April 6, 2015

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005-4026

Submitted online at http://www.regulations.gov

RE: Request for Information, Multiemployer Pension Reform Act of 2014: Partitions of Eligible Multiemployer Plans and Facilitated Mergers

The undersigned organizations respectfully submit the following response to the Request for Information ("RFI") published in the Federal Register on February 18, 2015, by the Pension Benefit Guaranty Corporation ("PBGC") regarding partitions of eligible multiemployer plans and facilitated mergers under the Multiemployer Pension Reform Act of 2014 ("MPRA"). Our comments are included on the following pages. The specific requests from the RFI are repeated for convenience.

In addition to those specific responses, we wish to explain an overall belief at the outset. The new tools under MPRA are designed to address the pressing needs of plans in critical and declining status to act expeditiously to avoid insolvency while saving the maximum amount of benefits possible. PBGC should provide guidance that clearly sets expectations for the applications while not creating unnecessary burdens on plan sponsors that could delay necessary action. Once guidance has been issued, PBGC should take care to act to review and approve applications for partitions and facilitated mergers as quickly as possible. We note that partitions and facilitated mergers will usually occur concurrently with benefit suspensions; for that reason, it is important for PBGC and the Department of Treasury ("Treasury") to communicate actively with each other throughout the approval process.

Each of our organizations is an association of employers in the construction industry. Collectively, we represent tens of thousands of employers that contribute to multiemployer pension plans. We are pleased to provide our comments, developed with the expert assistance of Horizon Actuarial Services LLC and Cox Castle & Nicholson LLP, and thank you for your consideration of our recommendations.

Sincerely,

The Associated General Contractors of America (AGC)
The Association of Union Constructors (TAUC)
Mechanical Contractors Association of America (MCAA)
National Electrical Contractors Association (NECA)
Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)

enc.

Comments of AGC, TAUC, MCAA, NECA, SMACNA

Issues Affecting both Partitions and Facilitated Mergers

1. *Application Process:* With respect to MPRA's changes to the rules governing mergers and partitions under sections 4231 and 4233 of ERISA, respectively, on which aspects of the application process would guidance be needed or helpful?

Timely corrective action will be needed for many plans in critical and declining status. A delay in a partition (combined with benefit suspensions) may increase the amount of benefit liability included in the partition. A delay in a facilitated merger may result in deeper reductions in participant benefits, greater financial assistance from PBGC, or both in order to make the merger a success. In other words, expeditious corrective action is in the best interests of both the plan participants and PBGC.

For this reason, we encourage PBGC to provide guidance that clearly sets its expectations for the contents of any application for a partition or facilitated merger. We also encourage PBGC to avoid setting expectations that would make the preparation of an application overly burdensome on the plan sponsor. For example:

- *"All reasonable measures."* Under section 4233(b)(2), before approving a partition, PBGC must determine that the plan sponsor has taken (or is taking) all reasonable measures to avoid insolvency, including maximum benefit suspensions if applicable.

  Most parties with whom we have consulted interpret this provision to require that any application for a partition must be preceded (or accompanied) by maximum benefit suspensions under MPRA. Others, however, have speculated whether the plan sponsor could determine it would not be "reasonable" to impose the maximum benefit suspensions. For example, what if the plan sponsor determined that maximum benefit suspensions would trigger crippling declines in active participation or increases in employer withdrawals, thus resulting in a larger partition needed to avoid insolvency?

- *Plan sponsor determinations.* Under section 432(e)(9)(G)(v) of the Code, when reviewing an application for benefit suspensions, Treasury must accept the plan sponsor's determinations unless it concludes (in consultation with PBGC and Labor) that the plan sponsor's determinations were clearly erroneous. We note that there is no equivalent requirement for PBGC to accept the plan sponsor's determinations when reviewing an application for a partition or a facilitated merger.

