requesting approval for a partition of the [insert Pension Fund name, Employer Identification Number, and three-digit Plan Number] (the "Plan").

What is partition?

A multiemployer plan that is in critical and declining status may apply to PBGC for an order that separates (*i.e.*, partitions) and transfers the PBGC-guaranteed portion of certain participants' and beneficiaries' benefits to a newly-created successor plan. The total amount transferred from the original plan to the successor plan is the minimum amount needed to keep the original plan solvent. While the Board of Trustees will administer the successor plan, PBGC will provide financial assistance to the successor plan to pay the transferred benefits.

If the PBGC-guaranteed amount payable by the successor plan is less than the benefit payable under the original plan, Federal law requires the original plan to pay the difference. Therefore, partition will not change the total amount payable to any participant or beneficiary.

What are the rules for partition?

Federal law permits, but does not require, PBGC to approve an application for partition. PBGC generally will make a decision on the application for partition within 270 days. A plan is eligible for partition if certain requirements are met, including:

1. The pension plan is in critical and declining status. A plan is in critical and declining status if it is in critical status and is projected to run out of money within either 15 years or 20 years if there are twice as many inactive as active participants or if the plan's funded percentage is less than 80%.
2. PBGC determines, after consulting with the PBGC Participant and Plan Sponsor Advocate, that the Board of Trustees has taken (or is taking) all reasonable measures to avoid insolvency. Reasonable measures may include contribution increases or reductions in the rate of benefit accruals.
3. PBGC reasonably expects that: (1) providing financial assistance to pay guaranteed benefits for some participants in the successor plan will be significantly less than providing financial assistance to pay guaranteed benefits for all participants in the event the plan becomes insolvent; and (2) partition is necessary for the plan to remain solvent.

4. PBGC certifies to Congress that its ability to meet existing financial assistance obligations to other multiemployer plans (including plans that are insolvent or projected to become insolvent within 10 years) will not be impaired by the partition.
5. The cost to the PBGC arising from the partition is paid exclusively from PBGC's multiemployer fund.

Why is partition needed?

The Plan is in critical and declining status, is *[insert funded percentage]* funded, and is projected to become insolvent by *[insert expected insolvency date]*. The Board of Trustees has taken reasonable measures to avoid insolvency, but has determined that these measures are insufficient and that the proposed partition is necessary for the Plan to avoid insolvency.

[Insert brief statement of the amount of liabilities the Board of Trustees proposes to partition and indicate whether it is the minimum amount needed for the Plan to remain solvent.] [If applicable, insert brief statement summarizing the proposed classes of participants and beneficiaries whose benefits will be partially or wholly transferred if the application is granted, and a summary of the factors considered.] If instead the Plan is allowed to become insolvent, the benefits of all participants and beneficiaries whose benefits exceed the PBGC-guaranteed amount would be reduced to the PBGC-guaranteed amount.

What is PBGC's multiemployer plan guarantee?

Federal law sets the maximum that PBGC may guarantee. For multiemployer plan benefits, PBGC guarantees a monthly benefit payment equal to 100 percent of the first \$11 of the Plan's monthly benefit accrual rate, plus 75 percent of the next \$33 of the accrual rate, times each year of credited service. The PBGC's maximum guarantee, therefore, is \$35.75 per month times a participant's years of credited service.

The PBGC guarantees vested pension benefits payable at normal retirement age, early retirement benefits, and certain survivor benefits, if the participant met the eligibility requirements for a benefit before plan termination or insolvency. A benefit or benefit increase that has been in effect for less than 60 months is not eligible for PBGC's guarantee. PBGC also does not guarantee benefits above the normal retirement benefit, disability benefits not in pay status, or non-pension benefits, such as health insurance, life insurance, death benefits, vacation pay, or severance pay.

How will I know when PBGC has made a decision on the application for partition?

If PBGC approves the Board of Trustees' application for partition, PBGC will issue a notice no later than 14 days after it issues the order of partition to affected participants and beneficiaries whose benefits will be transferred to the successor plan. You may also visit [www.pbgc.gov/\[specify page\]](http://www.pbgc.gov/[specify page]) for a list of applications for partition received by PBGC and the status of those applications.

