Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*	*	*	*	*	*		
300	10–1–18	11–1–18	1.25	4.00	4.00	4.00	7	8

■ 3. In appendix C to part 4022, Rate Set 300 is added at the end of the table to read as follows:

Appendix C to Part 4022—Lump Sum Interest Rates For Private-Sector Payments

* * * * *

Rate set	For plans with a valuation date		Immediate annuity rate (percent)	Deferred annuities (percent)				
	On or after	Before		i_1	i_2	i_3	n_1	n_2
*	*	*	*	*	*	*		
300	10–1–18	11–1–18	1.25	4.00	4.00	4.00	7	8

PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

■ 4. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 5. In appendix B to part 4044, an entry for ''October–December 2018'' is added at the end of the table to read as follows:

Appendix B to Part 4044—Interest Rates Used to Value Benefits

* * * * *

For valuation dates occurring in the month—	The values of i_t are:					
	i_t	for t =	i_t	for t =	i_t	for t =
*	*	*	*	*	*	*
October–December 2018	0.0284	1–20	0.0276	>20	N/A	N/A

Issued in Washington, DC.

Hilary Duke,

Assistant General Counsel, Pension Benefit Guaranty Corporation.

[FR Doc. 2018–19835 Filed 9–13–18; 8:45 am]

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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4231

RIN 1212–AB31

Mergers and Transfers Between Multiemployer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: PBGC is issuing a final rule amending its regulation on Mergers and Transfers Between Multiemployer Plans to implement procedures and information requirements for a request for a facilitated merger. This final rule also reorganizes and updates provisions in the existing regulation.

DATES: This rule is effective October 15, 2018.

FOR FURTHER INFORMATION CONTACT: Theresa B. Anderson (*anderson.theresa@pbgc.gov*), Deputy Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington DC 20005–4026; 202–326–4400, ext. 6353. (TTY users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–326–4400, extension 6353.)

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

This final rule is needed to implement statutory changes under the Multiemployer Pension Reform Act of 2014 (MPRA) affecting mergers of multiemployer plans under title IV of the Employee Retirement Income Security Act of 1974 (ERISA) and to update PBGC's existing regulatory requirements applicable to mergers and transfers between multiemployer plans. On June 6, 2016, PBGC published a proposed rule to amend its regulation on Mergers and Transfers Between Multiemployer Plans (81 FR 36229). In this final rule, PBGC adopts its proposed changes implementing MPRA, with some modifications in response to public comments, and some of its proposed changes updating and reorganizing the existing regulation. To allow more consideration of the concerns raised by the public comments, PBGC is not adopting its proposed changes to provisions of the existing regulation related to plan solvency.

PBGC's legal authority for this action is based on section 4002(b)(3) of ERISA, which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA, and section 4231 of ERISA, which sets forth the statutory requirements for mergers and transfers between multiemployer plans.

Major Provisions of the Regulatory Action

This final rule makes one major and numerous minor changes to PBGC's regulation on Mergers and Transfers

Between Multiemployer Plans. The major change is the addition of procedures and information requirements for a voluntary request for a facilitated merger to implement MPRA's changes to section 4231 of ERISA. This final rule also reorganizes and updates existing provisions of PBGC's regulation. The changes to part 4231 and the related public comments are discussed below.

Background

In General

The Pension Benefit Guaranty Corporation (PBGC) is a Federal corporation created under title IV of Employee Retirement Income Security Act of 1974 (ERISA) to guarantee the payment of pension benefits under private-sector defined benefit pension plans.

PBGC administers two insurance programs—one for single-employer pension plans, and one for multiemployer pension plans. This final rule applies only to the multiemployer program.

Under section 4231(b) of ERISA, mergers of two or more multiemployer plans and transfers of assets and liabilities between multiemployer plans must comply with four requirements:

(1) The plan sponsor must notify PBGC at least 120 days before the effective date of the merger or transfer;

(2) No participant's or beneficiary's accrued benefit may be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date;

(3) The benefits of participants and beneficiaries must not be reasonably expected to be subject to suspension as a result of plan insolvency under section 4245 of ERISA; and

(4) An actuarial valuation of the assets and liabilities of each of the affected plans must have been performed during the plan year preceding the effective date of the merger or transfer, based upon the most recent data available as of the day before the start of that plan year, or as prescribed by PBGC's regulation.

Section 4231(a) of ERISA grants PBGC authority to vary these requirements by regulation. Part 4231 of PBGC's regulations implements and interprets these requirements by providing a procedure under which plan sponsors must notify PBGC of any merger or transfer between multiemployer plans and may request a compliance determination from PBGC.

Under section 4261 of ERISA, PBGC provides financial assistance to multiemployer plans that are or will be insolvent under section 4245 of ERISA. Generally, a plan is insolvent when it is unable to pay benefits when due during the plan year. PBGC provides financial assistance to an insolvent plan in the form of a loan sufficient to pay its participants' and beneficiaries' guaranteed benefits.

In a few cases before the enactment of MPRA, PBGC provided financial assistance (within the meaning of section 4261 of ERISA) to facilitate the merger of a soon-to-be insolvent multiemployer plan into a larger, more financially secure multiemployer plan. The financial assistance provided was a single payment that generally covered the cost of guaranteed benefits under the failing plan. In exchange, the larger, more financially secure plan assumed responsibility for paying the full plan benefits of the participants and beneficiaries in the failing plan with which it merged. As a result, the participants and beneficiaries in the failing plan received more than they would have in the absence of a facilitated merger from a financially secure plan that was more likely to remain ongoing. In addition, the financial assistance provided was generally less than PBGC's valuation of the present value of future financial assistance to the failing plan.

Multiemployer Pension Reform Act of 2014

MPRA was enacted in December 2014 and contains several statutory reforms to assist financially troubled multiemployer plans and to improve the financial condition of PBGC's multiemployer insurance program. Sections 121 and 122 of MPRA provide that PBGC may assist financially troubled multiemployer plans under certain conditions.[1] This rule is necessitated by section 121 of MPRA.

Section 121 of MPRA authorizes PBGC to facilitate multiemployer plan mergers. Facilitation includes various forms of technical assistance as well as financial assistance (within the meaning of section 4261) if certain statutory conditions are met. The decision to facilitate a merger is within PBGC's discretion. Furthermore, before PBGC may exercise this discretion, it must first determine—in consultation with the Participant and Plan Sponsor Advocate[2]—that the merger 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 any of the plans.

As added by MPRA, section 4231(e)(1) of ERISA provides that, upon request by the plan sponsors, PBGC may take such actions as it deems appropriate to promote and facilitate the merger of two or more multiemployer plans. Facilitation may include training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies.

