Justification for No Material or Nonsubstantive Change to Currently Approved Collection

AGENCY: Pension Benefit Guaranty Corporation (PBGC)

TITLE: Application for Special Financial Assistance (29 CFR part 4262)

STATUS: OMB control number 1212-0074; expires 05/31/2027

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The Pension Benefit Guaranty Corporation (PBGC) is making changes that are not material to the currently approved information collection for multiemployer plans applying for special financial assistance (SFA) under section 4262 of the Employee Retirement Income Security Act of 1974 and part 4262 of PBGC's regulations.

To apply for SFA, a plan sponsor must file an application with PBGC and include information about the plan, plan documentation, and actuarial information, as specified in §§ 4262.6 through 4262.9. PBGC needs the application information to review a plan's eligibility for SFA and amount of requested SFA. In addition, a plan that receives SFA and wishes to request that PBGC approve an exception under §§ 4262.16(d), (e), (f), (g) and (h) for SFA conditions relating to reductions in contributions, reallocation of contributions, transfers or mergers, and withdrawal liability must file the request with the information required under those sections of PBGC's regulation and related instructions. PBGC requires this information to decide whether to approve an exception from the specified condition of receiving SFA.

PBGC received questions from practitioners about the application of the withdrawal liability conditions described under § 4262.16(g)(1) and (2) for a plan requesting approval under § 4262.16(f) of a plan merger involving a plan that has received SFA. Section 4262.16(f)(3)(iv) and (v) require that a merged plan use the conditions described in § 4262.16(g)(1) and (2) to determine the unfunded vested benefits that arose under the SFA-recipient plan before the date of the merger.

The withdrawal liability method a merged plan may use is fact specific and must comply with the conditions in § 4262.16(f)(3)(iv) and (v) and satisfy the standard under § 4262.16(f)(1). If the plan wants to adopt an alternative allocation method, it must submit a request for approval to PBGC when it submits the request for approval of the merger. PBGC developed an example alternative allocation method that satisfies the requirements in § 4262.16(f)(3)(iv) and (v) that the merged plan must use 4044 Rates until the later of 10 years or until the SFA exhaustion year (as described in § 4262.16(g)(1)(ii)), and must phase-in SFA, to calculate the UVBs that arose under the SFA recipient plan before the merger.

This example alternative allocation method describes a "two-pool" alternative allocation method. The method allocates plan-wide unfunded vested benefits (UVBs) into two "pools": the "SFA Pool" and the "Merged Plan Pool." To calculate liabilities in the SFA Pool, the plan actuary will project future benefit payments from the plan that received SFA. Each year, liabilities will be revalued using 4044 Rates according to this projection. Assets in the SFA Pool will be recalculated annually to reflect: (i) the projected benefit payments; (ii) a reasonable assumed investment return (using an assumption consistent with the restrictions on the investment of SFA

funds) and any withdrawal liability payments attributable to the SFA Pool, and (iii) the phase-in of SFA under the schedule submitted with the SFA application.

Merged Plan Pool liabilities will consist of total plan vested benefits, minus the remaining projected benefit payments from the SFA Pool. Merged Plan Pool assets will consist of total plan assets, minus the SFA Pool assets (including the amount of phased-in SFA).

For a withdrawn employer that contributed to the plan that received SFA before the merger and continued to contribute to the merged plan, withdrawal liability will be the sum of UVBs from each of the two pools.

By segregating the SFA Pool UVBs and using the 4044 Rates and phase-in condition for the SFA Pool, the plan satisfies the requirements of § 4262.16(f)(3)(iv) and (v).

Adoption of the method does not necessarily mean that the merger will satisfy the risk of loss standard under § 4262.16(f)(1). For an employer that contributed to the SFA-recipient plan, the method is designed to yield an amount of withdrawal liability comparable to the amount the SFA-recipient plan would have determined had it not merged. Nevertheless, each merger must be considered on its own terms to determine whether the merger increases the risk of loss to PBGC and whether the merger is adverse to the overall interests of participants and beneficiaries. For example, the merger of a large SFA-recipient plan with a smaller, better-funded plan or plans may fail to satisfy the risk of loss standard. A merger of this type might accelerate the projected insolvency date of the smaller plan, putting participants and beneficiaries, and PBGC, in a worse position than if the merger did not occur. On the other hand, the merger of a large better-funded plan with a smaller SFA-recipient plan may often satisfy the risk of loss standard.

To demonstrate how this two-pool alternative allocation method works, PBGC will publish on its website an example of an amendment that would satisfy the necessary criteria under § 4262.16(f)(3)(iv) and (v), along with a spreadsheet of illustrative calculations. Along with this example, PBGC will be publishing Frequently Asked Questions on its website to provide background information on this alternative allocation method, as well as answer some other common questions related to mergers involving SFA plans.