  For that reason, we encourage PBGC to provide guidance that clearly sets expectations for the determinations made by plan sponsors. At the same time, we encourage PBGC to avoid setting expectations that would be overly burdensome on the plan sponsor.

- *PBGC ability to meet obligations.* Under section 4233(b)(4), PBGC must certify to Congress that any partition it approves must not impair its ability to meet existing financial assistance to other plans (including those that are insolvent or projected to become insolvent within 10 years). There is a similar requirement under section 4231(e)(2)(C) regarding financial assistance to facilitate a merger.

  Plan sponsors considering applying for a partition or a facilitated merger may benefit from guidance from PBGC regarding its ability to provide financial assistance. PBGC may also wish to

provide guidance of the relevant factors (such as timing or amount of the financial assistance needed, likelihood of continued solvency, etc.) that it will consider in evaluating and prioritizing applications for partitions and facilitated mergers.

2. *PBGC Determinations:* With respect to a PBGC determination under section 4233(b)(3) that a partition is necessary for a plan to remain solvent, or in the case of a facilitated merger involving financial assistance under section 4231(e)(2)(B) that financial assistance is necessary for a merged plan to become or remain solvent:

- What types of actuarial and plan administrative information and analysis are available to demonstrate that a partition or facilitated merger of the plan is necessary to remain solvent?
- What issues arise in demonstrating solvency over an extended duration?

We expect the plan sponsor will be able to provide the following information to demonstrate that a partition or facilitated merger of the plan is necessary for the plan to remain solvent:

- A copy of the actuarial certification that the plan is in critical and declining status.
- For the plan(s) in critical and declining status, a document describing that all reasonable measures have been taken to avoid insolvency, including the maximum benefit suspensions (if applicable).
- A copy of the application for benefit suspensions submitted to Treasury (if applicable).
- Actuarial projections showing insolvency for the plan(s) in critical and declining status without a partition or facilitated merger, as well as actuarial projections showing continued solvency following a partition or facilitated merger.

3. *Small Plans:* What special concerns do small multiemployer plans and their sponsors have regarding partition and facilitated mergers?

As previously noted, we encourage PBGC to avoid issuing guidance or setting expectations that would make the preparation of an application overly burdensome on the plan sponsor. While this concern applies to plans of all sizes, it is especially important for smaller plans, which are more likely to have funding issues that could be further exacerbated by additional unplanned operating expenses.

We note that smaller plans will generally represent a smaller potential liability to PBGC. For that reason, PBGC may wish to apply a different level of rigor depending on the amount of potential liability or requested financial assistance involved with each particular application.

4. *Participants and Beneficiaries:* What special concerns do participants and beneficiaries in multiemployer plans have regarding the process for considering applications for partition and facilitated mergers?

We have no specific comment on the special concerns participants and beneficiaries may have regarding the process for considering applications for a partition or facilitated merger. We believe our general

comment regarding the need for timely corrective action applies here, however. A delay in corrective action may result in deeper benefit reductions or additional strain on PBGC, which are both concerns for participants and beneficiaries.

Issues Affecting Partitions Only

5. *Notice:* With respect to the requirement under section 4233(a)(2) to provide notice to participants and beneficiaries not later than 30 days after submitting the application for partition:

- How can PBGC reduce the burden of providing the notice under current law, while still providing important information to participants and beneficiaries? Should PBGC consider issuing a model notice in future guidance?
- What type(s) of information would participants and beneficiaries find most helpful?
- Given that the amount of liabilities required to be transferred in a partition may not be known at the time notice is issued, how should the notice reflect the requirements of section 4233(e)(1), which ensure that affected participants and beneficiaries will receive no less than they would have received prior to the partition (taking into account benefit suspensions under section 305(e)(9) and any plan amendments following the partition effective date)?

We agree that having a model notice to participants and beneficiaries regarding the application for the partition would likely reduce the burden on plan sponsors.