Under section 4231(e)(2), PBGC may also provide financial assistance (within the meaning of section 4261) to facilitate a merger that it determines is necessary to enable one or more of the plans involved to avoid or postpone insolvency, if the following statutory conditions are satisfied:

- *Critical and declining status.* Under section 4231(e)(2)(A) of ERISA, one or more of the plans involved in the merger must be in critical and declining status as defined in section 305(b)(6). Generally, a plan is in critical and declining status if it is in critical status under any subparagraph of section 305(b)(2) and is projected to become insolvent within 15–20 years.
- *Long-term loss and plan solvency.* Under section 4231(e)(2)(B), PBGC must reasonably expect that—
- Financial assistance will reduce PBGC's expected long-term loss with respect to the plans involved; and
- Financial assistance is necessary for the merged plan to become or remain solvent.
- *Certification.* Under section 4231(e)(2)(C), PBGC must certify to Congress that its ability to meet existing financial assistance obligations to other plans will not be impaired by the financial assistance.
- *Source of funding.* Under section 4231(e)(2)(D), financial assistance must be paid exclusively from the PBGC fund for basic benefits guaranteed for multiemployer plans.

In addition, section 4231(e)(2) requires that, not later than 14 days after the provision of financial assistance, PBGC provide notice of the financial assistance to the Committee on

[1] Section 122 of MPRA amended section 4233 of ERISA to provide a new statutory framework for partitions. PBGC issued an interim final rule under section 4233 of ERISA on June 19, 2015 (80 FR 35220), and a final rule on December 23, 2015 (80 FR 79687).

[2] The Participant and Plan Sponsor Advocate position was created in 2012 by the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141 (126 Stat. 405 (2012)). *See* section 4004 of ERISA for the rules governing this position. PBGC is not defining the Participant and Plan Sponsor Advocate's consultative role in determining how the merger affects the interests of the participants and beneficiaries of the plans involved but believes that role should evolve based on experience in implementing this rule.

Education and the Workforce of the House of Representatives; the Committee on Ways and Means of the House of Representatives; the Committee on Finance of the Senate; and the Committee on Health, Education, Labor, and Pensions of the Senate.

RFI and Proposed Rule

On February 18, 2015, PBGC published in the **Federal Register** (80 FR 8712) a request for information (RFI) to solicit information on issues PBGC should consider for a proposed rule; PBGC received 20 comments in response to the RFI.[3] In general, commenters expressed strong support for MPRA's changes to the merger rules under section 4231 of ERISA, and urged PBGC to issue timely guidance to the public on the types of information, documents, data, and actuarial projections needed for a request to be complete.

On June 6, 2016, PBGC published (81 FR 36229) a proposed rule to amend PBGC's regulation on Mergers and Transfers Between Multiemployer Plans (29 CFR part 4231) to implement MPRA's changes to section 4231 of ERISA.[4] PBGC also proposed to reorganize and update provisions of the existing regulation to reflect other changes in law.

PBGC provided a 60-day comment period for the proposed rule and received 10 comments from: Employers contributing to multiemployer plans; a union; and associations representing multiemployer plans, pension practitioners, and employers contributing to multiemployer plans. With some modifications in response to public comments it received, PBGC adopts in this final rule its proposed changes implementing MPRA. PBGC also adopts some of its proposed changes updating and reorganizing the existing regulation. To allow more consideration of public comments, PBGC is not adopting its proposed changes to provisions of the existing regulation related to plan solvency. The comments, PBGC's responses to the comments, and the changes adopted in this final rule are discussed below.

Overview

This final rule makes one major and numerous minor changes to PBGC's regulation on Mergers and Transfers Between Multiemployer Plans. The major change is the addition of procedures and information requirements for a voluntary request for a facilitated merger under section 4231(e) of ERISA, added by MPRA. This final rule also reorganizes and updates existing provisions of PBGC's regulation. The changes and the related public comments are discussed below.

Under this final rule, like the proposed, part 4231 provides guidance on: (1) The process for submitting a notice of merger or transfer, and a request for a compliance determination or facilitated merger; (2) the information required in such notices and requests; (3) the notification process for PBGC decisions on requests for facilitated mergers; and (4) the scope of PBGC's jurisdiction over a merged plan that has received financial assistance. This final rule reorganizes part 4231 by dividing it into subparts. Subpart A contains the general merger and transfer rules. Subpart B provides guidance on procedures and information requirements for facilitated mergers, including those involving financial assistance.

Section 4231 of ERISA and part 4231 do not address the requirements of title I of ERISA (other than section 406(a) and (b)(2), in the event of a compliance determination). In most instances, implementation of the mergers and transfers addressed in this final rule, including facilitated mergers, will involve conduct that is also subject to the fiduciary responsibility standards of part 4 of subtitle B of title I of ERISA. Among other things, these standards, which are enforced by the Department of Labor (DOL), require that a fiduciary with respect to a plan act prudently, solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. The fact that a merger or transfer, including a facilitated merger, may satisfy title IV of ERISA and the regulations thereunder is not determinative of whether it satisfies the requirements of part 4 of subtitle B of title I of ERISA (other than section 406(a) and (b)(2), in the event of a compliance determination).

Discussion of Comments

Plan Solvency Demonstrations

Most comments to PBGC's proposed rule addressed PBGC's proposed changes to provisions in its existing regulation—in particular, changes to the safe harbor solvency tests and to which plans must satisfy the more rigorous test for ''significantly affected plans.''

PBGC's regulation provides ''plan solvency'' tests under § 4231.6 that operate as regulatory safe harbors under section 4231(b)(3) of ERISA. Section 4231(b)(3) of ERISA prohibits a merger or transfer unless ''the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 4245.'' Section 4245, in turn, provides that an insolvent plan must suspend benefits that are above the level guaranteed by PBGC to the extent the plan has insufficient assets to pay such benefits. PBGC's experience suggests that its proposed changes to the ''plan solvency'' tests would result in a more reliable demonstration that benefits are not reasonably expected to be subject to suspension under section 4245 of ERISA because of insolvency.

