

**PENSION BENEFIT GUARANTY CORPORATION**

**29 CFR Parts 4001, 4211, and 4219**

**RIN 1212-AB07**

**Methods for Computing Withdrawal Liability; Reallocation Liability Upon Mass Withdrawal; Pension Protection Act of 2006**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

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**SUMMARY:** This final rule amends PBGC's regulation on Allocating Unfunded Vested Benefits to Withdrawing Employers (29 CFR part 4211) to implement provisions of the Pension Protection Act of 2006 that provide for changes in the allocation of unfunded vested benefits to withdrawing employers from a multiemployer pension plan, and that require adjustments in determining an employer's withdrawal liability when a multiemployer plan is in critical status. Pursuant to PBGC's authority under section 4211(c)(5) of ERISA to prescribe standard approaches for alternative withdrawal liability methods, the final rule also amends this regulation to provide additional modifications to the

statutory methods for determining an employer's allocable share of unfunded vested benefits. In addition, pursuant to PBGC's authority under section 4219(c)(1)(D) of ERISA, this final rule amends PBGC's regulation on Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR part 4219) to improve the process of fully allocating a plan's total unfunded vested benefits among all liable employers in a mass withdrawal. Finally, this final rule amends PBGC's regulation on Terminology (29 CFR part 4001) to reflect the definition of a "multiemployer plan" added by the Pension Protection Act of 2006.

**DATES:** Effective January 29, 2009. See Applicability in **SUPPLEMENTARY INFORMATION**.

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#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Under section 4201 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980, an employer that withdraws from a multiemployer pension plan may incur withdrawal liability to the plan. Withdrawal liability represents the employer's allocable share of the plan's unfunded vested benefits determined under section 4211 of ERISA, and adjusted in accordance with other provisions in sections 4201 through 4225 of ERISA. Section 4211 prescribes four methods that a plan may use to allocate a share of unfunded vested benefits to a withdrawing employer, and also provides for possible modifications of those methods and for the use of allocation methods other than those prescribed. In general, changes to a plan's allocation methods are subject to the approval of the Pension Benefit Guaranty Corporation ("PBGC").

Under section 4211(b)(1) of ERISA (which sets forth the "presumptive method" for determining withdrawal liability), the amount of unfunded vested benefits allocable to a withdrawing employer is the sum of the employer's proportional share of—

- The unamortized amount of the change in the plan's unfunded vested

benefits for each plan year ending after September 25, 1980, for which the employer has an obligation to contribute under the plan (*i.e.*, multiple-year liability pools) ending with the plan year preceding the plan year of the employer's withdrawal;

- The unamortized amount of the unfunded vested benefits at the end of the last plan year ending before September 26, 1980, with respect to employers who had an obligation to contribute under the plan for the first plan year ending after such date; and

- The unamortized amount of the reallocated unfunded vested benefits (amounts the plan sponsor determines to be uncollectible or unassessible) for each plan year ending before the employer's withdrawal.

Each amount described above is reduced by 5 percent for each plan year after the plan year for which it arose. An employer's proportional share is based on a fraction equal to the sum of the contributions required to be made under the plan by the employer over total contributions made by all employers who had an obligation to contribute under the plan, for the five plan years ending with the plan year in which such change arose, the five plan years preceding September 26, 1980, and the five plan years ending with the plan year such reallocation liability arose, respectively (the "allocation fraction").

Section 4211(c)(1) of ERISA generally prohibits the adoption of any allocation method other than the presumptive method by a plan that primarily covers employees in the building and construction industry ("construction plan"), subject to regulations that allow certain adjustments in the denominator of an allocation fraction.

Under section 4211(c)(2) of ERISA (which sets forth the "modified presumptive method"), a withdrawing employer is liable for a proportional share of—

- The plan's unfunded vested benefits as of the end of the plan year preceding the withdrawal (less outstanding claims for withdrawal liability that can reasonably be expected to be collected and the amounts set forth in the item below allocable to employers obligated to contribute in the plan year preceding the employer's withdrawal and who had an obligation to contribute in the first plan year ending after September 26, 1980); and

- The plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980 (amortized over 15 years), if the employer had an obligation to contribute under the plan for the first plan year ending on or after such date.

An employer's proportional share is based on the employer's share of total plan contributions over the five plan years preceding the plan year of the employer's withdrawal and over the five plan years preceding September 26, 1980, respectively. Plans that use this method fully amortize their first pool as of 1995. Then, employers that withdraw after 1995 are subject to the allocation of unfunded vested benefits as if the plan used the "rolling-5 method" discussed below.

Under section 4211(c)(3) of ERISA (which sets forth the "rolling-5 method"), a withdrawing employer is liable for a share of the plan's unfunded vested benefits as of the end of the plan year preceding the employer's withdrawal (less outstanding claims for withdrawal liability that can reasonably be expected to be collected), allocated in proportion to the employer's share of total plan contributions for the last five plan years ending before the withdrawal.

Under section 4211(c)(4) of ERISA (which sets forth the "direct attribution method"), an employer's withdrawal liability is based generally on the benefits and assets attributable to participants' service with the employer, as of the end of the plan year preceding the employer's withdrawal; the employer is also liable for a proportional share of any unfunded vested benefits that are not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the withdrawal.

Section 4211(c)(5)(B) of ERISA authorizes PBGC to prescribe by regulation standard approaches for alternative methods for determining an employer's allocable share of unfunded vested benefits, and adjustments in any denominator of an allocation fraction under the withdrawal liability methods. PBGC has prescribed, in § 4211.12 of its regulation on Allocating Unfunded Vested Benefits to Withdrawing Employers, changes that a plan may adopt, without PBGC approval, in the denominator of the allocation fractions used to determine a withdrawing employer's share of unfunded vested benefits under the presumptive, modified presumptive and rolling-5 methods.

