



[Billing Code 7709-02-P]

## **PENSION BENEFIT GUARANTY CORPORATION**

### **Requests to Review Multiemployer Plan Alternative Terms and Conditions to Satisfy Withdrawal Liability**

**AGENCY:** Pension Benefit Guaranty Corporation

**ACTION:** Policy Statement

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**SUMMARY:** PBGC is issuing this policy statement to provide insight to the public on the information PBGC finds helpful and factors PBGC considers in reviewing multiemployer plan proposals for alternative terms and conditions to satisfy withdrawal liability.

**FOR FURTHER INFORMATION CONTACT:** Daniel S. Liebman

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### **SUPPLEMENTARY INFORMATION:**

#### **Background**

The Pension Benefit Guaranty Corporation (“PBGC”) is a federal corporation created under the Employee Retirement Income Security Act of 1974 (“ERISA”) to guarantee the payment of pension benefits earned by nearly 40 million American workers and retirees in nearly 24,000 private-sector defined benefit pension plans. PBGC administers two insurance programs— one for single-employer defined benefit pension plans and a second for multiemployer defined benefit pension plans. Each program is operated and financed separately

from the other, and assets from one cannot be used to support the other. The multiemployer program protects basic benefits of approximately 10 million workers and retirees in approximately 1,400 plans.

#### *Multiemployer plan withdrawal liability in general*

A multiemployer pension plan is a collectively bargained plan involving two or more unrelated employers and is generally operated and administered by a joint board of trustees consisting of an equal number of employer and union appointees.

Under ERISA, an employer that withdraws from a multiemployer pension plan in a complete or partial withdrawal may be liable to the plan for withdrawal liability. The purpose of withdrawal liability is to ameliorate the effects of an employer leaving a plan without paying its proportionate share of the plan's unfunded benefit obligations, which could undermine the plan's funding and increase the burden and risk to remaining employers, plan participants, and the multiemployer insurance program.

Although there are two key aspects of withdrawal liability that are particularly important to distinguish—the method for determining a withdrawing employer's allocable share of the plan's unfunded vested benefits ("UVBs"), and the payment of an employer's withdrawal liability amounts to the plan—the guidance provided under this policy statement applies to the latter. Specifically, this guidance relates to a plan's proposed adoption of alternative payment amounts and terms and conditions to satisfy withdrawal liability as provided under section 4224.

#### *General legal framework of withdrawal liability payment*

As soon as practicable after an employer's withdrawal, the plan sponsor must notify the employer of the amount of its withdrawal liability—determined in accordance with one of the

four statutory allocation methods under ERISA section 4211, or if approved by PBGC, an alternative method— and provide a payment schedule.

Section 4219(c) of ERISA provides the statutory structure and process for payment of withdrawal liability. Under section 4219(c)(1), an employer's withdrawal liability must be paid over the number of years necessary to amortize its withdrawal liability, but in no event more than 20 years. An exception to the 20-year cap and to other limits on liability applies in the case of a mass withdrawal. The plan calculates the annual amount of withdrawal liability payment due under a formula set forth in the statute that is intended to approximate the employer's historical contributions.<sup>1</sup>

Sections 4219(c)(7) and 4224 of ERISA, which are virtually identical, provide plan sponsors with some latitude regarding the satisfaction of an employer's withdrawal liability.<sup>2</sup> They provide that a plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with ERISA and PBGC regulations. Although not required, plan trustees have sought assurance from PBGC that such alternative terms and conditions under section 4224 of ERISA are consistent with Title IV.<sup>3</sup>

PBGC has issued a regulation under 29 CFR Part 4219 that provides rules on the notice, collection, and redetermination and reallocation of withdrawal liability, but that regulation does

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<sup>1</sup> Under ERISA section 4219(c)(1), each annual payment is the product of (1) the employer's highest contribution rate in the ten plan years ending with the year of withdrawal, and (2) the average number of contribution base units (*e.g.*, hours worked) for the highest three consecutive plan years during the 10-year period preceding the year of withdrawal. Section 305(g) of ERISA, as added by the Multiemployer Pension Reform Act of 2014, provides special rules for determining, among other things, an employer's highest contribution rate for plans in endangered and critical status under sections 305(b)(1) and (b)(2), respectively.

<sup>2</sup> Trustees must make practical collection decisions as characteristic of a responsible creditor concerned with maximizing total recovery at supportable costs. See 126 Cong. Rec. 23039 (August 25, 1980, statement of Rep. Thompson). *See also* the requirements under ERISA section 4214 for plan rules, including that the rule operate and be applied uniformly to each employer but may take into account an employer's creditworthiness.

<sup>3</sup> *See e.g.*, PBGC Op. Ltr. 91-6 (Aug. 19, 1991) (<https://www.pbgc.gov/sites/default/files/legacy/docs/oplet/91-6.pdf>) and PBGC Op. Ltr. 82-24 (Aug. 5, 1982) (<https://www.pbgc.gov/sites/default/files/legacy/docs/oplet/82-24.pdf>).

not address a plan's adoption of alternative terms and conditions for the satisfaction of an employer's withdrawal liability. PBGC has not issued a regulation under ERISA section 4224, though PBGC has the authority to prescribe such a regulation.