For a plan that is not a significantly affected plan, § 4231.6(a) provides two alternative ''plan solvency'' tests. PBGC proposed to change the test in § 4231.6(a)(1) by increasing the multiple by which plan assets after the transaction must equal or exceed benefit payments for the plan year before the transaction from ''five times the benefit payments'' to ''ten times the benefit payments.'' PBGC also proposed to change the test in § 4231.6(a)(2) by increasing the number of years after the transaction for which assets, contributions, and investment earnings must cover expenses and benefit payments from ''five plan years'' to ''ten plan years.''[5]

PBGC proposed similar changes to the ''plan solvency'' test in § 4231.6(b) for significantly affected plans. PBGC proposed to change the requirement in § 4231.6(b)(1) that contributions satisfy the minimum funding requirement for the first ''five plan years'' after the transaction to the first ''ten plan years.'' PBGC also proposed to change the requirement in § 4231.6(b)(2) that assets cover the total benefit payments for the first ''five plan years'' after the transaction to ''ten plan years.'' Finally, PBGC proposed to change the amortization period in § 4231.6(b)(4)(i) from 25 to 15 years to reflect the amortization period generally applicable to changes in funding of multiemployer plans under PPA.[6]

PBGC also proposed to change which plans would be subject to the more rigorous test for significantly affected plans. PBGC proposed to amend the definition of ''significantly affected plan'' in § 4231.2 to include a plan in endangered or critical status, as defined

[3] The RFI and comments are accessible at *http://www.pbgc.gov/prac/pg/other/guidance/multiemployer-notices.html.*

[4] The proposed rule and comments are accessible at *https://www.pbgc.gov/prac/pg/other/guidance/pending-proposed-rules.*

[5] PBGC also proposed to transpose § 4231.6(a)(1) and (2).

[6] *See* section 304(b) of ERISA.

in section 305(b) of ERISA,[7] that engages in a transfer (other than a de minimis transfer). In PBGC's view, endangered and critical status plans generally present a greater risk of insolvency, and when these plans engage in non-de minimis transfers their risk of insolvency may increase.

Eight commenters responded to PBGC's proposed changes to the ''plan solvency'' tests and to the definition of a ''significantly affected plan.'' The commenters stated, in part, that PBGC's proposed changes to the ''plan solvency'' tests would make mergers and transfers more difficult or prohibit them, would substantially expand burden for plan sponsors, and would restrict options for plans. For example, commenters stated that two critical and declining status plans engaging in a merger, resulting in a merged plan projected to become insolvent in more than five but less than 10 years, would likely satisfy the applicable ''plan solvency'' test in § 4231.6(a) of the existing regulation but not the proposed regulation. In addition, commenters stated that a critical status plan engaging in a transfer would be unlikely to satisfy PBGC's proposed changes to the ''plan solvency'' test for a significantly affected plan—specifically, the requirement in § 4231.6(b)(1) that contributions satisfy the minimum funding requirement for 10 plan years after the transaction.

These commenters also considered PBGC's proposed change to the definition of a ''significantly affected plan'' unduly restrictive. Some commenters agreed with PBGC's assessment of the heightened risk of insolvency associated with transfers by endangered and critical status plans. But commenters suggested that PBGC could address this risk directly by requiring that the transaction postpone the date when the plan is projected to become insolvent.

In addition, these commenters stated that PBGC's proposed change to the definition of a ''significantly affected plan'' would prohibit transfers permitted under PBGC's existing regulation, even if the transfers would be beneficial for the plans and their participants. For example, a critical and declining status plan engaging in a non-de minimis transfer of accrued benefits and less than 15% of its assets would not be a significantly affected plan under PBGC's existing regulation and would likely satisfy the applicable ''plan solvency'' test in § 4231.6(a). But under PBGC's proposed changes, a critical and declining status plan that engages in a non-de minimis transfer would be a significantly affected plan and would not satisfy the applicable ''plan solvency'' test in § 4231.6(b). According to commenters, such a transfer from a critical and declining status plan could postpone the date the plan is projected to become insolvent and would effectively eliminate the risk of loss associated with the transferred benefits.

Moreover, four commenters stated that PBGC should otherwise update the solvency test for significantly affected plans. According to one commenter, the solvency test in § 4231.6(b) of the existing regulation is very difficult to demonstrate for most significantly affected plans. These commenters agreed that the requirement in § 4231.6(b)(3)—that contributions cover benefit payments in the first plan year after the transaction—could not be demonstrated for most mature plans, including plans that are well funded and projected to remain solvent indefinitely.

Four commenters also requested guidance on how an enrolled actuary may ''otherwise demonstrate'' solvency. PBGC's existing regulation provides that an enrolled actuary may ''otherwise demonstrate'' under § 4231.3(a)(3)(ii) that benefits under the plan are not reasonably expected to be subject to suspension under section 4245 of ERISA. This option is an alternative to the applicable ''plan solvency'' test under § 4231.6. Three of these commenters requested this guidance even if PBGC doesn't adopt its proposed changes. PBGC is considering these comments and whether to propose guidance on how an enrolled actuary may ''otherwise demonstrate'' solvency.

Seven commenters advocated for PBGC to change its existing regulation to provide a means for plans facing insolvency to satisfy the solvency requirement under section 4231(b)(3) of ERISA. According to commenters, PBGC could exercise its regulatory authority under section 4231(a) of ERISA to allow these plans to engage in transactions that may be beneficial. For example, as two commenters stated, a critical and declining status plan that cannot show that it will avoid insolvency with benefit suspensions under section 305(e)(9) of ERISA may be able to make that showing after it engages in a transfer (or the transfer might lessen the amount of benefit suspensions needed to avoid insolvency). A critical and declining status plan (which, among other criteria, is projected to become insolvent) may not, however, satisfy the solvency requirement under section 4231(b)(3) of ERISA and PBGC's regulation for a transfer. Even so, as one commenter stated, most plans can satisfy the solvency test in PBGC's regulation for plans that are not significantly affected—that assets equal or exceed five times the benefit payments—including many plans that are projected to be insolvent several years in the future.

PBGC continues to consider these comments to its proposed changes and to provisions of the existing regulation interpreting the solvency requirement under section 4231(b)(3) of ERISA. To allow more consideration of the concerns raised by the public comments, PBGC will not adopt its proposed changes to the ''plan solvency'' tests under § 4231.6 and to the definition of a ''significantly affected plan'' under § 4231.2. PBGC may eventually re-propose changes to provisions in the existing regulation interpreting the solvency requirement under section 4231(b)(3) of ERISA in consideration of these comments.

In addition, PBGC proposed to amend § 4231.3 to provide that plan sponsors may engage in informal consultations with PBGC to discuss proposed mergers and transfers. Two commenters supported this change. One of the commenters stated that having access to PBGC for informal consultation will be extremely helpful and may result in a more efficient process. Thus, PBGC is adopting its proposed voluntary option for assistance in this final rule.