#### **Pension Protection Act of 2006 Changes**

The Pension Protection Act of 2006, Public Law 109-280 ("PPA 2006"), which became law on August 17, 2006, makes various changes to ERISA's withdrawal liability provisions. Section 204(c)(2) of PPA 2006 added section 4211(c)(5)(E) of ERISA, which permits a

plan, including a construction plan, to adopt an amendment that applies the presumptive method by substituting a different plan year for which the plan has no unfunded vested benefits for the plan year ending before September 26, 1980. Such an amendment would enable a plan to erase a large part of the plan's unfunded vested benefits attributable to plan years before the end of the designated plan year, and to start fresh with liabilities that arise in plan years after the designated plan year.

Additionally, sections 202(a) and 212(a) of PPA 2006 create new funding rules for multiemployer plans in "critical" status, allowing these plans to reduce benefits and making the plans' contributing employers subject to surcharges. New section 305(e)(9) of ERISA and section 432(e)(9) of the Internal Revenue Code ("Code") provide that such benefit adjustments and employer surcharges are disregarded in determining a plan's unfunded vested benefits and allocation fraction for purposes of determining an employer's withdrawal liability, and direct PBGC to prescribe simplified methods for the application of these provisions in determining withdrawal liability.

PPA 2006 also makes other changes affecting the withdrawal liability provisions under ERISA that are not addressed in this final rule.

#### Proposed Rule

On March 19, 2008 (at 73 FR 14735), PBGC published a proposed rule to amend parts 4001, 4211, and 4219 to implement the PPA 2006 changes and make other changes under its regulatory authority. PBGC received two comments on the proposed rule, one from a chain of food stores, and the other from a member organization representing food retail and wholesale companies. One commenter suggested that PBGC eliminate or limit the "fresh start" options proposed under PBGC's regulatory authority. The other commenter suggested that PBGC modify the proposed rule regarding the allocation fraction for reallocation liability. These points are discussed below with the topics to which they relate.

The final regulation is the same as the proposed regulation, with a few minor exceptions, including a clarification to the language describing the reallocation liability formula for a plan terminated by mass withdrawal. (See Discussion, *Reallocation Liability Upon Mass Withdrawal*.) In response to a comment, the final rule eliminates an inconsistency between the fraction for reallocation liability under the proposed regulation and the current regulation,

and updates a citation to a Code provision under PPA 2006.

#### Overview of Final Rule

This final rule amends PBGC's regulation on Allocating Unfunded Vested Benefits to Withdrawing Employers (29 CFR part 4211) to implement the above-described changes made by PPA 2006.

The final rule also makes changes unrelated to PPA 2006. Under its authority to prescribe alternatives to the statutory methods for determining an employer's allocable share of unfunded vested benefits, the final rule also amends part 4211 to broaden the rules and provide more flexibility in applying the statutory methods. PBGC has identified certain modifications that may be advantageous to plans because they reduce administrative burdens for plans using the presumptive method and may assist plans in attracting new employers in the case of the modified presumptive method.

In addition, in the case of a plan termination by mass withdrawal, section 4219(c)(1)(D) of ERISA provides that the total unfunded vested benefits of the plan must be fully allocated among all liable employers in a manner not inconsistent with regulations prescribed by PBGC. PBGC has determined that the fraction for allocating this "reallocation liability" under PBGC's regulation on Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR part 4219) does not adequately capture the liability of employers who had little or no initial withdrawal liability. Accordingly, this final rule amends part 4219 to revise the allocation fraction for reallocation liability.

A detailed discussion of the final rule follows.

#### Discussion

##### *Withdrawal Liability Methods—Fresh Start Option*

Under section 4211(c)(5)(E) of ERISA, added by PPA 2006, a plan using the presumptive withdrawal liability method in section 4211(b) of ERISA, including a construction plan, may be amended to substitute a plan year that is designated in a plan amendment and for which the plan has no unfunded vested benefits, for the plan year ending before September 26, 1980. (This provision is referred to as the statutory "fresh start" option.) For plan years ending before the designated plan year and for the designated plan year, the plan will be relieved of the burden of calculating changes in unfunded vested benefits separately for each plan year

and allocating those changes to the employers that contributed to the plan in the year of the change. As the plan has no unfunded vested benefits for the designated plan year, employers withdrawing from the plan after the modification is effective will have no liability for unfunded vested benefits arising in plan years ending before the designated plan year. PBGC is amending § 4211.12 of its regulation on Allocating Unfunded Vested Benefits to Withdrawing Employers to reflect this new statutory modification to the presumptive method.

In addition, PBGC is expanding § 4211.12 to permit plans to substitute a new plan year for the plan year ending before September 26, 1980, *without regard* to the amount of a plan's unfunded vested benefits at the end of the newly designated plan year. (This amendment is referred to as a regulatory "fresh start" option.) This change will allow plans using the presumptive method to aggregate the multiple liability pools attributable to prior plan years and the designated plan year. It will thus allow such plans to allocate the plan's unfunded vested benefits as of the end of the designated plan year among the employers that have an obligation to contribute under the plan for the first plan year ending on or after such date. The plan will allocate unfunded vested benefits based on the employer's share of the plan's contributions for the five-year period ending with the designated plan year. Thereafter, such plans would apply the regular rules under the presumptive method to segregate changes in the plan's unfunded vested benefits by plan year and to allocate individual plan year liabilities among the employers obligated to contribute under the plan in that plan year.

PBGC believes this modification to the presumptive method will ease the administrative burdens of plans that have difficulty obtaining the actuarial and contributions data necessary to compute each employer's allocable share of annual changes in unfunded vested benefits occurring in plan years as far back as 1980. However this modification does not apply to a construction plan, because PBGC's authority is limited to adjustments in the denominators of the allocation fractions for such plans.<sup>1</sup>

<sup>1</sup> Under ERISA section 4211(c)(1), construction plans are limited to the presumptive method, except that PBGC may by regulation permit adjustments in any denominator under section 4211 (including the denominator of a fraction used in the presumptive method by construction industry plans) where such adjustment would be appropriate to ease the administrative burdens of plan sponsors.