Consistent with the legislative history of these provisions, PBGC has previously noted that the decision to modify and reduce an employer's withdrawal liability payment under plan rules adopted in accordance with Title IV of ERISA is subject to the fiduciary standards prescribed by Title I of ERISA.<sup>4</sup> The United States Department of Labor, Employee Benefits Security Administration ("EBSA"), is responsible for enforcing the fiduciary standards prescribed by Title I of ERISA.

PBGC encourages the innovative use of existing statutory and regulatory tools to reduce risk to employers (*e.g.*, investment risk and orphan liability risk) while protecting promised benefits and securing income to the plan. In response to an earlier, but related, Request for Information on so-called two-pool alternative withdrawal liability methods ("Two-Pool RFI"),<sup>5</sup> commenters indicated a preference for more information and clarity on PBGC's process for approving such alternative methods. PBGC is issuing this policy statement in response to those commenters' suggestion (as these two-pool and 4224 alternatives are sometimes combined in plan proposals), though this policy statement relates primarily to a plan's proposal to adopt alternative terms and conditions to satisfy withdrawal liability under ERISA section 4224.

*Requests for PBGC Review of Alternative Terms and Conditions to Satisfy Withdrawal Liability*

In the past, PBGC has reviewed proposals by multiemployer plans to adopt alternative terms and conditions to satisfy withdrawal liability in the context of a "managed mass withdrawal" where a mass withdrawal of employers was imminent or had occurred. The plan

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<sup>4</sup> See PBGC Op. Ltr. 91-6 and PBGC Op. Ltr. 82-24.

<sup>5</sup> See <https://www.pbgc.gov/sites/default/files//2016-31715.pdf>.

involved was generally a construction industry plan whose employers would incur withdrawal liability only if special statutory conditions were met.<sup>6</sup> In addition, the employers were generally small and likely to become insolvent if they were required to pay withdrawal liability.

More recently, PBGC has reviewed proposals to adopt alternative terms and conditions to satisfy withdrawal liability in advance of a potential mass withdrawal. Such proposals have been proactive, with the expressed aims of deterring continued withdrawals, extending plan solvency, and avoiding a potential mass withdrawal termination by offering incentives for employers to remain in the plan in the form of withdrawal liability relief. Several of these proposals came from plans that were facing significant financial distress, which if not addressed, could have adversely affected participants, employers, and the pension insurance system.

These more recent alternative proposals—intended to address events that may occur—involve numerous contingencies. For instance, it may be hard to foresee or evaluate how stakeholders will act in light of the alternative terms and conditions and in their absence (*i.e.*, under the statutory rules), or how the plan will be able to collect withdrawal liability in various scenarios.<sup>7</sup> Additionally, some recent proposals have included not only alternative terms and conditions for satisfaction of withdrawal liability, but alternative methods of allocating unfunded vested benefits (“UVBs”) for purposes of determining withdrawal liability as well, which add to the potential complexity of the plan’s proposal.<sup>8</sup>

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<sup>6</sup> See ERISA section 4203(b).

<sup>7</sup> For example, the employers in the plan may not be construction industry employers who are only subject to withdrawal liability in certain circumstances, or the trustees’ assessment of employers’ ability to continue withdrawal liability payments and make contributions in the future may vary over different time frames.

<sup>8</sup> ERISA section 4211(c)(5). Unlike statutory allocation methods that apportion liabilities based on the withdrawing employer’s participation in the plan, alternative allocation methods could have the effect of shifting liabilities in a substantial or systemic way toward weaker employers, increasing stakeholder risk. The methods identified in the Two-Pool RFI are examples of certain technical requirements for alternative allocation methods that create separate pools of UVBs. For example, for a method that creates one pool of UVBs for existing employers and one pool for

### *Case-by-Case Reviews*

Due to the complexities associated with any given individual plan proposal to adopt terms and conditions to satisfy withdrawal liability, based on recent experience, PBGC expects that there will be significant variations in the form and substance of these proposals. Evaluating the impact of such a proposal on the plan's future solvency and contribution and withdrawal liability income (and, thus, on the plan's participants and beneficiaries, and the multiemployer insurance program) is a highly complex matter, involving analysis of the probability of various events and comparing the actuarial present value of a plan's expected unfunded liability under various scenarios. Proposals, such as those that PBGC has reviewed recently from plans that faced significant financial distress, have the added dimension of weighing the comparative cost and benefits to the various, and potentially conflicting, interests at stake in the proposal—the plan, participants, employers, and the pension insurance system as a whole. Further, because of the potential impact on the multiemployer plan insurance system as a whole, it is necessary to engage in discussions with plan trustees to fully understand the alternative proposal. These discussions will often involve follow-ups as questions are addressed and information is exchanged, including the extent to which employers in the plan have already been consulted about, or have agreed in principle to, the proposed alternative terms and conditions. As a result, PBGC reviews these proposals on a case-by-case basis.

