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April 6, 2015

VIA HAND DELIVERY

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

Re: Comments - Request for Information on Partitions of Eligible Multiemployer Plans and Facilitated Mergers under the Multiemployer Pension Reform Act of 2014

To The Regulatory Affairs Group:

Morgan, Lewis & Bockius LLP ("Morgan Lewis") appreciates the opportunity to respond to the PBGC's request for comments on matters that may be addressed in future PBGC guidance on implementing the new partition and merger tools that Congress has provided to assist multiemployer pension plans in Critical and Declining status under the Multiemployer Pension Reform Act of 2014 ("MPRA"). We respectfully request that the PBGC provide guidance that is workable and clear; provide plan sponsors with substantial discretion and flexibility in determining a plan's needs and proposing ways to remedy its structural and financial problems; avoid a one-size-fits-all approach that fails to recognize and respond to the unique features and challenges facing many plans in Critical and Declining status; and that the PBGC's guidance not create a burdensome and time-consuming administrative structure that would undermine MPRA's goal of providing timely financial assistance to the most severely troubled multiemployer plans to avoid their insolvency.

I. Morgan Lewis's Interest in the PBGC's Request for Information

Morgan Lewis represents and provides legal counsel to the boards of trustees of numerous multiemployer defined benefit plans in various industries and, separately, advises many employers that participate in multiemployer plans. Morgan Lewis has a strong interest in the PBGC's regulatory guidance under MPRA because the PBGC's guidance will greatly affect contributing employers, boards of trustees as plan sponsors, plan administrators, service providers, and plan participants and beneficiaries.

Many multiemployer plans are in perilous financial shape. These plans are in Critical status under Section 305(b)(2) of ERISA and, notwithstanding actions taken under Sections 305(e) and (f) of ERISA, are facing insolvency in the near future. Many plans are also in Critical and Declining status under new Section 305(b)(6) of ERISA.

These plans desperately need governmental approval to utilize the new tools available to plans in Critical and Declining status, including but not limited to the ability to (1) suspend benefits under Section 305(e)(9) of ERISA, (2) partition certain liabilities with financial assistance from the PBGC under Section 4233 of ERISA, and/or (3) merge with other plans under Section 4231 of ERISA with the PBGC's financial and non-financial assistance. By enacting MPRA, Congress recognized the need to save from insolvency the multiemployer plans most in need of benefit reductions, structural reform, and PBGC financial assistance.

For many plans in Critical and Declining status, time is of the essence. Not only must Trustees be given sufficient discretion and flexibility to make the difficult decisions their individual plans need in order to avoid insolvency, they must be able to take action immediately. Neither time nor funding trends are on the side of plans in Critical and Declining status. We therefore request that the PBGC issue its guidance expeditiously so that plans in Critical and Declining status can embark on the road toward solvency before it is too late.

II. Detailed Comments to the Request for Information

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?**

Merger Application Process. MPRA amended Section 4231 of ERISA to set forth a facilitated merger procedure under Section 4231(e) whereby, upon request by plan sponsors, the PBGC may take such actions as it deems necessary to promote and facilitate a merger of two or more multiemployer plans, including providing financial assistance, if certain statutory requirements are met.

MPRA provides no specific rules or application procedures that must be followed by plan sponsors in requesting PBGC assistance in promoting and facilitating a merger, and we request that the PBGC not devise any rigid rules or burdensome application procedure. Because of major differences that exist among plans, the PBGC should offer plan sponsors maximum discretion and flexibility in the application process to respond to their particular circumstances and to request PBGC assistance as appropriate.

In addition, if the PBGC denies financial assistance for a merger, the PBGC should disclose to plan sponsors and the Plan Sponsor Advocate the reasons for the denial and provide other alternatives to facilitate a successful merger.

Partition Application Process. MPRA eliminated the previous statutory framework applicable to plan partitions and replaced it with new rules under Section 4233 of ERISA. Generally, under the new statute, upon application by an "eligible multiemployer plan," the PBGC may issue an order of partition if the requirements set forth under Section 4233(b) are satisfied, including maximum allowable benefit suspensions under Section 305(e)(9) of ERISA.