PBGC is also amending § 4211.12 to permit plans using the modified presumptive method to designate a plan year that would substitute for the last plan year ending before September 26, 1980, thus providing another regulatory “fresh start” option. This amendment provides for the allocation of substantially all of a plan’s unfunded vested benefits among employers that have an obligation to contribute under the plan, while enabling plans to split a single liability pool for plan years ending after September 25, 1980, into two liability pools. The first pool would be based on the plan’s unfunded vested benefits as of the end of the newly designated plan year, allocated among employers who have an obligation to contribute under the plan for the plan year immediately following the designated plan year. The second pool would be based on the unfunded vested benefits as of the end of the plan year prior to the withdrawal (offset in the manner described above for the modified presumptive method). For a period of time, this modification would reduce new employers’ liability for unfunded vested benefits of the plan before the employer’s participation, which could assist plans in attracting new employers and preserving the plan’s contribution base. The modification would not require PBGC approval for adoption.

For each of these modifications, the final rule clarifies that a plan’s unfunded vested benefits, determined with respect to plan years ending after the plan year designated in the plan amendment, are reduced by the value of the outstanding claims for withdrawal liability that can reasonably be expected to be collected for employers who withdrew from the plan in or before the designated plan year.

One commenter suggested that the final rule eliminate the regulatory “fresh start” options due to the commenter’s concern that plans may use these options to maximize withdrawal liability and to unfairly shift the allocation of withdrawal liability among employers. Alternatively, the commenter suggested that the regulation be clarified to restrict a plan’s ability to change repeatedly the “fresh start” date. The commenter also suggested limiting the application of the “fresh start” options to employers that begin contributing to a plan after the effective date of the final regulation, or to contributions made by employers after a “fresh start” date is determined.

Specifically, the commenter noted that section 4211(c)(5)(E) of ERISA, as added by PPA 2006, allows a plan to be amended with a “fresh start” option if the designated plan year in the amendment has no unfunded vested benefits. The commenter objected to the regulatory “fresh start” options because they permit a designated plan year to be a plan year for which the plan has unfunded vested benefits—resulting in liability allocated in a pool at the end of the designated plan year—unlike the “fresh start” permitted by section 4211(c)(5)(E).

As explained below, the “fresh start” provisions in the final regulation are unchanged from those in the proposed regulation.

First, contrary to the commenter’s concern, the “fresh start” rule does not alter the amount of withdrawal liability assessed in the aggregate and, therefore, does not work to maximize withdrawal liability. Rather, the “fresh start” rule allows a plan to amend the method for allocating substantially all of a plan’s unfunded vested benefits among employers who have an obligation to contribute under the plan and does not increase the amount of the unfunded vested benefits to be allocated.

Second, section 4211(c)(5)(E) is intended to provide flexibility to construction plans. Pursuant to section 4211(c)(1)(A) of ERISA, construction plans must use the presumptive method under section 4211(b) of ERISA, and may not adopt any of the three alternative allocation methods described by the statute (the modified presumptive, rolling-5, or direct attribution methods under sections 4211(c)(2), (c)(3), or (c)(4) of ERISA), or adopt any other alternative methods of determining an employer’s allocable share of unfunded vested benefits under section 4211(c)(5) of ERISA.

In contrast, non-construction plans have broad discretion to amend their withdrawal liability methods. Such plans may, for example, replace the presumptive method with the rolling-5 method, without PBGC approval,<sup>2</sup> or adopt an alternative non-statutory method designed by the plan to provide

<sup>2</sup> PBGC has published a class approval of any plan amendment that adopts one of the three alternative allocation methods described in sections 4211(c)(2), (c)(3) or (c)(4) of ERISA, without the need to obtain PBGC approval. PBGC determined that such amendments would not have the effect of creating an unreasonable risk of loss to plan participants and beneficiaries or to the PBGC (49 FR 37686). It is not important which allocation method is being used before the change, or whether the method in use before the change is one of the statutory methods or some other method. (See PBGC Opinion Letter 86-22, available on PBGC’s Web site <http://www.pbgc.gov>.)

for the allocation of the plan’s unfunded vested benefits, subject to PBGC approval.

Third, for non-construction plans, section 4211(c)(5) of ERISA gives PBGC authority to regulate the adoption of modifications to the four statutory methods and the adoption of other allocation methods. In this regulation, PBGC is simply exercising its authority under section 4211(c)(5)(B) to prescribe standard approaches for alternative methods that may be adopted by plan amendment, for which PBGC approval requirements may be waived or modified. In developing the “fresh start” options, PBGC relied upon its experience with alternative withdrawal liability methods, as proposed by plans or developed or approved by PBGC, since the inception of the withdrawal liability provisions in 1980 under Title IV of ERISA.

The regulatory “fresh start” options satisfy the requirement under section 4211(c)(5)(B) of ERISA. Specifically, each “fresh start” option provides for the allocation of substantially all of a plan’s unfunded vested benefits among employers who have an obligation to contribute under the plan. Each “fresh start” option is similar in effect to a plan’s change from one statutory method to another statutory method—which plans are free to adopt without PBGC approval.

For example, in the case of a plan replacing the presumptive method with the rolling-5 method or a plan adopting the “fresh start” option under the presumptive method, the plan may erase all of the negative or positive changes in unfunded vested benefits for any plan year through the plan year of the change or the designated plan year, respectively. Although the two plans may allocate different amounts to individual employers, each method apportions liability based on the withdrawing employer’s participation in the plan measured by that employer’s contributions relative to the total contributions to the plan. Thus, each method results in the allocation of substantially all of a plan’s unfunded vested benefits among employers who have an obligation to contribute under the plan.

Similarly, there is no significant difference in the degree of allocation of a plan’s unfunded vested benefits between a plan that changes from the modified presumptive to the presumptive method or a plan that adopts a “fresh start” option under the modified presumptive method and determines liability based on the plan’s unfunded vested benefits as of a designated plan year or as of the plan

year preceding the year of withdrawal. In addition, while PBGC does not contemplate that plans will repeatedly change the “fresh start” date, a plan’s decision to adopt a new “fresh start” date that might result in a greater liability for a particular employer would have a similar effect on the employer as a decision by the plan to adopt instead the rolling-5 method.