As in other contexts, PBGC welcomes informal consultations with trustees and their advisors in advance of a request for review, which can be helpful in answering questions and understanding issues before undertaking the time and effort to formally engage PBGC with a review request. Once PBGC has the information it needs to complete a review, PBGC endeavors

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new employers, the two pools are required to collapse into one pool if all employers withdraw from either pool, and the existing employers' pool of UVBs must equal the plan's total UVBs less the new employers' pool of UVBs.

to complete the review as quickly as it can. For less complex alternative proposals, PBGC aims to complete a review within 180 days or sooner; for the most complex proposals (such as those that combine both alternative allocation and settlement methods), PBGC aims to complete a review within 270 days.

#### *General Statement of Policy Goal*

Generally, in evaluating a proposal to adopt alternative terms and conditions to satisfy withdrawal liability, PBGC looks to whether trustees have supported their conclusion that the proposed alternative terms and conditions would realistically maximize the collection of withdrawal liability and projected contributions, relative to the statutory rules. Ultimately, PBGC should see that the proposed alternative terms are in the interests of participants and beneficiaries and do not create an unreasonable risk of loss to the insurance program and are otherwise consistent with ERISA and PBGC's regulations. If PBGC finds that the proposed alternative terms and conditions may create an unreasonable risk of loss to plan participants and beneficiaries and to the multiemployer pension insurance program, PBGC engages with the plan trustees and their representatives to discuss possible modifications to mitigate that risk.

#### *Helpful Information*

For proposals to adopt alternative terms and conditions to satisfy withdrawal liability that are intended to extend plan solvency by encouraging the continued commitment of contributing employers to the plan, PBGC finds it helpful to see support for an assertion that: (i) the alternative would retain employers in the plan long-term and secure income that would be otherwise unavailable to the plan, and (ii) absent the alternative, employers would withdraw from the plan or significantly reduce contributions in ways that would undermine plan solvency. PBGC will work with trustees to assess what kind of support a plan would be able to

most efficiently provide and what would be most useful for PBGC's understanding of the proposal.

PBGC finds it helpful to understand the following:

- The alternative terms and conditions for satisfying an employer's withdrawal liability under the plan's proposed rule, such as how the alternative payment amount or alternative payment schedule is determined.
- The requirements that an employer must satisfy to be eligible for the alternative terms and conditions, as applicable.
- How expected cash flows, expected unfunded liability, expected recovery of withdrawal liability, and projected insolvency dates under the statutory withdrawal liability rules compare with those likely under the alternative terms and conditions for satisfying withdrawal liability.
- The assumptions underlying the comparison of existing and alternative rules (taking into account the historical experience of the plan), including explanations and substantiations of assertions for the employers' ability to meet their pension obligations and the extent to which employers will elect to participate in the alternative terms and conditions.
- Information on the composition of contributing employers, as applicable,<sup>9</sup> such as contributions, active participants, contribution base units, the ability of employers to meet their pension obligations, and withdrawal liability estimates of significant employers, including how the alternative terms and conditions apply to significant employers.

In several cases, plans proposing alternative terms and conditions for satisfying withdrawal liability obtained an independent financial expert to study a representative sample of the plan's employers to help the plan determine that its expected net recovery of withdrawal liability under the alternative terms and conditions would be more favorable than the default method that would otherwise apply under the statute.

*Factors in PBGC Consideration of Alternative Terms and Conditions to Satisfy Withdrawal Liability*

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<sup>9</sup> PBGC can work with trustees to create sample or proxy groups for smaller employers.



PBGC's review of alternative terms and conditions typically includes whether:

- The proposed alternative terms and conditions are in the interests of participants and beneficiaries and do not create an unreasonable risk of loss to PBGC, and are otherwise consistent with ERISA and PBGC's regulations;
- The proposed alternative terms and conditions would realistically maximize projected contributions and the net recovery of withdrawal liability for the plan compared to the income generated by the statutory withdrawal liability rules;
- The assumptions used to support the plan's submission are reasonable and supported by credible data; and
- The proposed alternative terms and conditions are reasonable in scope and application and operate and apply uniformly to all employers (but may consider an employer's creditworthiness).

*Disclaimer*

This policy statement represents PBGC's current thinking on this topic. It does not create or confer any rights for or on any person or operate to bind the public. If an alternative approach satisfies the requirements of the applicable statutes and regulations, you may use that approach. If you want to discuss an alternative approach (which you are not required to do), you may contact PBGC.

PBGC invites public input on any other issue relating to alternatives for satisfying withdrawal liability (and allocating UVBs for purposes of determining withdrawal liability, if applicable). PBGC's consideration of such input is independent of, and without prejudice to, PBGC's ongoing review and determination of any request for approval or review of any alternative for allocating and satisfying withdrawal liability.

Signed in Washington, D.C. by

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Director

Pension Benefit Guaranty Corporation

[FR Doc. 2018-06780 Filed: 4/3/2018 8:45 am; Publication Date: 4/4/2018]