We do not think that the PBGC should issue guidance that attempts to limit or define which plan liabilities or beneficiaries may be transferred or partitioned out of the original plan and moved to a successor plan to avoid plan insolvency. Congress provided no such limiting language in MPRA, and this is largely because defining those who might be eligible for partitioning will vary depending on the particular multiemployer plan and industry. One plan, for example, may decide that a partition order should include any "orphan" beneficiary whose last signatory employer is not contributing to the plan as well as any "orphan" beneficiary whose last signatory employer has withdrawn from the plan and not paid its full withdrawal liability. Partitioning such beneficiaries (combined with benefit suspensions) might be sufficient for a plan to avoid insolvency.

For other plans, however, such a definition may not be sufficient to enable the plan to avoid insolvency and/or may not accurately reflect the work histories in the industry. For example, a plan could have many retirees who worked for 20-30 years for a company that went bankrupt without paying any withdrawal liability, and subsequently, worked only a few years for a contributing employer before retiring. To the extent the retirees' last signatory employer continues to contribute to the plan for hours worked by active employees, the retirees would not be considered "orphans" eligible for partitioning under the definition noted in the example above. The plan, however, would be burdened with substantial unfunded vested liability and perhaps unable to avoid insolvency.

Similarly, to avoid insolvency, some plans may need to partition all of the liabilities attributable to those beneficiaries for whom 50% or more of their credited service was not and is not supported by employer contributions.

In short, the PBGC should not establish rules restricting how a plan sponsor may propose to define which plan liabilities or beneficiaries are eligible for partitioning. Plan sponsors should have substantial discretion in determining which plan liabilities or beneficiaries are eligible to be partitioned.

In addition, if the PBGC preliminarily determines that financial assistance for a partition would impair the PBGC's ability to meet its existing financial obligations, the PBGC must disclose to plan sponsors and the Plan Sponsor Advocate sufficient financial and other information to evaluate and verify any such claim, and give the plan sponsor and Plan Sponsor Advocate an opportunity to respond.

Except as noted above, we do not think the Participant and Plan Sponsor Advocate should have any significant involvement in the merger and the partition processes. The Advocate should bring forward specific issues that may need to be addressed, but should not become a procedural hurdle that the plan sponsor must overcome or satisfy to obtain a partition or merger.

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?**

Under Sections 4231 and 4233 of ERISA, the PBGC's grant of financial assistance to facilitate a plan merger, or similarly, the PBGC's grant of a partition order, each require the plan sponsor to demonstrate that the PBGC's action or assistance is necessary for the partitioned or merged plan to remain solvent.

To demonstrate that a partition or merger is necessary for a plan to remain solvent, the PBGC should require certification by the plan's actuary, based on reasonable actuarial estimates, assumptions, and methods, most of which is already prepared and available. The PBGC should review the actuary's certification under a standard of reasonableness and not second-guess the actuary's judgment. The PBGC's review of the actuary's certification should be on a case-by-case basis, considering all relevant facts and circumstances, including industry declines and any other special challenges facing the particular plan. Such factors may vary greatly for those plans applying to the PBGC for assistance; therefore, we recommend that the PBGC should not issue rigid guidelines concerning what evidence the plan must present to the PBGC to establish that a partition or merger is necessary for the plan to remain solvent.

In addition, MPRA references the need for a plan to remain solvent, with no reference to the period of time that the plan should remain solvent. We believe that for this provision, the PBGC should require a plan to demonstrate that a partition or merger is necessary for the plan to remain solvent for at least 15 years, but not more than 30 years and not for an indefinite period. A period less than 15 years would suggest a short-term fix and likely require the plan to return to the PBGC for additional assistance. We do not think that result was ever the intent of MPRA.

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

The PBGC has requested comments regarding potential concerns for "small plans" seeking merger or partition assistance from the PBGC. If the PBGC will release guidance under Sections 4231 and 4233 of ERISA pertaining to "small plans," we believe "small plans" should be appropriately defined in the guidance. If the PBGC intends on referring to the definition in Section 303(g)(2)(B) of ERISA, then that reference should be clearly stated in the guidance. In addition, the PBGC should be receptive to a simultaneous partition and merger, or a staggered partition and merger of these small plans. In some situations, it may be desirable to first partition a plan to make it more attractive as a merger partner.

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?**

Plan sponsors have concerns that participants and beneficiaries will not fully understand the consequences of opposing or attempting to block a proposed partition or merger. If a plan proposes a partition, the plan's participants and beneficiaries probably will be fearful, apprehensive, and perhaps angry about the benefit reductions that likely will accompany the partition. Participants and beneficiaries, however, should be advised of the need to weigh the effects of a partition against the effects of plan insolvency, in which their benefits would be subject to even greater reductions and, for example, without special protection for those age 75 or older or disability pensioners. It would be helpful if the PBGC issued guidance describing the potential consequences of plan insolvency on plan participants and beneficiaries. Although plan sponsors could craft such language, it will have greater weight and import to the participants and beneficiaries if it comes from the PBGC. In addition, such guidance will assist plan sponsors in effectively communicating with participants and beneficiaries regarding how their benefits could be affected in the future.