Finally, the regulatory “fresh start” options are designed to provide additional flexibility in the methods available to non-construction plans for allocating a plan’s unfunded vested benefits among withdrawing employers, without PBGC approval. The decision, however, to adopt a “fresh start” option is discretionary and made by the plan sponsor, which is generally a joint board of trustees with an equal number of employer and employee representatives. Under section 4214 of ERISA, any plan rule or amendment may not be applied to any employer that withdrew before the amendment was adopted without that employer’s consent and any rule or amendment must be uniformly applied to each employer.

#### *Withdrawal Liability Computations for Plans in Critical Status—Adjustable Benefits*

PPA 2006 establishes additional funding rules for multiemployer plans in “endangered” or “critical” status under section 305 of ERISA and section 432 of the Code. The sponsor of a plan in critical status (less than 65 percent funded and/or meets any of the other defined tests) is required to adopt a rehabilitation plan that will enable the plan to cease to be in critical status within a specified period of time or to forestall possible insolvency. Notwithstanding section 204(g) of ERISA or section 411(d)(6) of the Code, as deemed appropriate by the plan sponsor, based upon the outcome of collective bargaining over benefit and contribution schedules, the rehabilitation plan may include reductions to “adjustable benefits,” within the meaning of section 305(e)(8) of ERISA and section 432(e)(8) of the Code. New section 305(e)(9) of ERISA and section 432(e)(9) of the Code provide, however, that any benefit reductions under subsection (e) must be disregarded in determining a plan’s unfunded vested benefits for purposes of an employer’s withdrawal liability under section 4201 of ERISA. (Also, under ERISA sections 305(f)(2) and (f)(3), and Code sections 432(f)(2) and (f)(3), a plan is limited in its payment of lump sums and similar benefits after a notice of the plan’s critical status is sent, but any such benefit limits must be

disregarded in determining a plan’s unfunded vested benefits for purposes of determining an employer’s withdrawal liability.)

Adjustable benefits under section 305(e)(8) of ERISA and section 432(e)(8) of the Code include benefits, rights and features under the plan, such as post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status; certain early retirement benefits, retirement-type subsidies and benefit payment options; and benefit increases that would not be eligible for a guarantee under section 4022A of ERISA on the first day of the initial critical year because the increases were adopted (or, if later, took effect) less than 60 months before such date. An amendment reducing adjustable benefits may not affect the benefits of any participant or beneficiary whose benefit commencement date is before the date on which the plan provides notice that the plan is or will be in critical status for a plan year; the level of a participant’s accrued benefit at normal retirement age also is protected.

Under section 4213 of ERISA, a plan actuary must use actuarial assumptions that, in the aggregate, are reasonable and, in combination, offer the actuary’s best estimate of anticipated experience in determining the plan’s unfunded vested benefits for purposes of determining an employer’s withdrawal liability (absent regulations setting forth such methods and assumptions). Section 4213(c) provides that, for purposes of determining withdrawal liability, the term “unfunded vested benefits” means the amount by which the value of nonforfeitable benefits under the plan exceeds the value of plan assets.

The final rule amends the definition of “nonforfeitable benefits” in § 4211.2 of PBGC’s regulation on Allocating Unfunded Vested Benefits to Withdrawing Employers, and the definition of “unfunded vested benefits” in § 4219.2 of PBGC’s regulation on Notice, Collection, and Redetermination of Withdrawal Liability, to include adjustable benefits that have been reduced by a plan sponsor pursuant to ERISA section 305(e)(8) or Code section 432(e)(8), to the extent such benefits would otherwise be nonforfeitable benefits.

Section 305(e)(9)(C) of ERISA and section 432(e)(9)(C) of the Code direct PBGC to prescribe simplified methods for the application of this provision in determining withdrawal liability. PBGC intends to issue guidance on simplified methods at a later date.

#### *Withdrawal Liability Computations for Plans in Critical Status—Employer Surcharges*

Under section 305(e)(7) of ERISA, added by section 202(a) of PPA 2006, and under section 432(e)(7) of the Code, added by section 212(a) of PPA 2006, each employer otherwise obligated to make contributions for the initial plan year and any subsequent plan year that a plan is in critical status must pay a surcharge to the plan for such plan year, until the effective date of a collective bargaining agreement (or other agreement pursuant to which the employer contributes) that includes terms consistent with the rehabilitation plan adopted by the plan sponsor. Section 305(e)(9) of ERISA and section 432(e)(9) of the Code provide, however, that any employer surcharges under paragraph (7) must be disregarded in determining an employer’s withdrawal liability under section 4211 of ERISA, except for purposes of determining the unfunded vested benefits attributable to an employer under section 4211(c)(4) (the direct attribution method) or a comparable method approved under section 4211(c)(5) of ERISA.

The presumptive, modified presumptive and rolling-5 methods of allocating unfunded vested benefits allocate the liability pools among participating employers based on the employers’ contribution obligations for the five-year period ending with the date the liability pool arose or the plan year immediately preceding the plan year of the employer’s withdrawal (depending on the method or liability pool). Under section 4211 of ERISA, the numerator of the allocation fraction is the total amount required to be contributed by the withdrawing employer for the five-year period, and the denominator of the allocation fraction is the total amount contributed by all employers under the plan for the five-year period.

The final rule amends PBGC’s regulation on Allocating Unfunded Vested Benefits to Withdrawing Employers (part 4211) by adding a new § 4211.4 that excludes amounts attributable to the employer surcharge under section 305(e)(7) of ERISA and section 432(e)(7) of the Code from the contributions that are otherwise includable in the numerator and the denominator of the allocation fraction under the presumptive, modified presumptive and rolling-5 methods. Pursuant to section 305(e)(9) of ERISA and section 432(e)(9) of the Code, a simplified method for the application of this principle is provided below in the form of an illustration of the exclusion

of employer surcharge amounts from the allocation fraction.