These changes will not impact the time or cost burden associated with this information collection.

The Frequently Asked Questions are as follows.

Withdrawal Liability SFA Merger FAQs for Practitioners
Withdrawal Liability

Criteria for Mergers Involving Plans that Received SFA

Q: ***What are the eligibility requirements for a merger involving a plan that received SFA?***

A: An SFA-recipient plan must satisfy the following statutory and regulatory conditions for PBGC to approve a merger involving that plan:

- The merger must comply with § 4231(a)-(d) of ERISA, and
- The merger must not unreasonably increase PBGC's risk of loss and must not reasonably be expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans involved in the merger. [1]

Q: ***What conditions apply after the merger?***

A: The following restrictions and conditions apply to the merged plan:

- SFA may be used only to make benefit payments and pay administrative expenses and may be used before other plan assets to do so.[2]
- SFA must be segregated from other plan assets and must be invested in investment grade bonds or other investments permitted under applicable regulations.[3]
- When determining withdrawal liability after the merger, the merged plan must:
    - Use the interest assumptions in appendix B to part 4044 when determining the unfunded vested benefits (UVBs) that arose under the plan that received SFA before the date of the merger, until the later of 10 plan years after the first plan year in which the plan received SFA, or the end of the plan year in which exhaustion of SFA assets was projected,[4] and
    - Use the SFA phase-in condition to determine the UVBs that arose under the plan that received SFA before the date of the merger.[5]
- The merged plan must obtain PBGC approval for a proposed settlement of withdrawal liability if the amount of withdrawal liability to be settled is more than $50 million.[6]
- The merged plan must submit an annual statement of compliance through the last plan year ending in 2051.[7]

The following restrictions and conditions continue to apply only to the plan that received SFA before the merger during the SFA coverage period, unless a waiver is approved:

- No retrospective benefit increases for participants who were in SFA-recipient plan before the merger,[8]
- No contribution decreases for employers who contributed to SFA-recipient plan,[9] and
- Where income or contributions are divided between a plan that received SFA and another benefit plan, the allocation of income to SFA-recipient plan may not decrease.[10]

Q: ***May plans request a waiver of any conditions beyond those permitted in § 4262.16(f)(4)?***

A: No. Plans may only request a waiver of the conditions regarding retrospective benefit increase, contribution decrease, and allocation of contributions and other income for the merged plan.

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[1] 29 C.F.R. § 4262.16(f)(1).
[2] 29 C.F.R. § 4262.16(f)(3)(i).
[3] *Id.; see* 29 C.F.R. § 4262.14.
[4] 29 C.F.R. § 4262.16(f)(3)(iv), (g)(1).
[5] 29 C.F.R. § 4262.16(f)(3)(v), (g)(2).
[6] 29 C.F.R. § 4262.16(h).
[7] 29 C.F.R. § 4262.16(i).
[8] 29 C.F.R. § 4262.16(f)(4).
[9] *Id.*
[10] *Id.*

Request for Approval

Q: ***Where should a plan representative file a request for approval?***

A: Requests for approval may be sent via email to: multiemployerprogram@pbgc.gov.

Q: ***When should a request for waiver of one or more conditions be submitted?***

A: A request for a waiver of conditions should be submitted with the request for approval of the merger.

Q: ***May plans confer with PBGC before submitting a request for approval?***

A: Yes. PBGC encourages plans to schedule an informal consultation with PBGC prior to preparing a request for approval of a merger. Plans may request an informal consultation by sending an email to: multiemployerprogram@pbgc.gov.

Q: ***When must a plan request approval of a merger involving a plan that received SFA?***

A: Plans must submit a request for approval at least 120 days prior to the proposed effective date of the merger.[11]

Q: ***If plans want to adopt an alternative allocation method for the merged plan, when should that request be submitted?***

A: If the plans want to adopt an alternative allocation method, they should submit a request for approval[12] at the same time they submit the request for approval of the merger.

Q: ***What withdrawal liability methods may a merged plan use to comply with § 4261.16(f)(3)(iv) and (v)?***

A: The withdrawal liability method a merged plan may use is fact specific. An example of a method that complies with the conditions in § 4262.16(f)(3)(iv) and (v) can be found here: [INSERT LINK]. Plans may request an alternative allocation method,[13] or may be able to adopt an existing method.[14]

Plans are encouraged to request an informal consultation to discuss what method(s) may be available by sending an email to: multiemployerprogram@pbgc.gov.