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 ensures 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)?**

A model notice to participants and beneficiaries would be helpful if it consists of the following:

- No more than 1-2 pages in length.

- Written in a manner to be understood by an average plan participant.

- Includes a statement that the plan is in Critical and Declining status and that a partition is an option created by federal law to enable the plan to avoid insolvency.

- Includes a statement that the plan's actuary has determined that a partition is necessary for the plan to avoid insolvency.

- Summarizes the classes of participant and beneficiaries who would be partitioned if the application is granted—e.g., beneficiaries whose former employer is not contributing to the plan or whose former employer withdrew without paying its full withdrawal liability.

- Includes a sentence from Section 4233(e)(1) of ERISA stating: "After the partition is effective, the Plan's affected participants and beneficiaries will not receive less of a benefit from the Plan than they would have received if the partition had not occurred, but taking into account the Plan's benefit suspensions under Section 305(e)(9) of ERISA and any future Plan amendments following the effective date of such partition."

- Summarizes the consequences if the plan becomes insolvent—e.g., benefits could be reduced to all participants and beneficiaries; benefits reduced to the PBGC guarantee; no protection for retirees age 75 and older; no protection for disability pensioners, etc.

- Includes a statement that Congress recognized that time is of the essence for plans in Critical and Declining status, and that the longer plan sponsors wait to take action, the more severe the benefit reductions likely will be.

- Includes a statement that the PBGC must make a determination on the application within 270 days.

6. ***PBGC Determination*: For purposes of the requirement under section 4233(b) that the 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?**

Section 4233(b)(2) of ERISA now requires a plan sponsor to demonstrate the plan is an "eligible multiemployer plan" and has taken (or is concurrently with an application for a partition) all reasonable measures to avoid a plan insolvency, including the maximum benefit suspensions under Section 305(e)(9) of ERISA.

The plan sponsor should be able to rely on any relevant economic, industry, or actuarial data that supports its application. Among other things, this could include governing plan documents, plan amendments, previous benefit adjustments, meeting minutes, Rehabilitation Plans, actuarial studies and reports, and funding status certifications. Any actuarial reports must be based on reasonable actuarial estimates, assumptions, and methods. The PBGC should review the plan's sponsor's supporting materials under a standard of reasonableness and should avoid a lengthy discovery-like request for information from the plan sponsor. The PBGC should limit the data it requests from the plan sponsor and avoid erecting procedural barriers or overly burdensome paperwork requirements that are inconsistent with the intent of Congress to timely address the severe financial problems facing plans in Critical and Declining status. The PBGC's determination should be decided on a case-by-case basis, considering all relevant facts and circumstances surrounding the plan in question.

With respect to the role of the Participant and Plan Sponsor Advocate during the partition application process, it should raise issues or other specific participant situations to be sure they are considered in the application, but the Advocate should avoid becoming a partisan voice in favor of or against the proposed partition. The Advocate should help facilitate the process and assist in the ultimate goal of avoiding a plan insolvency.

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.**

Time is of the essence for plans in Critical and Declining status. Where a plan sponsor has submitted concurrent applications for partition and benefit suspensions, it is essential for the PBGC and Treasury to work closely together and communicate with one another during the application review period. It might be useful for there to be an interagency taskforce that would jointly manage such concurrent applications. Delays in suspending benefits could jeopardize that plan's solvency. Delays could also jeopardize the plan sponsor's ability to find a suitable merger partner. If benefit suspensions may not become effective prior to the partition, the

Treasury and PBGC should act to ensure that suspensions and partitions become effective at the same time and on the earliest possible date.

With respect to funds to be transferred in a partition for a plan to remain solvent, we recommend that the amount be sufficient to enable the plan to remain solvent for no less than 15 years and no more than 30 years. Any shorter period would not "reform" a plan. It would constitute only a short-term fix and likely require repeat applications from the same plan sponsors. We do not think this was the intent of Congress in enacting MPRA.

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?**

MPRA removed the prior restrictions on which plan liabilities (i.e., those directly attributable to bankrupt employers) could be transferred to a partitioned plan. The PBGC therefore should not attempt to create or impose any such restriction as it would be contrary to the intent of the statute.