*Example:* Plan X is a multiemployer plan that has vested benefit liabilities of \$200 million and assets of \$130 million as of the end of its 2015 plan year. During the 2015 plan year, there were three contributing employers. Two of three employers were in the plan for the

entire five-year period ending with the 2015 plan year. One employer was in the plan during the 2014 and 2015 plan years only. Each employer had a \$4 million contribution obligation each year under a collective bargaining agreement. In addition, for the 2011, 2012, and 2013 plan years, employers were liable for the automatic employer

surcharge under section 305(e)(7) of ERISA and section 432(e)(7) of the Code, at a rate of 5% of required contributions in 2011 and 10% of required contributions in 2012 and 2013. The following table shows the contributions and surcharges owed for the five-year period.

[In millions]

Year	Employer A		Employer B		Employer C	
	Contribution	Surcharge	Contribution	Surcharge	Contribution	Surcharge
2011 .....	\$4	\$0.2	\$4	\$0.2		
2012 .....	4	0.4	4	0.4		
2013 .....	4	0.4	4	0.4		
2014 .....	4	0	4	0	\$4	\$0
2015 .....	4	0	4	0	4	0
5-year total .....	20	1.0	20	1.0	8	0

Employers A, B and C contributed \$48 million during the five-year period, excluding surcharges, and \$50 million including surcharges. Under the rolling-5 method, the unfunded vested benefits allocable to an employer are equal to the plan's unfunded vested benefits as of the end of the last plan year preceding the withdrawal, multiplied by a fraction equal to the amount the employer was required to contribute to the plan for the last five plan years preceding the withdrawal over the total amount contributed by all employers for those five plan years (other adjustments are also required).

Employer A's share of the plan's unfunded vested benefits in the event it withdraws in 2016 is \$29.17 million, determined by multiplying \$70 million (the plan's unfunded vested benefits at the end of 2015) by the ratio of \$20 million to \$48 million. Employer B's allocable unfunded vested benefits are identical to Employer A's, and the amount allocable to Employer C is \$11.66 million (\$70 million multiplied by the ratio of \$8 million over \$48 million). The \$2.0 million attributable to the automatic employer surcharge is excluded from contributions in the allocation fraction.

*Reallocation Liability Upon Mass Withdrawal*

Section 4219(c)(1)(D) of ERISA applies special withdrawal liability rules when a multiemployer plan terminates because of mass withdrawal (i.e., the withdrawal of every employer under the plan) or when substantially all employers withdraw pursuant to an agreement or arrangement to withdraw, including a requirement that the total

unfunded vested benefits of the plan be fully allocated among all employers in a manner not inconsistent with PBGC regulations. To ensure that all unfunded vested benefits are fully allocated among all liable employers, § 4219.15(b) of PBGC's regulation on Notice, Collection, and Redetermination of Withdrawal Liability requires a determination of the plan's unfunded vested benefits as of the end of the plan year in which the plan terminates, based on the value of the plan's nonforfeitable benefits as of that date less the value of plan assets (benefits and assets valued in accordance with assumptions specified by PBGC), less the outstanding balance of any initial withdrawal liability (assessments without regard to the occurrence of a mass withdrawal) and redetermination liability (assessments for de minimis and 20-year cap reduction amounts) that can reasonably be expected to be collected.

Pursuant to § 4219.15(c)(1), each liable employer's share of this "reallocation liability" is equal to the amount of the reallocation liability multiplied by a fraction—

- (i) The numerator of which is the sum of the employer's initial withdrawal liability and any redetermination liability, and
- (ii) The denominator of which is the sum of all initial withdrawal liabilities and all the redetermination liabilities of all liable employers.

PBGC believes the current allocation fraction for reallocation liability must be modified to address those situations in which employers—who would otherwise be liable for reallocation liability—have little or no initial withdrawal liability or redetermination

liability and, therefore, have a zero (or understated) reallocation liability. Such situations may arise, for example, where an employer withdraws from the plan before the mass withdrawal valuation date, but has no withdrawal liability under the modified presumptive and rolling-5 methods because either (i) the plan has no unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdrew, or (ii) the plan did not require the employer to make contributions for the five-year period preceding the plan year of withdrawal. In these cases, if the employer's withdrawal is later determined to be part of a mass withdrawal for which reallocation liability applies under section 4219 of ERISA, the employer would not be liable for any portion of the reallocation liability.

A plan's status may change from funded to underfunded between the end of the plan year before the employer withdraws and the mass withdrawal valuation date as a result of differences in the actuarial assumptions used by the plan's actuary in determining unfunded vested benefits under sections 4211 and 4219 of ERISA, or due to investment losses that reduce the value of the plan's assets, among other reasons. Likewise, an employer may not have paid contributions for purposes of the allocation fraction used to determine the employer's initial withdrawal liability if the plan provided for a "contribution holiday" under which employers were not required to make contributions.

PBGC believes the absence of initial withdrawal liability should not generally exempt an otherwise liable employer from reallocation liability. By

shifting reallocation liability away from some employers, the current regulation increases the allocable share of other employers in a mass withdrawal, increases the risk of loss of benefits to participants, and increases the financial risk to PBGC. To ensure that reallocation liability is allocated broadly among all liable employers, PBGC is amending § 4219.15(c) of the Notice, Collection, and Redetermination of Withdrawal Liability regulation to replace the current allocation fraction based on initial withdrawal liability with a new allocation fraction for determining an employer's allocable share of reallocation liability.

The new fraction allocates the plan's unfunded vested benefits based on the average of the employer's contribution base units relative to the combined averages of the plan's total contribution base units for the three plan years preceding each employer's withdrawal from the plan. The numerator consists of the withdrawing employer's average contribution base units during the three plan years preceding the employer's withdrawal (*i.e.*, the employer's total contribution base units over the three plan years divided by three). The final rule clarifies that the denominator is the sum of the averages of all withdrawing employers' contribution base units for the three plan years preceding each employer's withdrawal. This is not a substantive change from the proposed regulation.