Your Rights to Receive Information about Your Plan and its Benefits

Your plan's Summary Plan Description ("SPD") will include information on the procedures for claiming benefits, which will apply to both the original and successor plans until the Plan provides you a new SPD. You also have the legal right to request documents from the original plan to help you understand the partition and your rights such as:

- The plan document, trust agreement, and other documents governing the Plan (*e.g.*, collective bargaining agreements);
- The SPD and summaries of material modification;
- The Plan's Form 5500 annual reports, including audited financial statements, filed with the U.S. Department of Labor during the last six years;
- The Plan's annual funding notices for the last six years;
- Actuarial reports (including reports submitted in support of the application for partition) furnished to the Plan within the last six years;
- The Plan's current rehabilitation plan, including contribution schedules; and
- Any quarterly, semi-annual or annual financial reports prepared for the Plan by an investment manager, fiduciary or other advisor and furnished to the Plan within the last six years.

If your benefits are transferred to the successor plan, you will be furnished a successor plan SPD within 120 days of the partition; and the plan document, trust agreement, and other documents governing the successor plan will be available for review following the partition.

The plan administrator must respond to your request for these documents within 30 days, and may charge you the cost per page for the least expensive means of reproducing documents, but cannot charge more than 25 cents per page. Some of the documents also may be available for examination, without charge, at the plan administrator's office, your worksite, or union hall.

Plan Contact Information

For more information about this Notice, you may contact:

[Insert Name of Plan Administrator, address, email address, and phone number]

PBGC Contact Information

For questions regarding the application process, you may contact:

Multiemployer Program Division, PBGC, 1200 K Street NW, Washington, DC 20005-4026

Email: Multiemployerprogram@pbgc.gov

Phone: (202) 326-4000 x6535

PBGC Participant and Plan Sponsor Advocate Contact Information

Constance Donovan, PBGC, 1200 K Street NW, Washington, DC 20005-4026

Email: Advocate@pbgc.gov

Phone: (202) 326-4488

**NOTICE OF APPLICATION FOR PARTITION FOR
[INSERT PLAN NAME]**

[For plans filing coordinated applications for partition and suspension of benefits]

[Insert Date]

This notice is to inform you that, on *[insert Date]*, *[insert Plan Sponsor's Name]* ("Board of Trustees") filed a complete application with the Pension Benefit Guaranty Corporation ("PBGC") requesting approval for a partition of the *[insert Pension Fund name, Employer Identification Number, and three-digit Plan Number]* (the "Plan"). *[Insert statement that the plan sponsor has submitted an application for suspension of benefits under section 305(e)(9)(G) of ERISA, and identify how to obtain a copy of the application and notice required by section 305(e)(9)(F) of ERISA.]*

What is partition?

A multiemployer plan that is in critical and declining status may apply to PBGC for an order that separates (*i.e.*, partitions) and transfers the PBGC-guaranteed portion of certain participants' and beneficiaries' benefits to a newly-created successor plan. The total amount transferred from the original plan to the successor plan is the minimum amount needed to keep the original plan solvent. While the Board of Trustees will administer the successor plan, PBGC will provide financial assistance to the successor plan to pay the transferred benefits.

If the PBGC-guaranteed amount payable by the successor plan is less than the benefit payable under the original plan after taking into account benefit reductions or any plan amendments after the effective date of the partition, Federal law requires the original plan to pay the difference. Therefore, partition will not further change the total amount payable to any participant or beneficiary.

What are the rules for partition?

Federal law permits, but does not require, PBGC to approve an application for partition. PBGC generally will make a decision on the application for partition within 270 days. A plan is eligible for partition if certain requirements are met, including:

1. The pension plan is in critical and declining status. A plan is in critical and declining status if it is in critical status and is projected to run out of money within either 15 years or 20 years if there are at least twice as many inactive as active participants or if the plan's funded percentage is less than 80%.
2. PBGC determines, after consulting with the PBGC Participant and Plan Sponsor Advocate, that the Board of Trustees has taken (or is taking) all reasonable measures to avoid insolvency, including reducing benefits to the maximum allowed under the law.
3. PBGC reasonably expects that: (1) providing financial assistance to pay guaranteed benefits for some participants in the successor plan will be significantly less than

providing financial assistance to pay guaranteed benefits for all participants in the event the plan becomes insolvent; and (2) partition is necessary for the plan to remain solvent.

4. PBGC certifies to Congress that its ability to meet existing financial assistance obligations to other multiemployer plans (including plans that are insolvent or projected to become insolvent within 10 years) will not be impaired by the partition.
5. The cost to the PBGC arising from the partition is paid exclusively from PBGC's multiemployer fund.

Why are partition and benefit reductions needed?