In determining the plan's liability that should be transferred to enable the plan to remain solvent, the PBGC should rely on the analysis and actuarial data in the plan sponsor's application, provided that the data is based on reasonable actuarial estimates, assumptions, and methods. MPRA provides plan sponsors with substantial flexibility and discretion in determining the extent to which plan liabilities should be transferred to avoid insolvency. The plan's showing must be evaluated by the PBGC on a case-by-case basis.

The PBGC should not add additional recordkeeping requirements for the plan sponsors. We believe plan sponsors have access to most, if not all, of the administrative and actuarial information the PBGC would need to analyze whether the plan sponsors have partitioned the proper amount of liabilities for the plan to remain solvent. We believe the amount transferred should be sufficient to enable the plan to remain solvent for 15-30 years, depending on the specific facts and circumstances.

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?**

We do not anticipate specific administrative or operational issues resulting from the partition of a plan under MPRA's rules. If a partition combined with benefit suspensions keeps contribution rates reasonable and enables the plan to avoid insolvency, we would not anticipate substantial employer withdrawals from the plan. Of course, the extent of any future withdrawals will depend on the particular facts and circumstances present at the time and likely will vary from plan to plan.

We are confident the plan sponsors will be able to monitor, administer, and operate their plans post-partition without extensive government oversight. The trustees of the plans will continue to be fiduciaries with an obligation to act in the best interests of the plan's participants and beneficiaries. Any oversight by the PBGC could be accomplished by an annual reporting requirement whereby the plan sponsors of the original and successor plans would summarize the plans' financial condition, funding status, and actuarial projections of solvency for the period of the partition.

__Issues Affecting Facilitated Mergers Only__

10. ***Technical Assistance:*** **MPRA provides a non-exclusive list of the types of non-financial 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 nonfinancial technical advice that would help facilitate multiemployer mergers?**

Many plans are searching for suitable merger partners and these plans likely will request both financial and non-financial assistance from the PBGC in the coming months. It would be helpful if the PBGC issued guidance to clearly inform plan sponsors of the various types of assistance that are available, how to apply for the assistance, and the name of a contact person at the PBGC responsible for follow-up. In light of the unique nature of every potential merger, the PBGC should consider an interactive process that might involve an initial conference with the plan sponsor and a "facilitator" for each merger case file.

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?**

Each facilitated merger under Section 4231(e)(1) of ERISA will require an individualistic approach. In light of every plan's unique situation and the differences in industries and economic factors affecting each plan, the PBGC should avoid requiring a standardized list of actuarial, economic, industry or other information as part of the facilitated merger process. Rather, the PBGC should consider an interactive process, whereby the Agency, and potentially the Advocate, meet with the plan sponsors to understand the merger opportunity, and based on this input, develop the information necessary to evaluate the merger.

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?**

Often, for a plan to find a suitable and willing merger partner, the plan sponsor seeking the merger likely will need to suspend benefits prior to the merger. If a plan sponsor files concurrent applications for a suspension of benefits and a merger, the PBGC and the Treasury must work closely together and communicate regularly with each other and the plan sponsor. This communication is vital to the potential success of MPRA's reforms and facilitating plan solvency.

Procedures should be established by the relevant agencies to ensure that concurrent applications to the PBGC and Treasury do not unduly delay a plan sponsor's ability to suspend benefits under Section 432(e)(9) of the Code. For plans in Critical and Declining status that need both benefit suspensions and a merger to avoid insolvency, a timely and coordinated response by the government will be essential.

III. Conclusion

For most multiemployer pension plans in Critical and Declining status, MPRA offers their only hope for survival. The responses of the PBGC and the Treasury to forthcoming applications for benefit suspensions, partitions, and mergers likely will determine whether MPRA can reform troubled plans or whether MPRA is a well-intentioned but futile law.

Morgan Lewis appreciates the opportunity to submit these comments. If you have questions concerning our comments, or if we can be of further assistance, please contact Steve Spencer at (215) 963-5714 or John Ring at (202) 739-5096.