Section 4001(a)(11) of ERISA defines a "contribution base unit" as a unit with respect to which an employer has an obligation to contribute under a multiemployer plan, *e.g.*, an hour worked. PBGC is adding a similar definition for purposes of § 4219.15 of the Notice, Collection, and Redetermination of Withdrawal Liability regulation.

One commenter suggested that the final rule modify the allocation fraction for reallocation liability under the proposed rule to reflect variations in contribution rates among employers. The commenter proposed that a fraction be based on the product of the employer's contribution base units and contribution rates (*e.g.*, the highest rate in effect under the collective bargaining agreement) for the three plan years preceding the employer's withdrawal. In the case of an employer that contributes at different contribution rates under different collective bargaining agreements or for different groups of employees, the numerator of the fraction would be the sum of the separate products for each agreement or group. The commenter suggested that the purpose of this change would be to

allocate reallocation liability in a manner that takes into account employers' relative contribution rates; for example, in a plan with two employers that each have average contribution base units of 1000, and contribution rates of \$1.50 and \$2.00, respectively, the employers would have different allocation fractions.

PBGC did not adopt the commenter's suggestion. A plan may adopt the variation proposed by the commenter, or another variation needed by the plan, pursuant to § 4219.15(d) of the current regulation. This provision under the current regulation allows plans to adopt rules for calculating an employer's initial allocable share of the plan's unfunded vested benefits in a manner other than that prescribed by the regulation.

The commenter also noted an inconsistency between the allocation fraction under the proposed regulation and § 4219.15(c)(3) of the current regulation, which creates a special rule for certain employers with no or reduced initial withdrawal liability. Because the allocation fraction under § 4219.15(c)(1) will no longer be based on initial withdrawal liability, the final rule eliminates current § 4219.15(c)(3).

The commenter identified a reference in the regulation to section 412(b)(3)(A) of the Code that should be updated to reflect PPA 2006 section 431(b)(3)(A). The final regulation reflects this change and makes conforming changes in the regulation.

PBGC is also amending § 4219.1 of the regulation on Notice, Collection and Redetermination of Withdrawal Liability to implement a provision under new section 4221(g) of ERISA, added by section 204(d)(1) of PPA 2006, which relieves an employer in certain narrowly defined circumstances of the obligation to make withdrawal liability payments until a final decision in the arbitration proceeding, or in court, upholds the plan sponsor's determination that the employer is liable for withdrawal liability based in part or in whole on section 4212(c) of ERISA. The regulation states that an employer that complies with the specific procedures of section 4221(g) (or a similar provision in section 4221(f) of ERISA, added by Pub. L. 108–218) is not in default under section 4219(c)(5)(A).

#### *Definition of Multiemployer Plan*

Section 1106 of PPA 2006 amended the definition of a "multiemployer" plan in section 3(37)(G) of ERISA and section 414(f)(6) of the Code to allow certain plans to elect to be multiemployer plans for all purposes

under ERISA and the Code, pursuant to procedures prescribed by PBGC. PBGC is amending the definition of a "multiemployer plan" under § 4001.2 of its regulation on Terminology (29 CFR part 4001) to add a definition that is parallel to the definition in section 3(37)(G) of ERISA and section 414(f)(6) of the Code.

#### **Applicability**

The changes relating to modifications to the statutory methods prescribed by PBGC for determining an employer's share of unfunded vested benefits are applicable to employer withdrawals from a plan that occur on or after January 29, 2009, subject to section 4214 of ERISA (relating to plan amendments). Changes in the fraction for allocating reallocation liability are applicable to plan terminations by mass withdrawals (or by withdrawals of substantially all employers pursuant to an agreement or arrangement to withdraw) that occur on or after January 29, 2009.

The change relating to the presumptive method made by PPA 2006 is applicable to employer withdrawals occurring on or after January 1, 2007, subject to section 4214 of ERISA.

The changes relating to the effect of PPA 2006 benefit adjustments and employer surcharges for purposes of determining an employer's withdrawal liability are applicable to employer withdrawals from a plan and plan terminations by mass withdrawals (or withdrawals of substantially all employers pursuant to an agreement or arrangement to withdraw) occurring in plan years beginning on or after January 1, 2008.

The change in the definition of a multiemployer plan is effective August 17, 2006. The change in section 4221(g) of ERISA made by PPA 2006 is effective for any person that receives a notification under ERISA section 4219(b)(1) on or after August 17, 2006, with respect to a transaction that occurred after December 31, 1998.

#### **Compliance With Rulemaking Requirements**

##### *E.O. 12866*

The PBGC has determined, in consultation with the Office of Management and Budget, that this final rule is not a "significant regulatory action" under Executive Order 12866. PBGC identifies the following specific problems that warrant this agency action:

- This regulatory action implements the PPA 2006 amendment to section 4211(c)(5) of ERISA that permits a plan using the presumptive method to

substitute a specified plan year for which the plan has no unfunded vested benefits for the plan year ending before September 26, 1980. The final rule provides necessary guidance on the application of this modification to the specific provisions of the presumptive method under section 4211(b) of ERISA. Also, because the statutory amendment lacks specificity in describing how to compute unfunded vested benefits, the rule clarifies the need to reduce the plan's unfunded vested benefits for plan years ending on or after the last day of the designated plan year by the value of all outstanding claims for withdrawal liability reasonably expected to be collected from withdrawn employers as of the end of the designated plan year.

- Existing modifications to the statutory withdrawal liability methods not subject to PBGC approval are outmoded and restrictive and an expansion of the modifications is consistent with statutory changes under PPA 2006. This problem is significant because the current rules impose significant administrative burdens on plans and impede flexibility needed by multiemployer plans to attract new employers.

- This regulatory action implements the PPA 2006 amendment to section 305(e)(9) of ERISA and section 432(e)(9) of the Code requiring plans in critical status to disregard reductions in adjustable benefits and employer surcharges in determining a plan's unfunded vested benefits for purposes of an employer's withdrawal liability. The rule is necessary to conform the definition of nonforfeitable benefits and the allocation fraction based on employer contributions under PBGC's regulations to the statutory changes.