Facilitated Mergers

PBGC proposed new rules to implement the facilitated merger provisions added by MPRA. Two commenters requested examples of the types of facilitation, other than financial assistance, that PBGC might approve for a facilitated merger. Section 4231(e)(1) of ERISA provides examples of facilitation that PBGC may provide if it makes a determination, in consultation with the Participant and Plan Sponsor Advocate, about the interests of the participants and beneficiaries. One example of facilitation is ''communication with stakeholders.'' In that regard, PBGC could, for example, participate in meetings or a town hall to discuss or answer questions about a potential merger with stakeholders.

The other comments to the facilitated merger provisions in PBGC's proposed rule addressed mergers facilitated with financial assistance (financial assistance mergers). In the preamble of the proposed rule, PBGC discussed the amount of financial assistance it generally expects to be available for

[7] ''Endangered'' and ''critical'' are plan categories established by the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780 (2006) (PPA)).

financial assistance mergers. PBGC stated that, while it imposes no additional limitations on the amount of financial assistance available, MPRA requires PBGC to certify that its ability to meet existing financial obligations to other plans will *not* be impaired by the financial assistance provided for a merger or partition.[8] In addition, PBGC stated that it anticipates that the amount of financial assistance available to a critical and declining status plan for a financial assistance merger generally will not exceed the amount available to that plan for a partition (and could be less). This is because the funds available for financial assistance mergers under section 4231(e), partitions under section 4233, and financial assistance to insolvent plans under 4261, are derived from the same source—the revolving fund for basic benefits guaranteed under section 4022A (the multiemployer revolving fund). Finally, although PBGC will decide the structure of financial assistance on a case-by-case basis, PBGC stated that it expects that in most cases the financial assistance it provides in a facilitated merger will be in the form of periodic payments.

One commenter requested a more complete discussion of PBGC's rationale for linking the amount of financial assistance available to a critical and declining status plan for a financial assistance merger to the amount available to that plan for a partition. The commenter noted that the financial assistance available to a plan for a partition ''relates only to a portion of the plan's liabilities.'' The commenter suggested that it would be more appropriate to limit financial assistance to an amount generally less than the present value of the amount of future financial assistance to the critical and declining status plan.

This comment overlooks a statutory condition on PBGC's provision of financial assistance for a merger. While MPRA requires PBGC to reasonably expect that the financial assistance provided for a merger will reduce PBGC's expected long-term loss with respect to the plans involved,[9] MPRA also requires that the financial assistance provided for a merger not impair PBGC's ability to meet existing financial obligations to *other* plans.

Since publication of the proposed rule, PBGC has provided its interpretation of the statutory condition that the financial assistance provided for a merger will not impair PBGC's ability to meet existing financial obligations to other plans.[10] Looking at the statute as a whole, PBGC interprets this condition to require that the financial assistance provided for a merger not materially advance the date when PBGC's multiemployer insurance fund is projected to become insolvent. This interpretation is based on PBGC's current understanding of the universe of potentially eligible multiemployer plans, and the financial condition of the multiemployer insurance program, which can change over time.

Although application of the non-impairment condition may result in limiting financial assistance for a merger to the amount available for a partition, there may be situations where it does not. Therefore, PBGC will rely on the non-impairment test described above. PBGC's analysis of the non-impairment condition is highly fact-specific. PBGC encourages plans to engage in informal consultation with PBGC to help determine how much financial assistance would be permitted by the statute.

Under §§ 4231.12 through 4231.16, PBGC proposed information requirements for a request for a facilitated merger. PBGC requires the information proposed so that it could determine whether the statutory conditions are satisfied. One commenter stated that a plan would incur considerable cost to provide the information PBGC requires for a financial assistance merger ''solely for purposes of showing PBGC that the financial assistance is no more than the cost of a hypothetical partition.'' Financial assistance mergers, unlike partitions, seek assistance to continue to pay plan benefits. Accordingly, the commenter suggested that plans shouldn't have to provide the same substantiation as with partition, unless the request is coupled with a request to the Department of the Treasury (Treasury) for approval of benefit suspensions.

In consideration of this comment, PBGC will not adopt its proposed information requirements about the maximum benefit suspensions permissible under section 305(e)(9) of ERISA, which are required for partition. Thus, PBGC will not adopt its proposed requirement under § 4231.15 that each critical and declining status plan provide a projection of benefit disbursements reflecting maximum benefit suspensions. Also, PBGC will not adopt its proposed requirement under § 4231.16 to include with participant census data the monthly benefit reduced by the maximum benefit suspension. If the amount of financial assistance requested for a merger is at the margins of satisfying the statutory condition that PBGC's ability to meet existing financial obligations to other plans will not be impaired, PBGC may request this information to help the critical and declining status plan(s) determine whether a partition is more likely to satisfy this statutory condition.

Under § 4231.15, PBGC proposed guidance on the required demonstration that financial assistance is necessary for the merged plan to become or remain solvent. One commenter stated that requiring a merged plan to project solvency for a minimum of 20–30 years for a financial assistance merger is inconsistent with MPRA's purpose. The commenter suggested that the demonstration should be that the plans will postpone insolvency with the financial assistance merger. While PBGC may exercise its discretion to approve a financial assistance merger that it determines necessary to allow one or more of the plans to avoid or postpone insolvency,[11] section 4231(e)(2)(B)(ii) of ERISA requires that PBGC reasonably expect that the financial assistance is necessary for the *merged plan* to become or remain *solvent.* PBGC interprets the requirement that the merged plan become or remain solvent to mean that solvency must be demonstrated for the merged plan over a period, not that insolvency is postponed.

PBGC proposed differentiated solvency demonstrations based on the financial health of the merged plan, allowing flexibility for healthier merged plans. Under § 4231.15, the type of projection required depends on whether the merged plan would be in critical status under section 305(b) of ERISA immediately after the merger (without taking the proposed financial assistance into account), as reasonably determined by the actuary. For example, if a critical and declining status plan merges into an endangered status plan, and the actuary anticipates that the merged plan would be in critical status under section 305(b)(2) of ERISA immediately after the merger without financial assistance, then the merged plan would be in critical status for purposes of the projections. Alternatively, if the actuary

[8] *See* sections 4231(e)(2)(C) and 4233(b)(4) of ERISA. PBGC may approve a partition of an eligible multiemployer plan under section 4233 of ERISA to provide for a transfer of liabilities from an original plan to a successor plan that is created by a partition order. PBGC provides financial assistance to pay for the guaranteed benefits under the successor plan.

[9] Section 4231(e)(2)(B)(i) of ERISA.

