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 whether the withdrawal liability modifications described in § 4211.36(b), (c), or (d) may be adopted by plans requesting approval under § 4262.16(f) for a merger involving a plan that received SFA. If any of the pre-merger plans received SFA, the merged plan must satisfy the risk of loss standard under § 4262.16(f)(1) and comply with the conditions 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.

The withdrawal liability modification described in § 4211.36(b), restarting initial plan year liabilities, is viewed by PBGC as inconsistent with the post SFA-merger withdrawal liability conditions under § 4262.16(f)(3)(iv) and (v).

In PBGC's view, the withdrawal liability modification described in § 4211.36(c)(1), adjusting the amortization of initial liabilities, may be adopted by a merged plan provided the modification complies with both §§ 4211 and 4262.

In PBGC's view, the withdrawal liability modification described in § 4211.36(d), adopting an allocation fraction based on a withdrawn employer's share of contributions instead of UVBs, may be adopted by a merged plan. This modification tends to yield an amount of withdrawal liability for SFA plan employers that is closer to the amount the SFA-recipient plan would have determined had it not merged. By adopting an allocation method which better preserves the amount of withdrawal liability assessable to SFA plan employers, it may be more feasible to show that the merger will not increase the risk of loss to PBGC and will not be adverse to the overall interests of participants and beneficiaries.

To demonstrate how the § 4211.36(d) modification works, PBGC will publish on its website three examples to illustrate how the § 4211.36(d)(1) & (2) modifications reduce volatility in the withdrawing employer's post-merger withdrawal liability assessment across a range of scenarios, as compared to the allocation method specified under § 4211.32. Along with these examples, PBGC will publish Frequently Asked Questions on its website to explain why these modifications are or are not permitted, 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.

SFA Merger FAQs for Practitioners

Q: What withdrawal liability method may a merged building and construction industry SFA plan use to comply with § 4262.16(f)(3)(iv) and (v)?

A: A merged building and construction industry SFA plan must use the post-merger presumptive method described in § 4211.32.[1] Under this method, withdrawal liability is calculated as the sum of an employer's share of initial plan year unfunded vested benefits (UVBs), annual changes in UVBs post-merger, and reallocated UVBs.

Initial plan year UVBs are the sum of prior plan liabilities and adjusted initial plan year UVBs.

- **Prior plan liabilities** represent the amount of UVBs that would have been allocated to the employer if it had withdrawn on the first day of the first complete plan year beginning after the effective date of the merger, determined "as if each plan had remained a separate plan." For employers that contributed to the SFA-recipient plan, this amount would be determined using 4044 rates and the phase-in condition.
- **Adjusted initial plan year UVBs** equal the plan's UVBs at the close of the first full plan year following the merger less the sum of prior plan liabilities of all employers still contributing.[2] Because UVBs from the initial plan year did not "arise" before the merger, these UVBs would not have to be determined using 4044 rates and would not be determined using the phase-in condition.

[1] *See* 29 C.F.R. § 4211.31(b).
[2] *See* 29 C.F.R. § 4211.32(b)(2).

An employer’s share of initial plan year UVBs is calculated by multiplying the initial plan year UVBs by an allocation fraction based on the employer’s share of total prior plan UVBs.

PBGC has determined that by using 4044 rates and the phase-in condition to calculate prior plan liabilities, a merged plan’s use of the post-merger presumptive method should comply with § 4262.16(f)(3)(iv) and (v).

Q: May a merged building and construction industry SFA plan restart initial plan year liabilities under § 4211.36(b)?

A: PBGC generally views restarting initial plan year liabilities as being inconsistent with the post SFA-merger withdrawal liability conditions under § 4262.16(f)(3)(iv) and (v). When a merged plan restarts initial plan year liabilities, it allocates to employers the amount of UVBs in the merged plan at the close of the initial plan year. That modification is inconsistent with the requirement that merged plans use 4044 rates and the phase-in condition to determine UVBs that arose before the date of the merger.

Q: May a merged building and construction industry SFA plan adopt a modification to the post-merger presumptive method under § 4211.36(c)(1)?

A: Yes, so long as the modification complies with both 29 C.F.R. parts 4211 and 4262. Under § 4211.36(c)(1), a plan may adjust the amortization of initial liabilities calculated under § 4211.32(b) to amortize those UVBs over the remaining length of the prior plans’ amortization schedules. Instead of calculating initial plan year UVBs as the sum of prior plan liabilities and adjusted initial plan year UVBs, as required under § 4211.32(b), this modification effectively permits the merged plan to preserve the plans’ pre-merger UVB pools. However, consistent with § 4211.21(c), the merged plan must not adopt a method that systematically and substantially over allocates UVBs to employers that did not participate in the SFA-recipient plan before the merger.

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

Q: May a merged building and construction industry SFA plan adopt modifications to the post-merger presumptive method under § 4211.36(d)?

A: Yes. Under § 4211.36(d), a plan may be amended to adopt an allocation fraction based on a withdrawn employer’s share of contributions, rather than UVBs. This modification tends to yield an amount of withdrawal liability for SFA plan employers that is closer to the amount the SFA-recipient plan would have determined had it not merged. By adopting an allocation method which better preserves the amount of withdrawal liability assessable to SFA plan employers, it may be more feasible to show that the merger will not increase the risk of loss to PBGC and will not be adverse to the overall interests of participants and beneficiaries. An example may be found at [insert link to examples].

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

Q: May a merged building and construction industry SFA plan adopt a "fresh start" under ERISA section 4211(c)(5)(E) or 29 C.F.R. § 4211.12(d)?

A: PBGC generally views a statutory or regulatory fresh start as being inconsistent with the post SFA-merger withdrawal liability conditions under § 4262.16(f)(3)(iv) and (v). Because the merged plan would not be required to calculate changes in UVBs before the designated fresh start plan year, a fresh start in any plan year prior to the expiration of the withdrawal liability conditions would mean the plan would not use 4044 rates and the phase-in condition to determine UVBs that arose before the date of the merger.

Q: May a plan that received SFA merge with another plan that received SFA?

A: A merger between two SFA-recipient plans is not prohibited. Each merger must be considered on its own terms to determine whether the merger increases the risk of loss to PBGC and/or is adverse to the overall interests of participants and beneficiaries. The merger of two SFA-recipient plans may sometimes concentrate the risk of each plan's insolvency, in which case the proposed merger might fail the risk of loss standard. But this is far from a foregone conclusion.

To the extent PBGC approves the merger of two SFA-recipients plans, the conditions under § 4262.16, including the withdrawal liability conditions under subsection (g), will continue to apply to the merged plan.

Plans are encouraged to request an informal consultation to discuss whether they may be good candidates for a dual SFA plan merger by sending an email to: multiemployerprogram@pbgc.gov