Q: ***How does the example of a compliant alternative allocation method work?***

A: PBGC has developed an example alternative allocation method that satisfies the requirements in § 4262.16(f)(3)(iv) and (v). Those requirements are that the merged plan must use 4044 Rates

[11] *See* 29 C.F.R. § 4231.8.
[12] *See* 29 C.F.R. 4211 Subpart C.
[13] *See id.*
[14] *See* 29 C.F.R. § 4211 Subpart D.

until the later of 10 years or until SFA is exhausted, and must phase-in SFA, to calculate the UVBs that arose under the SFA recipient plan before the merger. The example method and a hypothetical showing how the method would work are available here: [INSERT LINK ONCE AVAILABLE]. It is a "two-pool" alternative allocation method.

The method allocates plan-wide UVBs into two "pools", the "SFA Pool" and the "Merged Plan Pool." To calculate liabilities in the SFA Pool, the plan actuary will project future benefit payments from the plan that received SFA. Each year, liabilities will be revalued using 4044 Rates according to this projection. Assets in the SFA Pool will be recalculated annually to reflect the projected benefit payments, accrued interest, and to reflect the phase-in of SFA under the phase-in schedule submitted with the SFA application.

Merged Plan Pool liabilities will consist of total plan vested benefits, minus the remaining projected benefit payments from the SFA Pool. Merged Plan Pool assets will consist of total plan assets, minus the SFA Pool assets (including the amount of phased-in SFA).

For a withdrawn employer that contributed to the plan that received SFA before the merger and continued to contribute to the merged plan, withdrawal liability will be the sum of UVBs from each of the two pools.

Q*: *How does the example alternative allocation method satisfy the requirements of § 4262.16(f)(3)(iv) and (v)?

A: By segregating the SFA Pool UVBs and using the 4044 Rates and phase-in condition for the SFA Pool, the method satisfies the requirements that the merged plan use 4044 rates and phase-in SFA to determine the UVBs that arose under the plan that received SFA before the date of the merger.

Q: Will adoption of the example alternative allocation method satisfy the risk of loss standard?

Adoption of the method does not necessarily mean that the merger will satisfy the risk of loss standard.[15] For an employer that contributed to the SFA-recipient plan, the method is designed to yield an amount of withdrawal liability comparable to the amount the SFA-recipient plan would have determined had it not merged. But each merger must be considered on its own terms to determine whether the merger increases the risk of loss to PBGC and is adverse to the overall interests of participants and beneficiaries. For example, the merger of a large SFA-recipient plan with a smaller, better-funded plan or plans may fail to satisfy the risk of loss standard. A merger of this type might accelerate the projected insolvency date of the smaller plan, putting participants and beneficiaries, and PBGC, in a worse position than if the merger did not occur. On the other hand, the merger of a large better-funded plan with a smaller SFA-recipient plan may often satisfy the risk of loss standard.

[15] *See* § 4262.16(f)(1).

Other methods, such as the post-merger presumptive method,[16] will generally result in the collection of materially less withdrawal liability than the example method, such that the merger may fail to satisfy the risk of loss standard.

Q: ***May plans propose a different alternative allocation method?***

A: Yes, plans may propose their own alternative allocation method that satisfies the requirements of § 4262.16(f)(3)(iv) and (v).

The example of the two-pool alternative allocation method is as follows:

Withdrawal Liability Plan Amendment for Mergers Involving an SFA-Recipient Plan

A merged plan may adopt its own allocation method in accordance with subpart C of 29 CFR part 4211.[17] In a merger that involves an SFA-recipient plan, the merged plan may satisfy the necessary criteria under § 4262.16(f)(3)(iv) and (v) by adopting the following withdrawal liability plan amendment, contingent on PBGC's approval of the merger, and submitting the amendment with its request for PBGC approval of the merger:

I. General

A. Withdrawal liability for employers that contributed to the SFA-recipient plan pre-merger will be an allocable share of the sum of UVBs from the (1) SFA Pool and the (2) Merged Plan Pool.

B. Withdrawal liability for employers that did not contribute to the SFA-recipient plan pre-merger will be an allocable share of UVBs from the Merged Plan Pool.

II. UVBs in the SFA Pool will consist of SFA Pool vested liabilities less SFA Pool assets

A. SFA Pool Vested Liabilities

1. SFA Pool vested liabilities will initially consist of the vested benefits of the SFA-recipient plan on the last day of the plan year ending on or just before the merger date, valued using 4044 rates consistent with § 4262.16(g)(1).