Sincerely,

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JFR/dpo

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April 6, 2015

VIA HAND DELIVERY

CC:PA:LPD:PR (REG-102648-15)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Re: Comments - Request for Information on Suspension of Benefits under the Multiemployer Pension Reform Act of 2014

Dear Internal Revenue Service:

Morgan, Lewis & Bockius LLP ("Morgan Lewis") appreciates the opportunity to respond to the Treasury Department and the Internal Revenue Service's (collectively, "Treasury") request for comments on implementing the new rules relating to plans in Critical and Declining status under new Section 432(e)(9) of the Internal Revenue Code of 1986, as amended (the "Code") added by the Multiemployer Pension Reform Act of 2014 ("MPRA"). As discussed in greater detail below, we respectfully request that Treasury provide guidance that is workable and clear; provide plan sponsors with substantial discretion and flexibility in determining a plan's needs and proposing ways to remedy its structural and financial problems; avoid a one-size-fits-all approach that fails to recognize and respond to the unique features and challenges facing many plans in Critical and Declining status; and that Treasury's guidance not create a burdensome and time-consuming administrative structure that would undermine MPRA's goal of providing timely financial assistance to the most severely troubled multiemployer plans to avoid their insolvency.

I. Morgan Lewis's Interest in the Treasury's Request for Information

Morgan Lewis represents and provides legal counsel to the boards of trustees of numerous multiemployer defined benefit plans in various industries and, separately, advises many employers that participate in multiemployer plans. Morgan Lewis has a strong interest in Treasury's regulatory guidance under MPRA because Treasury's guidance will affect contributing employers, boards of trustees as plan sponsors, plan administrators, service providers, and plan participants and beneficiaries.

Many multiemployer plans are in perilous financial shape. These plans have already been actuarially certified to be in Critical status under Section 432(b) of the Code and, notwithstanding actions taken under Sections 432(e) and (f) of the Code, are facing insolvency soon. Several plans are in Critical and Declining status under the criteria set forth under the new Section 432(b)(6) of the Code.

These multiemployer plans desperately need governmental approval to utilize the new tools available to plans in Critical and Declining status, including but not limited to, the ability to suspend benefits under Section 432(e)(9) of the Code. By enacting MPRA, Congress recognized the need to save from insolvency the multiemployer plans most in need of benefit reductions, structural reform, and PBGC assistance.

For many plans in Critical and Declining status, time is of the essence. Not only must trustees be given sufficient discretion and flexibility to make the difficult decisions their individual plans need to avoid insolvency, they must be able to take action immediately. Neither time nor funding trends are on the side of many of these plans in Critical and Declining status. We therefore respectfully request Treasury issue its guidance expeditiously so that plans in Critical and Declining status may get to work and embark on a road toward solvency before it is too late.

II. <u>Detailed Comments to the Request for Information</u>

1. **How should future guidance address actuarial and other issues, including duration, related to the following certifications and determinations:**

    a) **The actuary's certification under section 432(b)(3) that a multiemployer plan is in critical and declining status;**

    b) **The actuary's section 432(e)(9)(C)(i) projection of continued solvency (taking into account the proposed suspension and, if applicable, a proposed partition under section 4233 of ERISA); and**

    c) **The plan sponsor's section 432(e)(9)(C)(ii) determination that the plan is projected to become insolvent unless benefits are suspended?**

The process surrounding the annual actuarial certification of plans currently functions well under Section 432(b) of the Code; therefore, we primarily defer to the specific comments submitted by the professional actuarial community.

We recommend, however, that future regulatory guidance not make it more arduous or time consuming for an actuary to certify a plan in Critical and Declining status under MPRA's new test than it is for the certification of the other plan statuses already set forth under the Code.

We additionally suggest that future guidance confirm that once a plan has been certified to be in Critical and Declining status and has suspended benefits under Section 432(e)(9) of the Code, a subsequent annual actuarial certification that certifies the plan to have an improved funding status should not have an impact on the plan's previous suspension of benefits under Section 432(e)(9). Treasury should avoid rulemaking that would require a plan, which has previously suspended benefits but later shows an improved funding trend, to make subsequent benefits changes or improvement that may jeopardize a plan's future funding status. Critical and Declining status plans should not be subjected to legal requirements that create a whipsawing or instability effect from year-to-year on the plan's goal of reaching solvency. Plan sponsors, with the help of the actuaries, need to be able to reasonably project future funding and work steadily towards solvency.

Under MPRA, one of the conditions placed on a plan sponsor's ability to suspend benefits under Section 432(e)(9)(C)(ii) is that "the plan sponsor determines, in a written record to be maintained throughout the period of benefit suspensions, that the plan is still projected to become insolvent unless benefits are suspended." To allow plan sponsors to effectively suspend benefits and potentially improve the plan's funding status, we recommend future guidance confirm that this provision only requires the plan sponsor to make this determination (based upon available actuarial data) once a year and record it in trustees' regular meeting minutes. It is important this documentation requirement not create an unnecessary additional burden or expense for plan sponsors.