We suggest that the notice contain information that will enable plan participants and beneficiaries to understand that the plan sponsor is applying for a partition to enable the plan to remain solvent; a description of how the partition will work (if it is approved) and how benefits will be paid for participants and beneficiaries included in the new plan created by the partition; and a statement that the partition itself will not result in a reduction in the level of benefits.

It may also be instructive for the notice to include a description of how payments will be made to participants and beneficiaries whose benefits were transferred to another plan under the partition, but whose benefits are above the level guaranteed by PBGC. For example, would a participant or beneficiary in this situation receive one or two pension checks?

With respect to the fact that the amount of liabilities that will be transferred in a partition may not be known at the time the notice is issued, we suggest that the notice include a statement to that effect. We also suggest that the notice state that the amount of the participant's or beneficiary's benefit will not be affected by whether or not the individual is included in the transfer under the partition.

Finally, as the notice regarding an application for benefit suspensions (under section 432(e)(9)(F) of the Code) must be provided at about the same time as the notice regarding an application for a partition (under section 4233(a)(2) of ERISA), PBGC and Treasury may wish to issue guidance that permits a single notice to satisfy both requirements at once.

6. *PBGC Determination:* For purposes of the requirement under section 4233(b) that PBGC determine, in 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 the maximum benefit suspensions under section 432(e)(9) of the Code:

- What actuarial, economic, industry, or other information could a plan sponsor provide to make such a showing? What information or analysis might be difficult to provide?
- With respect to the consultation process under section 4233(b)(2), how can the Participant and Plan Sponsor Advocate best assist PBGC in making its determination under this section?

We expect that any plan sponsor applying for a partition would be able to provide documentation and an explanation that it has taken all reasonable measures to avoid insolvency. Due to the widely varying circumstances facing different plans, however, we believe it would be difficult (if not impossible) to define the specific actuarial, economic, industry, or other information plan sponsors used in making its determination.

For that reason, if PBGC issues guidance regarding the determination that all reasonable measures have been taken to avoid insolvency, we suggest that it include a list of factors the plan sponsor may wish to consider. We caution, however, against any guidance that is overly prescriptive.

We have no commentary on the role of the Participant and Plan Sponsor Advocate.

7. *Concurrent Applications:* What practical issues do plan sponsors and their professional advisors anticipate may arise in connection with a decision to submit combined applications for partition to PBGC under section 4233 of ERISA, and suspension of benefits to the Department of Treasury under section 432 of the Code? In responding to this question, consider the following:

- *Timing*: With respect to an application for partition, PBGC is required to make a determination not later than 270 days after the application date (or, if later, the date such application was completed). With respect to an application for suspension of benefits, the Treasury Secretary (in consultation with PBGC and the Secretary of Labor) is required to approve or deny an application within 225 days after submission.
- *Effective Date*: With respect to a concurrent application for partition and suspensions of benefits, the suspension of benefits may not take effect prior to the effective date of such partition.
- *Solvency:* Under section 4233(c), the amount to be transferred in a partition is the minimum amount of the plan's liabilities necessary for the plan to remain solvent. Section 432(e)(9)(D)(iv) of the Code 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.

As noted above, in a case in which a suspension of benefits is made in combination with a partition, the suspension may not take effect prior to the effective date of the partition. Furthermore, by definition, both the partition and benefit suspensions must be needed in order for the plan to avoid insolvency. In other words, neither the partition nor benefit suspensions would be sufficient on its own to avoid insolvency, and therefore neither will be permitted without the other.

Therefore, in the event that a plan sponsor concurrently submits an application for a partition with an application for benefit suspensions, it will be very important for PBGC and Treasury to actively communicate with each other when reviewing the applications.

With those points in mind, the following are issues we anticipate may arise in the event that a plan sponsor submits an application for benefit suspensions in combination with an application for a partition.

- *Applications*: Ideally, the plan sponsor will submit the two applications at about the same time, and PBGC will approve the application for the partition at about the same time as Treasury approves (in consultation with PBGC and Labor) the application for benefit suspensions. If either Treasury or PBGC uncovers an issue with the application it is reviewing that must be addressed by the plan sponsor, it should communicate the issue to the other agency.