[10] *See* ''Partition FAQs for Practitioners,'' accessible at *https://www.pbgc.gov/prac/pg/mpra/partition-faqs-for-practitioners#impairment.*

[11] *See* section 4231(e)(2) of ERISA.

anticipates that the merged plan would not satisfy the criteria for critical status under section 305(b)(2) of ERISA immediately after the merger, then the merged plan would not be in critical status for purposes of the projections (even if the merged plan could elect to be in critical status).

PBGC proposed that the plan's enrolled actuary may use any reasonable estimation method for determining the expected funded status of the merged plan. The preamble of the proposed rule also suggested that the funded status of the merged plan could be determined based on the combined data and projections underlying the status certifications of each of the plans for the plan year immediately preceding the merger (including any selected updates in the data based on the experience of the plans in the immediately preceding plan year). PBGC requested comments on this issue. Two commenters responded in favor of each approach. One commenter suggested that PBGC should take care to allow the enrolled actuary to make reasonable adjustments to the data and projections from the most recent status certifications if the above alternative is included in the final regulations. PBGC agrees with these comments. Because the use of status certifications for the preceding year is intended to provide a simpler and cost-effective alternative, PBGC will allow, but not require, reasonable adjustments to be made. Thus, § 4231.15 of this final rule adopts the option, supported by commenters, for the enrolled actuary to base the determination on the combined data and projections underlying the status certifications of each of the plans for the plan year immediately preceding the merger, including any selected updates in the data based on the experience of the plans in the immediately preceding plan year (reasonable adjustments are permitted but not required).

To encourage the merger of critical and declining status plans into financially stable plans, PBGC proposed a solvency demonstration based on the circumstances and challenges specific to the merged plan. For a merged plan that would not be in critical status and for which solvency could be demonstrated for 20 years without taking financial assistance into account (or with less than the full amount taken into account), PBGC proposed a demonstration that financial assistance is necessary to mitigate the adverse effects of the merger on the merged plan's ability to remain solvent. In the preamble of the proposed rule, PBGC provided as examples that the merger might have an impact on the plan's funding requirements, increase the ratio of inactive to active participants, or decrease the funded percentage of the healthy plan in a manner that can be demonstrated to adversely affect the merged plan's ability to remain solvent long-term. PBGC requested comments on this issue.

One commenter stated that, ''the solvency measure should be that the merger does not increase the risk of insolvency for the merged plan.'' If the merger would have no effect on the merged plan's ability to remain solvent, financial assistance would not be necessary for the merged plan to become or remain solvent as required by the statute.

Two commenters were concerned that a financially stable plan for which solvency is projected after the merger (without taking financial assistance into account) would not be able to show adverse effects of the merger on the merged plan's ability to remain solvent. One of these commenters provided the example of a financially stable plan that would have a lower funded percentage after the merger but for which solvency would still be projected. The commenter stated that the financially stable plan would likely not agree to that merger without financial assistance, because the merger would increase the plan's risk of insolvency if there were adverse plan experience in the future. The commenters suggested that the demonstration focus on the merger's impact on metrics such as the financially stable plan's ability to satisfy funding requirements or its funded percentage. The commenters also suggested permitting consideration of unfavorable future experience. One of these commenters suggested that PBGC provide that the demonstration may be based on stress testing over a long-term period (which could consider unfavorable future experience).

To demonstrate that financial assistance is necessary for the merged plan to become or remain solvent, the enrolled actuary must show that the merger has adverse effects on the merged plan's ability to remain solvent. If no adverse effect on solvency can be demonstrated, financial assistance is not necessary. In response to the above comments, PBGC will allow this demonstration to consider unfavorable future experience. Thus, PBGC will add in this final rule that the demonstration that financial assistance is necessary to mitigate the adverse effects of the merger on the merged plan's ability to remain solvent may be based on stress testing over a long-term period (and may reflect reasonable future adverse experience), using a reasonable method in accordance with generally accepted actuarial standards.

For example, one possible demonstration that financial assistance is necessary to mitigate the adverse effects of the merger on the merged plan's ability to remain solvent could be based on a projection of the merged plan's insolvency within 30 years using an investment return assumption no less than one-half of a standard deviation less than the best estimate assumption, and using a current set of capital market assumptions from a recognized investment consultant and the plans' current asset allocation.

This demonstration may also be based on stochastic modeling. For example, while not a threshold, a possible demonstration may be based on stochastic modeling showing that the merged plan's probability of insolvency within 30 years of the merger exceeds 65% without the requested financial assistance.

Interaction Between Benefit Suspension and Merger

Plans in critical and declining status may suspend benefits under section 305(e)(9) of ERISA under certain conditions. Treasury has interpretative jurisdiction over the subject matter in section 305. In the preamble of the proposed rule, PBGC suggested that plan sponsors must carefully consider how the various requirements under sections 305(e)(9) and 4231 would apply.

For example, a critical and declining status plan could merge into a large, well-funded multiemployer plan. In such a case, to the extent any of the benefits previously provided by the critical and declining status plan had been subject to suspension under section 305(e)(9) or become subject to suspension concurrently with the merger, the plan sponsor of the merged plan would become responsible for making the annual determinations necessary for continued benefit suspensions under section 305(e)(9) and the implementing regulations. Under section 305(e)(9)(C)(ii) of ERISA, benefits may continue to be suspended for a plan year only if the plan sponsor determines, in a written record to be maintained throughout the period of the benefit suspension, that although all reasonable measures to avoid insolvency have been and continue to be taken, the plan is still projected to become insolvent unless benefits are suspended.[12] PBGC suggested that,

[12] The required projection under Treasury's regulation is that ''[t]he plan would not be projected

Continued

absent these determinations, restoration of the suspended benefits would be required.

Four commenters stated that it is contrary to MPRA's remedial intent to restore suspended benefits following a merger if the merged plan could not demonstrate that continued suspensions are required to avoid insolvency. The commenters urged PBGC to work with Treasury to issue guidance so that the statute is not interpreted to require restoration under these circumstances. In addition, the commenters stated that critical and declining status plans that suspend benefits would be significantly more likely to attract merger partners, who may view benefit suspensions as a necessary condition to merger. Commenters suggested that, for purposes of the annual determination required for suspensions, Treasury could permit a separate accounting of assets and liabilities attributable to the ''plan'' that suspended benefits before the merger. The suspended benefits would be restored only if the annual determination couldn't be made for this notional plan. These comments are beyond the scope of this final rule and should be addressed to Treasury, which has jurisdiction over section 305 of ERISA.