2. **For purposes of the section 432(e)(9)(D)(iii) limitation that a suspension is not permitted to apply benefits based on disability (as defined under the plan), how can a plan sponsor identify which benefits are based on disability?**

The new Section 432(e)(9)(D)(iii) of the Code provides that no benefits based on disability (as defined under the plan) may be suspended. In our experience, multiemployer plans provide several different types of disability benefits. Some plans include provisions that permit a participant who becomes disabled under the plan's terms, to commence his or her retirement regardless of age. In other plans, the disability benefit is a disability auxiliary benefit as described under Treas. Reg. 1.401(a)-20, i.e., a benefit that is payable upon disability, but which ceases as the first to occur of a cessation of the disability or the participant's attainment of normal retirement age (as defined under the terms of the plan but usually age 65). At normal retirement age the participant then becomes entitled to commence his vested pension, commencing upon his attainment of normal retirement age and equal to the monthly amount of normal pension the participant accrued as of the date his disability benefit commenced under the plan.

Plan sponsors should be able to rely on existing guidance that permits suspension of a disability benefit that is an auxiliary benefit, as this benefit is not part of the participant's accrued benefit under Section 411(d)(6) of the Code and request that proposed guidance make this clear. We request that guidance clarify that once a participant who has been receiving an auxiliary disability benefit attains normal retirement age and converts from the disability benefit to the normal retirement pension, the benefit being received should not be considered a benefit based on disability and thus may be suspended, subject only to the limitations set forth under Section 432(e)(9)(D).

3. For participants who have not yet retired:

a) What practical issues should be considered as a result of the fact that their benefits are not yet fixed (for example, their benefits could vary as a result of future accruals, when they decide to retire and which optional form of benefit they select)?

b) What practical issues should be considered in the case of a suspension of benefits that is combined with a reduction of future accruals or a reduction of section 432(e)(8) adjustable benefits (such as subsidized early retirement factors) under a rehabilitation plan?

We understand there will be uncertainty within the multiemployer community, especially amongst participants, surrounding future rulemaking and implementing MPRA's suspension of benefit provisions, and during a plan's benefit suspension application process. Specifically, practical issues will arise for those active participants contemplating their retirement without knowing exactly if or when their plan will implement benefit suspensions. Communication between the plan sponsor and the participants concerning the specifics of any future benefit changes is critical to limiting many of these potential arising issues and related uncertainty.

Current law already provides for suitable communication mechanisms and forms of notice that plans must provide to participants when their benefits or terms of the plan change. These already existing and effective communication methods should be carried over and utilized when a plan is undertaking the benefit suspension process.

4. **For participants who have retired, what practical issues should be considered regarding the section 432(e)(9)(D)(ii) age limitations on suspensions, the application of the section 432(e)(9)(E) rules on benefit improvements or other provisions?**

The new Sections 432(e)(9)(D) and (E) of the Code include specific age limitations for benefit suspensions, including protections for participants and beneficiaries who have attained the age of 80 and partial protection and phase-in cuts for participants and beneficiaries between the ages of 75 to 79. The limitations on suspensions set forth under Section 432(e)(9)(D) are important and relatively clear. Future guidance should be limited to reinforcing MPRA's requirement regarding the applicability of the benefit suspension limitation. Specifically, guidance should provide that benefit suspensions to a particular participant or beneficiary be determined by taking a snapshot as of the effective date of the plan's benefit suspension; the protections for those participants and beneficiaries over the specified ages at the time of the benefit suspension should be protected. Future regulations should clarify that these participants and beneficiaries are prohibited from aging-into suspension protection upon achieving a certain age after the effective date of the plan's benefit suspension. These clarifications should help facilitate those plans in Critical and Declining status in taking the necessary measures to avoid insolvency.

Section 432(e)(9)(D)(iv), provides that a plan's benefit suspensions must be reasonably estimated to achieve the level to avoid insolvency but must "not materially exceed, the level that is necessary to avoid insolvency." As written, this provision of MPRA does not provide for any test a plan sponsor may use to make a determination that the benefit suspensions do not "materially exceed" the level that is necessary to avoid insolvency. Any guidance issued with respect to this determination should provide maximum flexibility and discretion to plan sponsors to make the necessary benefit cuts to allow the plan to achieve solvency for a 15-30 year period. We also request this guidance clarify that this determination be made at the time the plan sponsor is implementing suspensions and need not be updated or revised thereafter, thus eliminating the potential for plan sponsors being required to react to year-to-year market fluctuations that could alter the prior projections.