- The rule revises the allocation fraction for reallocation liability, which applies when a multiemployer plan terminates by mass withdrawal, to ensure that reallocation liability is allocated broadly among all liable employers.

*Regulatory Flexibility Act*

PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that the amendments in this final rule will not have a significant economic impact on a substantial number of small entities. Specifically, the amendments will have the following effect:

- A statutory change under PPA 2006 provides plans with a "fresh start" option in determining withdrawal liability when an employer withdraws from a multiemployer plan. This rule clarifies the application of this fresh start option and extends the option to

other withdrawal liability calculations. Under these amendments, plans may avoid costly and burdensome year-by-year calculations of unfunded vested benefits and employers' allocable shares of such benefits for years as far back as 1980; alternatively, these amendments may help plans attract new employers by shielding them from unfunded liabilities that arose in the past. Any changes to a plan's withdrawal liability method are adopted at the discretion of each plan's governing board of trustees. Accordingly, there is no cost to compliance.

- A statutory change under PPA requires plans in "critical" status to disregard reductions in adjustable benefits and employer surcharges in determining an employer's withdrawal liability. This rule clarifies the exclusion of any surcharges from the allocation fraction consisting of employer contributions, and the exclusion of the cost of any reduced benefits from the plan's unfunded vested benefits. The rule simply applies the statutory provisions and imposes no significant burden beyond the burden imposed by statute. Furthermore, more than 88 percent of all multiemployer pension plans have 250 or more participants.

- Another amendment in the rule revises the fraction for allocating reallocation liability (unfunded vested benefits as of the end of the plan year of a plan's termination) among employers when a plan terminates in a mass withdrawal. Plans routinely maintain the contribution records necessary to apply the new fraction in place of the old fraction for this purpose. Moreover, a majority of all plans that terminate in a mass withdrawal have more than 250 participants at the time of termination.

Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), sections 603 and 604 do not apply.

**List of Subjects**

*29 CFR Part 4001*

Business and industry, Organization and functions (Government agencies), Pension insurance, Pensions, Small businesses.

*29 CFR Part 4211*

Pension insurance, Pensions, Reporting and recordkeeping requirements.

*29 CFR Part 4219*

Pensions, Reporting and recordkeeping requirements.

■ For the reasons above, PBGC is amending 29 CFR parts 4001, 4211 and 4219 as follows.

**PART 4001—TERMINOLOGY**

■ 1. The authority citation for part 4001 continues to read as follows:

**Authority:** 29 U.S.C. 1301, 1302(b)(3).

■ 2. In § 4001.2, the definition of *Multiemployer plan* is amended by adding at the end the sentence "Multiemployer plan also means a plan that elects to be a multiemployer plan under ERISA section 3(37)(G) and Code section 414(f)(6), pursuant to procedures prescribed by PBGC."

**PART 4211—ALLOCATING UNFUNDED VESTED BENEFITS TO WITHDRAWING EMPLOYERS**

■ 3. The authority citation for part 4211 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3); 1391(c)(1), (c)(2)(D), (c)(5)(A), (c)(5)(B), (c)(5)(D), and (f).

■ 4. In § 4211.2—

■ a. The first sentence is amended by removing the words "nonforfeitable benefit,".

■ b. The definition of *Unfunded vested benefits* is amended to add the words "as defined for purposes of this section," between the words "plan" and "exceeds".

■ c. A new definition is added in alphabetical order to read as follows:

**§ 4211.2 Definitions.**

\* \* \* \* \*

*Nonforfeitable benefit* means a benefit described in § 4001.2 of this chapter plus, for purposes of this part, any adjustable benefit that has been reduced by the plan sponsor pursuant to section 305(e)(8) of ERISA or section 432(e)(8) of the Code that would otherwise have been includable as a nonforfeitable benefit for purposes of determining an employer's allocable share of unfunded vested benefits.

\* \* \* \* \*

■ 5. A new § 4211.4 is added to read as follows:

**§ 4211.4 Contributions for purposes of the numerator and denominator of the allocation fractions.**

Each of the allocation fractions used in the presumptive, modified presumptive and rolling-5 methods is based on contributions that certain employers have made to the plan for a five-year period.

(a) The numerator of the allocation fraction, with respect to a withdrawing employer, is based on the "sum of the contributions required to be made" or



the "total amount required to be contributed" by the employer for the specified period. For purposes of these methods, this means the amount that is required to be contributed under one or more collective bargaining agreements or other agreements pursuant to which the employer contributes under the plan, other than withdrawal liability payments or amounts that an employer is obligated to pay to the plan pursuant to section 305(e)(7) of ERISA or section 432(e)(7) of the Code (automatic employer surcharge). Employee contributions, if any, shall be excluded from the totals.

(b) The denominator of the allocation fraction is based on contributions that certain employers have made to the plan for a specified period. For purposes of these methods, and except as provided in § 4211.12, "the sum of all contributions made" or "total amount contributed" by employers for a plan year means the amounts considered contributed to the plan for purposes of section 412(b)(3)(A) or section 431(b)(3)(A) of the Code, other than withdrawal liability payments or amounts that an employer is obligated to pay to the plan pursuant to section 305(e)(7) of ERISA or section 432(e)(7) of the Code (automatic employer surcharge). For plan years before section 412 applies to the plan, "the sum of all contributions made" or "total amount contributed" means the amount reported to the IRS or the Department of Labor as total contributions for the plan year; for example, for the plan years in which the plan filed the Form 5500, the amount reported as total contributions on that form. Employee contributions, if any, shall be excluded from the totals.