One of these commenters stated that section 4231(b)(2) of ERISA isn't implicated if the benefit suspensions under section 305(e)(9) of ERISA occur before a merger. Section 4231(b)(2) of ERISA requires that no accrued benefit is lower immediately after a merger or transfer than the benefit immediately before the transaction. This requirement would, however, prohibit a merger or transfer that is contemporaneous with benefit suspensions. To allow this transaction, PBGC adds in this final rule under § 4231.4 that it may waive this requirement to the extent the accrued benefit is suspended under section 305(e)(9) of ERISA contemporaneously with a merger or transfer.

Section-by-Section Discussion

Subpart A—General Provisions

Section 4231.1

Section 4231.1 describes the purpose and scope of part 4231, which is to prescribe notice requirements for mergers and transfers of assets or liabilities among multiemployer plans and to interpret other requirements under section 4231 of ERISA. In this final rule, PBGC adopts the minor changes it proposed to § 4231.1.[13]

Section 4231.2

Section 4231.2 defines terms for purposes of part 4231. In this final rule, like the proposed, PBGC amends the existing regulation by adding new definitions, and by moving existing definitions elsewhere in the regulation to § 4231.2. For example, this final rule moves the existing definition of ''effective date'' from § 4231.8(a) to § 4231.2.[14] In response to comments and pending further consideration, PBGC will not adopt its proposed change to the existing definition of a ''significantly affected plan'' (see above, ''Discussion of Comments'').

Section 4231.3

Section 4231.3 provides guidance on the statutory requirements for mergers and transfers. PBGC proposed to clearly provide that plan sponsors may engage in informal consultations with PBGC to discuss proposed mergers and transfers. Two commenters supported this change. PBGC agrees with those comments. Thus, PBGC is adopting its proposed voluntary option for assistance in this final rule.[15]

Section 4231.4

PBGC did not propose any changes to § 4231.4 of the existing regulation. That section provides guidance on the requirement under section 4231(b)(2) of ERISA that no participant's or beneficiary's accrued benefit may be lower immediately after the effective date of a merger or transfer than the benefit immediately before that date.

In this final rule, PBGC maintains this existing guidance without change in a new paragraph (a). To allow a merger or transfer that is coupled with benefit suspensions under section 305(e)(9) of ERISA, PBGC provides in a new paragraph (b) that it may waive the requirement under section 4231(b)(2) of ERISA to the extent the participant's or beneficiary's accrued benefit is suspended under section 305(e)(9) of ERISA contemporaneously with a merger or transfer (see above, ''Discussion of Comments''). Section 4231.4(b) also provides that, if PBGC grants this waiver, the plan provision described under § 4231.4(a) may exclude accrued benefits only to the extent those benefits are suspended under section 305(e)(9) of ERISA contemporaneously with the merger or transfer.

Section 4231.5

Section 4231.5 provides guidance on the actuarial valuation requirement under section 4231(b)(4) of ERISA. Under § 4231.5(a) of the existing regulation, a plan that is not a significantly affected plan (or that is a significantly affected plan only because the transaction involves a plan terminated by mass withdrawal under section 4041A(a)(2) of ERISA) satisfies this requirement if an actuarial valuation has been performed for the plan based on the plan's assets and liabilities as of a date not more than three years before the date on which the notice of the merger or transfer is filed. Under § 4231.5(b) of the existing regulation, a significantly affected plan (other than a plan that is a significantly affected plan only because the transaction involves a plan terminated by mass withdrawal) must have an actuarial valuation performed for the plan year preceding the proposed effective date of the merger or transfer.

Multiemployer plans are now generally required to perform actuarial valuations not less frequently than once every year.[16] Thus, PBGC proposed to amend § 4231.5 to require, as section 4231(b)(4) of ERISA states, that each plan involved in a merger or transfer have an actuarial valuation performed for the plan year preceding the proposed effective date of the merger or transfer. PBGC also proposed to provide that if

to avoid insolvency . . . if no suspension of benefits were applied under the plan.'' 26 CFR 1.432(e)(9)–1(c)(4)(i)(B).

[13] PBGC proposed to remove the reference in § 4231.1(a) of the existing regulation to the OMB control number 1212–0022 under which information collection in part 4231 has been approved. PBGC also proposed to reorganize § 4231.1 and to refer in paragraph (b) of this section to the additional requirements and procedures in subpart B of part 4231 for a request for a facilitated merger.

[14] This final rule, like the proposed, also changes § 4231.2 of the existing regulation to add the following to the terms defined in § 4001.2 of PBGC's regulations: Annuity, guaranteed benefit, normal retirement age, and plan sponsor. In addition, this final rule, like the proposed, adds in § 4231.2 definitions for the following terms: Advocate, critical and declining status, critical status, facilitated merger, financial assistance, financial assistance merger, insolvent, and merged plan. Furthermore, this final rule, like the proposed, adds in § 4231.2 the terms ''de minimis merger,'' and ''de minimis transfer'' and refers to their existing definitions in § 4231.7(b) and (c), respectively. Finally, this final rule, like the proposed, moves the definition of ''certified change of collective bargaining representative'' from § 4231.2 of the existing regulation to § 4231.3(c).

[15] This final rule also incorporates by reference in § 4231.3(a)(1) the waiver to the preservation of accrued benefits added under a new § 4231.4(b) in the event of a contemporaneous suspension of benefits under section 305(e)(9) of ERISA. In addition, this final rule, like the proposed, moves the definition of ''certified change of collective bargaining representative'' from § 4231.2 of the existing regulation to § 4231.3(c). Finally, this final rule, like the proposed, changes § 4231.3 to conform references to other sections of part 4231 to the reorganization of this final rule.

[16] *See* section 304(c)(7) of ERISA.

the valuation is not complete as of the date the plan sponsors file the notice of merger or transfer, the plan sponsors may provide the most recent actuarial valuation performed for the plans with the notice, and the required valuations when complete. PBGC received no comments on these proposed changes and adopts them in this final rule.[17]

Section 4231.6

Section 4231.6 provides guidance on ''plan solvency'' tests that operate as safe harbors under section 4231(b)(3) of ERISA. PBGC proposed changes to the tests in § 4231.6(a) and (b) (see above, ''Discussion of Comments''). Pending further consideration, PBGC is not adopting in this final rule the major changes it proposed to the tests in § 4231.6(a) and (b) (see above, ''Discussion of Comments''). In this final rule, PBGC is adopting the minor changes it proposed to the tests in § 4231.6(a) and (b); PBGC received no comments about these minor changes.[18]

Section 4231.6(c) provides rules for determinations about the requirements set forth under § 4231.6. PBGC proposed to amend § 4231.6(c)(1) by requiring withdrawal liability payments to be listed separately from contributions. PBGC received no comments on its proposed change to § 4231.6(c)(1) and adopts this change in this final rule.