Treasury should consider that the benefit suspension limitations set forth under 432(e)(9)(D) will, in reality, prevent some plans from actually reaching their goal of solvency. Some plans will implement all reasonable measures and suspend all benefits allowable under the law, but these actions will still not prevent a plan's future insolvency. MPRA does not seem to contemplate this scenario. These types of plans will need a certain amount of discretion or an alternative avenue, within the statutory framework, to reduce or suspend everyone's benefit equally under a set of circumstances, including, for example, the possibility of locating a merger partner or considering a partition in the future. Without such flexibility, these plans will still enter insolvency under MPRA. We recognize the importance of MPRA's limitations on a plan's benefit suspensions, but too strict a reading of the statute's limitations could prohibit a plan sponsor from improving the funding of the plan.

5. **With respect to the section 432(e)(9)(F) requirement to provide notice of the proposed suspension to plan participants and beneficiaries concurrently with the submission of the application for approval:**

   a) **What suggestions do commenters have for the steps that are needed to satisfy the requirement to provide notice to the plan participants and the beneficiaries "who may be contacted by reasonable efforts," including the application of that requirement to terminated vested participants?**

   b) **What practical issues do plan sponsors anticipate in providing individual estimates of the effect of the proposed suspensions on each participant and beneficiary?**

   c) **If the suspension is combined with other reductions as described in request number 3.b, how will the notice of proposed suspension interact with the notices required for those other reductions?**

   d) **What issues arise in coordinating benefit protections that are measured as of the date of suspensions (such as the restriction on suspensions that apply to a participant or beneficiary who has attained age 75 as of the effective date of the suspension) with the timing of the application, notice, and voting process?**

To accommodate both the concerns of the plan sponsors and the participants and beneficiaries, whose benefits may be suspended, the notice of proposed benefit suspensions, required under Section 432(e)(9)(F) of the Code, should follow the notice a plan must generally provide to "applicable individuals," under Section 4980F of the Code. Treasury's future guidance under 432(e)(9)(F) should correspond with the already existing Treasury regulations governing the notice of reduction of future benefit accruals under Section 4980F, as opposed to developing an entirely new notice to be used for proposed benefit suspensions. Similar form, content, and timing will keep plan expenditures down while providing participants with a familiar notice many have seen in the past. The notices should also discuss the consequences if the plan sponsor does not suspend benefits, such as insolvency and more drastic benefit reductions.

Requiring plan sponsors to provide individual estimates of the effect of the proposed benefit suspensions is a time consuming and expensive administrative burden to place on financially troubled plans. Future guidance should allow plans, in certain situations, the discretion to follow other benefit change notices required under the Code and ERISA and provide anonymous but specific examples of the effects of the benefit suspensions on individuals rather than beneficiary-by-beneficiary individual estimates. If a plan satisfies certain regulatory criteria and includes Treasury-approved examples of benefit calculations, Treasury would then deem that the plan has provided proper notice of the benefit suspension to the plan's participants and beneficiaries.

Further, plan sponsors should be allowed to distribute only one notice from the plan, which would address any proposed benefit suspensions and other benefit reductions taking effect under the plan. Congress already considered this approach as Section 432(e)(9)(F)(iv) provides that any notice of benefit suspension shall fulfill the requirement for notice of significant benefit reduction as set forth in Section 4980F.

6. **With respect to item 5, please provide any examples of notice of proposed suspension that commenters would like to be considered in the development of a model notice.**

Future guidance concerning the notice of proposed suspension of benefits should be modeled after the current Section 4980F of the Code notice regulations.

7. **What issues arise in connection with section 432(e)(9)(G)(ii) requirement to solicit comments on the application for suspension of benefits?**

    a) **Should the comments received from contributing employers, employee organizations, participants and beneficiaries, and other interested parties be made available to the public?**

    b) **How long should the comment period last?**

We recommend Treasury avoid publishing or otherwise publically releasing any comments it receives concerning a plan's application to suspend benefits under Section 432(e)(9)(G)(ii) of the Code. Comments submitted should be utilized internally by Treasury to consider any issues or special circumstances that interested parties may want to make sure are raised. Publication of comments could lead to the over-politicization and polarization of a plan sponsor's decision to suspend benefits, which could ultimately lead to unnecessary delays in a plan's benefit suspension process and attempt to avoid insolvency. The publication of the comments and potential responses could have a chilling effect on a plan sponsor's efforts to suspend benefits, which will already be a very difficult and laborious decision.