- *Participant notices*: The notice to participants regarding proposed benefit suspensions must be provided concurrently with the submission of the application to Treasury. However, the notice of the application for the partition must be submitted no later than 30 days after the application for the partition is made. Practically, the plan sponsor may wish to provide participants with both notices at the same time. As noted earlier, PBGC and Treasury may wish to issue guidance that permits a single notice to satisfy at once the requirements of section 4233(a)(2) of ERISA and section 432(e)(9)(F) of the Code.

- *Participant vote*: Under section 432(e)(9)(H) of the Code, the plan sponsor shall administer the participant vote regarding the proposed benefit suspensions no later than 30 days after the suspensions are approved by Treasury. Notwithstanding the longer approval period for the partition (270 days vs. 225 days), ideally PBGC will have approved the application for the partition before the participant vote on benefit suspensions is administered. Otherwise, the voting process would be further complicated by the uncertainty of the outcome of the partition application.

- *Liabilities to be transferred*: The statute is open to interpretation regarding the amount of liabilities to be transferred under a partition. As noted in question 5, the amount of the liability to be transferred will likely not be known at the time the plan sponsor submits the application for the partition. We expect there may be differences between the actuarial assumptions and projections (performed by the plan actuary) used by the plan sponsor in its partition application and those performed independently by the PBGC. We note that if the partition is combined with maximum benefit suspensions, overly conservative assumptions will serve to increase the amount of liability transferred (and therefore financial assistance required from PBGC) under the partition.

8. *Transferred Liabilities*: Prior to MPRA, PBGC's partition order would provide for a transfer of no more than the non-forfeitable benefits directly attributable to service with the bankrupt employer and an equitable share of assets. In contrast, under section 4233(c), the partition order will provide for a transfer of the minimum amount of the plan's liabilities necessary for the plan to remain solvent. In addition, section 4233(e)(1) prescribes a continuing payment obligation that applies to the plan that was partitioned (the original plan).

- What types of actuarial and administrative information and data do multiemployer plans generally maintain that would allow PBGC to determine the minimum amount of the plan's liabilities necessary for the plan to remain solvent?
- What administrative or operational issues (*e.g*., recordkeeping, benefit processing, allocation of expenses) arise in connection with this change?
- Are there additional issues that arise with respect to the transfer of the plan's liabilities for particular groups of individuals?

We expect that the typical multiemployer plan sponsor maintains sufficient records to determine benefit liability for each individual participant and beneficiary. While the data may not be perfect, we expect that it will be appropriate for the purpose of determining the minimum amount of the liabilities needed to be transferred under a partition for the plan to remain solvent. (The same potential issue exists for benefit suspensions that are not combined with a partition.)

With respect to administrative and operational issues, we expect that the sponsor of a partitioned plan will develop reasonable practices with respect to recordkeeping, benefit processing, and allocation of expenses for the partitioned plan and the new plan. If PBGC issues guidance on these matters, we generally encourage the guidance to allow flexibility for the plan sponsor.

Specific guidance may be needed, however, with respect to benefit processing. For example, if the partitioned (original) plan is responsible for paying the portion of the monthly benefits in excess of the amounts guaranteed by PBGC as described under section 4233(e)(1)(A), would the affected participants receive one check from the plan, with PBGC providing financial assistance to the plan? Or would they receive two checks: one from the plan and one from PBGC?

9. *Post-Partition:* With respect to issues that might arise post-partition:

- What kinds of administrative or operational issues (*e.g.,* recordkeeping, benefit processing, allocation of expenses, the original plan's ongoing payment obligations under section 4231(e)(1)) might arise post-partition for plan sponsors?
- What issues or challenges do plan sponsors and their professional advisors anticipate in connection with the special withdrawal liability rule under section 4233(d)(3), which applies for a 10-year period following the partition effective date?
- What issues or challenges do plan sponsors and their professional advisors anticipate in connection with the special benefit improvement and premium rules under sections 4233(e)(2) and (3) of ERISA, which apply for a 10-year period following the partition effective date?
- Is there a need for additional post-partition oversight by PBGC to ensure compliance with MPRA's post-partition requirements, and if so, in what areas?