Section 4231.7

PBGC did not propose any changes to § 4231.7 of the existing regulation. That section continues to set forth special rules for de minimis mergers and transfers.

Section 4231.8

Section 4231.8 provides guidance on the requirement under section 4231(b)(1) of ERISA that the plan sponsor notify PBGC of a merger or transfer, and on requests for compliance determinations under section 4231(c). In general, a notice of a merger or transfer must be filed well in advance of the transaction's effective date (or not less than 45 days in advance in the case of a merger for which a compliance determination is not requested). Section 4231.8(f) permits PBGC to waive the timing of the notice requirements under certain circumstances.

In the case of a facilitated merger, PBGC proposed to amend § 4231.8(a) to require that notice of a proposed facilitated merger be filed not less than 270 days before the proposed effective date of a facilitated merger. PBGC received no comments on its proposed changes to § 4231.8 and adopts them in this final rule.[19]

Section 4231.9

Section 4231.9 of this final rule, like the proposed, generally retains the information requirements under § 4231.8(e) of the existing regulation, with minor modifications. For example, the de minimis exception under § 4231.8(e)(6) of the existing regulation does not apply to a request for a financial assistance merger. PBGC received no comments on its proposed changes to § 4231.9 and adopts them in this final rule.[20]

Section 4231.10

Section 4231.10 of this final rule, like the proposed, describes the additional information required for a request for a compliance determination.[21] In addition to some minor changes, PBGC proposed to amend this section to make clear that a request for a compliance determination must be filed contemporaneously with a notice of merger or transfer.[22] PBGC received no comments on its proposed changes to § 4231.10 and adopts them in this final rule.

Section 4231.11

Section 4231.11 of this final rule, like the proposed, describes the requirements for actuarial calculations and assumptions.[23] PBGC proposed to conform these requirements to section 304(c)(3) of ERISA, to specify that calculations must be performed by an enrolled actuary, and to expand the bases upon which PBGC may require updated calculations. PBGC received no comments on its proposed changes under § 4231.11 and adopts them in this final rule.

Subpart B—Additional Rules for Facilitated Mergers

Section 4231.12

Section 4231.12 of this final rule, like the proposed, provides general guidance on a request for a facilitated merger. A request for a facilitated merger, including a financial assistance merger, must satisfy the requirements of section 4231(b) of ERISA and the general provisions of subpart A of the regulation, in addition to section 4231(e) of ERISA and the additional rules for facilitated mergers of subpart B. The procedures set forth in this final rule represent the exclusive means by which PBGC will approve a request for a facilitated merger, including a financial assistance merger. Any financial assistance provided by PBGC will be limited by section 4261 of ERISA and based on the guaranteed benefits of the plans involved in the merger that are in critical and declining status.

Section 4231.12 of this final rule, like the proposed, states that a request must include the information required for a notice of merger or transfer (§ 4231.9) and request for compliance determination (§ 4231.10), as well as a detailed narrative description with supporting documentation demonstrating that the proposed merger is in the interests of 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 any of the plans. The narrative description and supporting documentation should reflect, among other things, any material efficiencies expected as a result of the merger and the basis for those expectations.

In addition, a request for a financial assistance merger must contain information about the plans (§ 4231.13), information about the proposed financial assistance merger (§ 4231.14), actuarial and financial information

[17] This final rule, like the proposed, also reorganizes § 4231.5 of the existing regulation by removing its division into paragraphs (a) and (b).

[18] For example, PBGC proposed to update a statutory reference in § 4231.6(b)(1) of the existing regulation.

[19] PBGC also proposed to clarify that a request for a compliance determination or facilitated merger must be filed within the timing specified in § 4231.8(a) for a notice. In addition, PBGC proposed to clarify that a request for a compliance determination or facilitated merger, like a notice, is not considered filed until all the required information is submitted. PBGC also proposed to clarify that the waiver provided in § 4231.8(f) of the existing regulation relates to the timing requirements in § 4231.8(a). Furthermore, PBGC proposed to move the definition of ''effective date'' from § 4231.8(a)(1) of the existing regulation to § 4231.2, and to move the information requirements contained in § 4231.8(e) of the existing regulation to § 4231.9. Finally, PBGC proposed to reorganize § 4231.8 of the existing regulation, to conform references to other sections of part 4231 to the reorganization of this final rule, and to add that the guidance on who must file is applicable to a request for a facilitated merger.

[20] PBGC also proposed to add that the statement required in § 4231.8(e)(5)(i) of the existing regulation about the plan's satisfaction of the applicable solvency test must include the supporting data, calculations, assumptions, and methods.

[21] PBGC proposed to move these requirements from § 4231.9 of the existing regulation, except certain information requirements.

[22] PBGC also proposed to delete the ''place of filing'' provision under § 4231.9(a)(1) of the existing regulation. Section 4231.8(e) of this final rule, like the proposed, provides guidance about where to file. In addition, PBGC proposed to delete certain information requirements under § 4231.9(b) of the existing regulation because those requirements are contained in § 4231.9(e) of this final rule. Finally, PBGC proposed to conform references to other sections of part 4231 to the reorganization of this final rule.

[23] PBGC proposed to move these requirements from § 4231.10 of the existing regulation.

(§ 4231.15), and participant census data (§ 4231.16). This final rule, like the proposed, provides that PBGC may require additional information to determine whether the requirements of section 4231(e) of ERISA are met or to enable it to facilitate the merger. As with the proposed, this final rule also imposes an affirmative obligation on plan sponsors to promptly notify PBGC in writing if a plan sponsor discovers that any material fact or representation contained in or relating to the request for a facilitated merger, or in any supporting documents, is no longer accurate, or has been omitted.

PBGC received no comments on its proposed § 4231.12 and adopts it in this final rule.

Section 4231.13

Section 4231.13 of this final rule, like the proposed, provides guidance on the various categories of plan-related information required for a request for a financial assistance merger, such as trust agreements, plan documents, summary plan descriptions, summaries of material modifications, and rehabilitation or funding improvement plans. PBGC expects that most, if not all, of the information required under this section should be readily available and accessible by plan sponsors. PBGC received no comments on its proposed § 4231.13 and adopts it in this final rule.

Section 4231.14

Section 4231.14 of this final rule, like the proposed, sets forth information requirements relating to the proposed structure of a financial assistance merger. The information required includes a detailed description of the financial assistance merger, including any larger integrated transaction of which the proposed merger is a part (including, but not limited to, an application for suspension of benefits under section 305(e)(9)(G) of ERISA), and the estimated total amount of financial assistance the plan sponsors request for each year. It also requires a narrative description of the events that led to the sponsors' decision to request a financial assistance merger, and the significant risks and assumptions relating to the proposed financial assistance merger and the projections provided. PBGC received no comments on its proposed § 4231.14 and adopts it in this final rule.