2. The plan actuary will project future benefit payments associated with the accumulated nonforfeitable benefits of SFA plan participants as of the last day of the plan year ending on or just before the merger date (the SFA-Pool Benefit Projection) through the year the SFA-recipient plan is projected to pay its last dollar of benefit, but not to exceed 100 years (the SFA Projection Period). For purposes of the SFA-Pool Benefit Projection, eligibility service and vesting service are assumed to continue to be earned throughout the SFA Projection Period.

[16] *See* 29 C.F.R. § 4211.32.
[17] *See* 29 C.F.R. § 4211.31(a).

3. During the SFA Projection Period, and until the separate pools have ceased as described in Section VI, SFA Pool vested liabilities will be revalued as of the last day of each plan year following the plan year in which the merger occurs to reflect the remaining annual payments under the SFA-Pool Benefit Projection, using 4044 Rates consistent with § 4262.16(g)(1).

B. SFA Pool Assets

1. SFA Pool assets will initially consist of the assets of the SFA-recipient plan on the last day of the plan year ending on or just before the merger date, including the amount of SFA phased-in consistent with § 4262.16(g)(2).

2. During the SFA period, SFA Pool assets will be revalued as of the last day of each plan year following the plan year in which the merger occurs by:

(a) subtracting the annual benefit payment for the year determined under the SFA-Pool Benefit Projection in Section II.A; and

(b) adding reasonable assumed investment returns on SFA-recipient plan assets; and

(c) adding any withdrawal liability payments made that are attributable to the SFA Pool.

3. SFA Pool assets as of the revaluation date are adjusted for the amount of SFA phased-in consistent with § 4262.16(g)(2), using the previously determined phase-in schedule.

4. SFA Pool assets may not be less than 0.

C. Investment gains and losses, administrative expenses, employer contributions, and benefit accruals after the last day of the plan year prior to the merger shall not be allocated to the SFA Pool.

III. <u>UVBs in the Merged Plan Pool will consist of Merged Plan Pool vested liabilities less Merged Plan Pool assets</u>

A. The Merged Plan Pool vested benefits each year of the SFA Projection Period shall be the total vested benefits of the Plan minus the remaining benefit payments projected from the SFA Pool under the SFA-Pool Benefit Projection described in Section II.A for that year.

B. The Merged Plan Pool vested liabilities shall be the present value of the Merged Plan Pool vested benefits determined using the merged plan withdrawal liability assumptions.

C. Merged Plan Pool assets shall equal the Plan's total assets at the revaluation date less the amount of SFA assets not phased in as of the revaluation date, minus the assets in the SFA Pool described in Section II.B (already reflecting phase-in adjustment).

IV. Allocation of UVBs to a Withdrawn Employer

A. UVBs from the SFA Pool shall be allocated to a withdrawn employer using an appropriate statutory method.[18]

NOTE: For the SFA Pool, if the Plan adopts any allocation method that requires an allocation fraction, the fraction will be frozen as of the last day of the plan year before the year of the merger.

B. UVBs from the Merged Plan Pool shall be allocated to a withdrawn employer using an appropriate statutory method.

C. If the SFA Pool UVBs in any plan year are less than zero, they shall be deemed to be zero; and assets of the SFA Pool shall not include assets to the extent that they exceed the liabilities in the SFA Pool but instead such assets will be included in the Merged Plan Pool.

V. Cessation of Pools

A. The SFA Pool and the Merged Plan Pool will cease to exist at the later of the end of the tenth plan year after the first plan year in which the plan receives SFA as described under § 4262.12 or the SFA exhaustion year as described under § 4262.16(g), and the pools will consolidate into one. For any employer who withdraws from the Plan at any time beginning with the plan year following such consolidation of the pools, its allocable UVBs shall be calculated using an appropriate statutory method.

B. If before the separate pools cease as described in Section V all employers that contributed to the plan that received SFA before the merger withdraw and the Fund's trustees determine that the UVBs in the SFA Pool are uncollectible, the pools will consolidate into one. For any employer who withdraws from the Plan at any time beginning with the plan year following such consolidation of the pools, its allocable UVBs shall be calculated using an appropriate statutory method.

VII. Mass Withdrawal

Notwithstanding anything herein to the contrary, if all or substantially all Employers withdraw from the Fund, as determined under § 4219(c)(1)(D) of ERISA, that ERISA section and the regulations thereunder will apply to determine the withdrawal liability of each Employer.

VIII. PBGC Approval Required for a Change in Method

Consistent with the requirements of §§ 4262.16 and 4211.22, the Plan shall not modify this method, or adopt any other method, without the advance written approval of the PBGC.

[18] *See* the methods described in § 4211(b) (presumptive method), (c)(2) (modified presumptive method), (c)(3) (rolling-5 method), and (c)(4) (direct attribution method) of ERISA.