The Plan is in critical and declining status, is [*insert funded percentage*] funded, and is projected to become insolvent by [*insert expected insolvency date*]. The Board of Trustees has taken reasonable measures to avoid insolvency, but has determined that these measures are insufficient and that the proposed partition and reduction of benefits combined are necessary for the Plan to avoid insolvency.

[*Insert brief statement of the amount of liabilities the Board of Trustees proposes to partition and indicate whether it is the minimum amount needed for the Plan to remain solvent.*] [*If applicable, insert brief statement summarizing the proposed classes of participants and beneficiaries whose benefits will be partially or wholly transferred if the application is granted, and a summary of the factors considered.*] If instead the Plan is allowed to become insolvent, the benefits of all participants and beneficiaries whose benefits exceed the PBGC-guaranteed amount would be reduced to the PBGC-guaranteed amount.

What is PBGC's multiemployer plan guarantee?

Federal law sets the maximum that PBGC may guarantee. For multiemployer plan benefits, PBGC guarantees a monthly benefit payment equal to 100 percent of the first \$11 of the Plan's monthly benefit accrual rate, plus 75 percent of the next \$33 of the accrual rate, times each year of credited service. The PBGC's maximum guarantee, therefore, is \$35.75 per month times a participant's years of credited service.

The PBGC guarantees vested pension benefits payable at normal retirement age, early retirement benefits, and certain survivor benefits, if the participant met the eligibility requirements for a benefit before plan termination or insolvency. A benefit or benefit increase that has been in effect for less than 60 months is not eligible for PBGC's guarantee. PBGC also does not guarantee benefits above the normal retirement benefit, disability benefits not in pay status, or non-pension benefits, such as health insurance, life insurance, death benefits, vacation pay, or severance pay.

How will I know when PBGC has made a decision on the application for partition?

If PBGC approves the Board of Trustees' application for partition, PBGC will issue a notice no later than 14 days after it issues the order of partition to affected participants and beneficiaries

whose benefits will be transferred to the successor plan. You may also visit [www.pbgc.gov/\[specify page\]](http://www.pbgc.gov/[specify page]) for a list of applications for partition received by PBGC and the status of those applications.

How do I obtain information on the application for approval to reduce benefits?

The application for approval of the proposed reduction of benefits will be publicly available within 30 days after the Treasury Department receives the application. See [www.treasury.gov/\[specify page\]](http://www.treasury.gov/[specify page]) for a copy of the application, instructions on how to send comments on the application, and how to contact the Treasury Department for further information and assistance.

Your Rights to Receive Information about Your Plan and its Benefits

Your Plan's Summary Plan Description ("SPD") will include information on the procedures for claiming benefits, which will apply to both the original and successor plans until the Plan provides you a new SPD. You also have the legal right to request documents from the original plan to help you understand the partition and your rights such as:

- The plan document, trust agreement, and other documents governing the Plan (*e.g.*, collective bargaining agreements);
- The SPD and summaries of material modification;
- The Plan's Form 5500 annual reports, including audited financial statements, filed with the U.S. Department of Labor during the last six years;
- The Plan's annual funding notices for the last six years;
- Actuarial reports (including reports submitted in support of the application for partition) furnished to the Plan within the last six years;
- The Plan's current rehabilitation plan, including contribution schedules; and
- Any quarterly, semi-annual or annual financial reports prepared for the Plan by an investment manager, fiduciary or other advisor and furnished to the Plan within the last six years.

If your benefits are transferred to the successor plan, you will be furnished a successor plan SPD within 120 days of the partition; and the plan document, trust agreement, and other documents governing the successor plan will be available for review following the partition.

The plan administrator must respond to your request for these documents within 30 days, and may charge you the cost per page for the least expensive means of reproducing documents, but cannot charge more than 25 cents per page. Some of the documents also may be available for examination, without charge, at the plan administrator's office, your worksite, or union hall.

Plan Contact Information

For more information about this Notice, you may contact:

[Insert Name of Plan Administrator, address, email address, and phone number]

PBGC Contact Information

For questions regarding the application process, you may contact:

Multiemployer Program Division, PBGC, 1200 K Street NW, Washington, DC 20005-4026
Email: Multiemployerprogram@pbgc.gov
Phone: (202) 326-4000 x6535

PBGC Participant and Plan Sponsor Advocate Contact Information

Constance Donovan, PBGC, 1200 K Street NW, Washington, DC 20005-4026
Email: Advocate@pbgc.gov
Phone: (202) 326-4488

Issued in Washington DC this _____ day of June, 2015.

Alice Maroni
Acting Director
Pension Benefit Guaranty Corporation

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