With respect to post-partition issues:

- *Administrative and operational issues*: As described above, specific guidance may be needed with respect to benefit processing in the event that the partitioned (original) plan is responsible for paying the portion of the monthly benefits in excess of the amounts guaranteed by PBGC as described under section 4233(e)(1)(A).

- *Special withdrawal liability rule*: We believe the statute is clear with respect to calculating withdrawal liability for a plan that has been partitioned, as described under section 4233(d)(3). Because the plan sponsor will retain administrative responsibilities for the plan created by the partition, we do not anticipate any significant issues or challenges in connection with the the special withdrawal liability rule.

- *Benefit improvements and premiums*: We believe the statute is clear with respect to the rules regarding benefit improvements and premiums under sections 4233(e)(2) and (3) of ERISA.

- *Oversight*: We believe it would be reasonable for the PBGC to require some level of periodic reporting by the plan sponsor with respect to the plan created by the partition. For example, it would be reasonable to require the plan sponsor to provide census data for the participants in the new plan on an annual basis. It would also be reasonable to require the plan sponsor to issue an annual certification with respect to benefit improvements to confirm that the requirements under section 4233(e)(2) are being met.

Issues Affecting Facilitated Mergers Only

10. *Technical Assistance:* MPRA provides a non-exclusive list of the types of nonfinancial assistance that PBGC may provide in the context of a facilitated merger (*e.g.*, training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies). For purposes of a facilitated merger, which of these types of assistance would plan sponsors and professional advisors find most helpful? Are there other examples of non-financial technical advice that would help facilitate multiemployer mergers?

We have no commentary on nonfinancial or technical assistance that PBGC may provide.

11. *PBGC Determination:* For purposes of the facilitated merger requirement under section 4231(e)(1) that PBGC determine, in consultation with the Participant and Plan Sponsor Advocate, that the transaction is in the interests of the participants and beneficiaries of at least one of the plans and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of the plans:

- What actuarial, economic, industry, or other information could the plan sponsors of the plans involved in the proposed merger provide to make such a showing?
- With respect to the consultation process under section 4231(e)(1), how can the Participant and Plan Sponsor Advocate best assist PBGC in making its determination under this section?

We expect that any plan sponsor applying for a facilitated merger would be able to provide supporting information that the transaction is in the interests of the participants and beneficiaries of at least one of

the plans and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of the plans.

For example, we expect that a plan sponsor would be able to provide actuarial projections showing (a) insolvency for the plan(s) in critical and declining status without the facilitated merger (b) continued solvency following the facilitated merger, and (c) no adverse effect on any of the plans involved as a result of the facilitated merger.

We have no commentary on the role of the Participant and Plan Sponsor Advocate.

12. *Concurrent Applications:* What procedural issues do plan sponsors and their professional advisors anticipate in connection with a decision to request assistance from PBGC for a facilitated merger under section 4231(e) of ERISA, concurrently with an application for suspension of benefits from the Department of Treasury under section 432(e)(9) of the Code?

Most of the points raised in the response to item 7, regarding concurrent applications for partitions and a suspension of benefits, also apply to concurrent applications for a facilitated merger and a suspension of benefits. Specifically, one or more of the plans seeking a facilitated merger will be in critical and declining status, and benefit suspensions under section 432(e)(9) of the Code may not be sufficient to enable the plan to avoid insolvency.

Therefore, in the event that a plan sponsor concurrently submits an application for a facilitated merger with an application for benefit suspensions, it will be very important for PBGC and Treasury to actively communicate with each other when reviewing the applications.