During the benefit suspension process, there are numerous statutory mechanisms already in place under Section 432(e)(9) to provide notice to and receive feedback from the plan's interested parties, including a participant and beneficiary ratification process. Also, the voting ballot must include a "statement in opposition to the suspension compiled from comments." The publication of individual comments for the general public and unrelated parties is not necessary or beneficial to the process.

Further, Treasury should only consider those comments received that discuss serious and overlooked issues, deficiencies, or special circumstances regarding the particular benefit suspension application in question. If a plan sponsor must overcome additional hurdles prior to suspending benefits, it may jeopardize the plan's ability to avoid insolvency in time.

For reasons similar to those identified above, the comment period on a plan's application to suspend benefits should be kept relatively short, such as approximately 15 days. A plan sponsor should be able to move through the benefit suspension process relatively quickly in order to implement the plan changes needed to stave off and avoid an impending insolvency.

8. **With respect to the section 432(e)(9)(H) participant vote, what issues arise in connection with:**

    a) **Preparing the ballot, including developing a statement in opposition to the suspension compiled from comments and obtaining approval of the ballot within the statutory time constraints for conducting a vote; and**

    b) **Conducting the vote and obtaining certification of the results of the vote?**

Section 432(e)(9)(H)(ii) of the Code states that Treasury, in consultation with the PBGC and DOL, shall administer the vote of the plan's participants and beneficiaries, and the voting ballot must contain specific statements as set forth in Section 432(e)(9)(H)(iii). In consideration of the statutory language, Treasury's future guidance should make the plan sponsor primarily responsible for conducting the balloting and certifying the vote based on general common-sense guidelines to ensure compliance with the statute and a fairly-conducted ratification process. Treasury should maintain neutral oversight of the plans' day-to-day administration of this ratification process, such as approving the plan's ballot to be used for the voting process.

Second, plan sponsors should be allowed to administer a mail-in balloted vote whereby the ballots are mailed out to the participants and beneficiaries by the plan sponsor and then returned to the plan sponsor within a set timeframe, which should be kept reasonably short.

Third, under Section 432(e)(9)(H)(ii), Treasury must administer a vote on the proposed suspension "not later than 30 days after approval of the suspension by Treasury." Future guidance should clarify this provision by mandating that the entire administration of the voting process, including the participant and beneficiary voting, be completed within that 30 day period.

Fourth, Treasury should issue a simple and concise model ballot in its future guidance but then give the plan sponsors discretion to supplement the plan's ballot package. Under Section 432(e)(9)(H)(iii)(2), we recommend that Treasury mandate that the statements of support and opposition included in the ballot be exactly the same length or contain the same number of words.

Last, because we contend the plan sponsor should maintain primary responsibility for administering the voting process for the plan's participants and beneficiaries, we propose that upon the conclusion of the vote, the plan sponsor certifies to the Treasury that it conducted the vote and the votes have been properly counted in compliance with MPRA and Treasury regulations.

9. **What other practical issues do commenters anticipate will arise in the course of implementing these provisions?**

Additionally, we anticipate future issues regarding the effect of the benefit suspension provisions of MPRA on the operation of plans' rules governing the suspension of benefits for engaging in disqualifying employment. We expect that as those already retired have their pensions suspended, it is likely that they will seek to return to work. In addition to issues of whether plan rules relating to prohibited employment may need to relaxed or suspended, there may be special issues that arise for those pensioners who return to work under a benefit suspension and then later seek to retire under different plan provisions. Treasury should consider the interplay between the two pension-related rules in any future rulemaking under MPRA.

III. Conclusion

For most multiemployer pension plans in Critical and Declining status, MPRA offers their only hope for survival. The responses of the PBGC and the Treasury to forthcoming applications for benefit suspensions, partitions, and mergers likely will determine whether MPRA can reform extremely troubled plans or whether MPRA is a well-intentioned but futile law.

Morgan Lewis appreciates the opportunity to submit these comments. If you have any questions concerning our comments, or if we can be of further assistance, please contact Steve Spencer at (215) 963-5714 or John Ring at (202) 739-5096.

Sincerely,

MORGAN, LEWIS & BOCKIUS LLP

JFR/dpo