■ 6. In § 4211.12—

- a. Paragraph (a) is removed;
- b. Paragraphs (b) and (c) are redesignated as paragraphs (a) and (b);
- c. Newly designated paragraph (a) introductory text is amended by removing the words "(b)(4)" and adding in their place the words "(a)(4)";
- d. Newly designated paragraph (a)(1) is amended by adding the words "or section 431(b)(3)(A)" after the words "section 412(b)(3)(A)";
- e. Newly designated paragraphs (a)(2) and (a)(3) are amended by adding the words "or section 431(c)(8)" after the words "section 412(c)(10)";
- f. Newly designated paragraph (a)(4)(ii) is amended by removing the words "paragraph (a) of this section, or the amount described in paragraph (b)(1), (b)(2) or (b)(3) of this section" and adding in their place the words "§ 4211.4(b), or the amount described in paragraph (a)(1), (a)(2) or (a)(3) of this section";

- g. Newly designated paragraph (b) introductory text is amended by removing the words "(c)(1)" and adding in their place the words "(b)(1)";
- h. Newly designated paragraph (b)(2) introductory text is amended by removing the words "(c)" and adding in their place the words "(b)";
- i. Newly designated paragraph (b)(3) introductory text is amended by removing the words "(c)(2)" and adding in their place the words "(b)(2)"; and
- j. Paragraphs (c) and (d) are added to read as follows:

**§ 4211.12 Modifications to the presumptive, modified presumptive and rolling-5 methods.**

\* \* \* \* \*

(c) "*Fresh start*" rules under presumptive method.

(1) The plan sponsor of a plan using the presumptive method (including a plan that primarily covers employees in the building and construction industry) may amend the plan to provide—

- (i) A designated plan year ending after September 26, 1980, will substitute for the plan year ending before September 26, 1980, in applying section 4211(b)(1)(B), section 4211(b)(2)(B)(ii)(I), section 4211(b)(2)(D), section 4211(b)(3), and section 4211(b)(3)(B) of ERISA, and
- (ii) Plan years ending after the end of the designated plan year in paragraph (c)(1)(i) will substitute for plan years ending after September 25, 1980, in applying section 4211(b)(1)(A), section 4211(b)(2)(A), and section 4211(b)(2)(B)(ii)(II) of ERISA.

(2) A plan amendment made pursuant to paragraph (c)(1) of this section must provide that the plan's unfunded vested benefits for plan years ending after the designated plan year are reduced by the value of all outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers that had withdrawn from the plan as of the end of the designated plan year.

(3) In the case of a plan that primarily covers employees in the building and construction industry, the plan year designated by a plan amendment pursuant to paragraph (c)(1) of this section must be a plan year for which the plan has no unfunded vested benefits.

(d) "*Fresh start*" rules under modified presumptive method.

(1) The plan sponsor of a plan using the modified presumptive method may amend the plan to provide—

- (i) A designated plan year ending after September 26, 1980, will substitute for the plan year ending before September 26, 1980, in applying section

4211(c)(2)(B)(i) and section 4211(c)(2)(B)(ii)(I) and (II) of ERISA, and

(ii) Plan years ending after the end of the designated plan year will substitute for plan years ending after September 25, 1980, in applying section 4211(c)(2)(B)(ii)(II) and section 4211(c)(2)(C)(i)(II) of ERISA.

(2) A plan amendment made pursuant to paragraph (d)(1) of this section must provide that the plan's unfunded vested benefits for plan years ending after the designated plan year are reduced by the value of all outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers that had withdrawn from the plan as of the end of the designated plan year.

**PART 4219—NOTICE, COLLECTION, AND REDETERMINATION OF WITHDRAWAL LIABILITY**

- 7. The authority citation for part 4219 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3) and 1399(c)(6).

■ 8. In § 4219.1, paragraph (c) is amended by removing the words "after April 28, 1980 (May 2, 1979, for certain employees in the seagoing industry)" and adding in their place the words "on or after September 26, 1980, except employers with respect to whom section 4221(f) or section 4221(g) of ERISA applies (provided that such employers are in compliance with the provisions of those sections, as applicable)".

■ 9. In § 4219.2—

- a. Paragraph (a) is amended by removing the words "nonforfeitable benefit,".
- b. Paragraph (b) is amended by adding the word "nonforfeitable" between the words "vested" and "benefits" and the words "(as defined for purposes of this section)" between the words "benefits" and "exceeds" in the definition of *Unfunded vested benefits*.
- c. Paragraph (b) is amended by adding a new definition in alphabetical order to read as follows:

**§ 4219.2 Definitions.**

\* \* \* \* \*

"*Nonforfeitable benefit* means a benefit described in § 4001.2 of this chapter plus, for purposes of this part, any adjustable benefit that has been reduced by the plan sponsor pursuant to section 305(e)(8) of ERISA and section 432(e)(8) of the Code that would otherwise have been includable as a nonforfeitable benefit."

\* \* \* \* \*

- 10. In § 4219.15, revise paragraphs (c)(1) and (c)(3) to read as follows:

**§ 4219.15 Determination of reallocation liability.**

\* \* \* \*

(c) \* \* \*

(1) *Initial allocable share.* Except as otherwise provided in rules adopted by the plan pursuant to paragraph (d) of this section, and in accordance with paragraph (c)(3) of this section, an employer's initial allocable share shall be equal to the product of the plan's unfunded vested benefits to be reallocated, multiplied by a fraction—

(i) The numerator of which is the yearly average of the employer's contribution base units during the three plan years preceding the employer's withdrawal; and

(ii) The denominator of which is the sum of the yearly averages calculated under paragraph (c)(1)(i) of this section for each employer liable for reallocation liability.

\* \* \* \*

(3) *Contribution base unit.* For purposes of paragraph (c)(1) of this section, a contribution base unit means a unit with respect to which an employer has an obligation to contribute, such as an hour worked or shift worked or a unit of production, under the applicable collective bargaining agreement (or other agreement pursuant to which the employer contributes) or with respect to which the employer would have an obligation to contribute if the contribution requirement with respect to the plan were greater than zero.

\* \* \* \*

Issued in Washington, DC, this 23 day of December 2008.

**Charles E.F. Millard,**

*Director, Pension Benefit Guaranty Corporation.*

Issued on the date set forth above pursuant to a resolution of the Board of Directors authorizing publication of this final rule.

**Judith R. Starr,**

*Secretary, Board of Directors, Pension Benefit Guaranty Corporation.*

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