Section 4231.15

Section 4231.15 of this final rule, like the proposed, identifies the actuarial and financial information required for a request for a financial assistance merger. Section 4231.15(a) and (b) of this final rule, like the proposed, relate to plan actuarial reports and actuarial certifications, which should ordinarily be within the possession of the plan sponsors or plan actuaries. Section 4231.15(c)–(e) of this final rule, like the proposed, requires the submission of certain actuarial and financial information specific to the proposed financial assistance merger, which are necessary for PBGC to evaluate the solvency requirements under section 4231(e)(2) of ERISA. PBGC adopts its proposed § 4231.15 in this final rule with the modifications discussed below, which respond to comments it received (see above, ''Discussion of Comments'').

Section 4231.15 of this final rule, like the proposed, provides that each critical and declining status plan must demonstrate that its projected date of insolvency without the merger is sooner than the projected date of insolvency of the merged plan. The plan(s) may take the proposed financial assistance into account in this demonstration.

Section 4231.15 of this final rule, like the proposed, also provides guidance on the required demonstration that financial assistance is necessary for the merged plan to become or remain solvent. The type of projection required depends on whether the merged plan would be in critical status under section 305(b) of ERISA immediately following the merger (without taking the proposed financial assistance into account), as reasonably determined by the actuary. This final rule adds the option, supported by commenters, for the enrolled actuary to base the determination of whether the merged plan would be in critical status on the combined data and projections underlying the status certifications of each of the plans for the plan year immediately preceding the merger, including any selected updates in the data based on the experience of the plans in the immediately preceding plan year (reasonable adjustments are permitted but not required) (see above, ''Discussion of Comments''). This final rule also clarifies that the statement of whether the merged plan would be in critical status must be certified by an enrolled actuary.

Under § 4231.15 of this final rule, like the proposed, if the merged plan would be in critical status under section 305(b) of ERISA (without taking the proposed financial assistance into account), the plans must demonstrate that financial assistance is necessary for the merged plan to ''avoid insolvency'' under section 305(e)(9)(D)(iv) of ERISA and the regulations thereunder (excluding stochastic projections). This solvency standard is consistent with the ''emergence'' test under section 305(e)(4)(B) of ERISA, which requires a plan in critical status to show that it is not projected to become insolvent for any of the 30 succeeding plan years.

If the merged plan would *not* be in critical status under section 305(b) of ERISA (without taking the proposed financial assistance into account), under § 4231.15 of this final rule, like the proposed, the plans must demonstrate that the merged plan is *not* projected to become insolvent during the 20 years beginning after the proposed effective date of the merger with the proposed financial assistance. In this final rule, like the proposed, if this demonstration can be satisfied without taking the proposed financial assistance into account, or if the amount of financial assistance requested exceeds the amount that satisfies this demonstration, the plan sponsors must demonstrate that financial assistance is necessary to mitigate the adverse effects of the merger on the merged plan's ability to remain solvent. In response to comments, PBGC adds in this final rule that the demonstration that financial assistance is necessary to mitigate the adverse effects of the merger on the merged plan's ability to remain solvent may be based on stress testing over a long-term period (and may reflect reasonable future adverse experience), using a reasonable method in accordance with generally accepted actuarial standards (see above, ''Discussion of Comments'').

In response to a comment, PBGC will not adopt in this final rule its proposed requirement that each critical and declining status plan provide a projection of benefit disbursements reflecting maximum benefit suspensions (see above, ''Discussion of Comments'').

Finally, to provide a cost-effective alternative, PBGC adds the option to estimate benefit disbursements to satisfy the requirement that each critical and declining status plan provide a projection of benefit disbursements reflecting reduced benefit disbursements at the PBGC-guarantee level. This final rule also clarifies that the projection of benefit disbursements must include the supporting data, calculations, assumptions, and, if applicable, a description of estimates used.

Section 4231.16

Under § 4231.16, PBGC proposed that a request for a financial assistance merger include certain types of participant census data. In response to a comment, PBGC will not adopt in this final rule its proposed requirement that this participant census data include the monthly benefit reduced by the maximum benefit suspension permissible under section 305(e)(9) of ERISA (see above, ''Discussion of Comments''). Otherwise, in this final rule, PBGC adopts its proposed § 4231.16 with the clarification that the projections for which the census data must be provided include the projection in § 4231.15(d).

Section 4231.17

Section 4231.17 of this final rule, like the proposed, describes how PBGC will notify a plan sponsor(s) of PBGC's decision on a request for a facilitated merger. PBGC will approve or deny a request for a facilitated merger in writing and in accordance with the standards set forth in section 4231(e) of ERISA.[24] If PBGC denies a request, PBGC's written decision will state the reason(s) for the denial. If PBGC approves a request for a financial assistance merger, PBGC will provide a financial assistance agreement detailing the total amount and terms of the financial assistance as soon as practicable after notifying the plan sponsor(s) in writing of its approval. The decision to approve or deny a request for facilitated merger under section 4231(e) of ERISA is within PBGC's discretion and constitutes a final agency action not subject to PBGC's rules for reconsideration or administrative appeal. PBGC received no comments on its proposed § 4231.17 and adopts it in this final rule.

Section 4231.18

Section 4231.18 of this final rule, like the proposed, describes PBGC's jurisdiction over the merged plan resulting from a financial assistance merger. PBGC has determined that maintaining oversight is necessary to ensure compliance with financial assistance agreements, and proper stewardship of PBGC financial assistance. Based on the foregoing, § 4231.18(a) provides that PBGC will continue to have jurisdiction over the merged plan resulting from a financial assistance merger to carry out the purposes, terms, and conditions of the financial assistance merger, sections 4231 and 4261 of ERISA, and the regulations thereunder. Section 4231.18(b) states that PBGC may, upon notice to the plan sponsor, make changes to the financial assistance agreement(s) in response to changed circumstances consistent with sections 4231 and 4261 of ERISA and the regulations thereunder. PBGC received no comments on its proposed § 4231.18 and adopts it in this final rule.

Cost-Benefit Analysis

In general

Because this rulemaking relates to transfer payments, it is not subject to the requirements of Executive Order 13771. PBGC further notes that it results in no more than de minimis net costs. The rule has been determined to be ''significant'' under Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this final rule under E.O. 12866.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Executive Orders 12866 and 13563 require a comprehensive regulatory impact analysis to be performed for any economically significant regulatory action, defined as an action that would result in an annual effect of $100 million or more on the national economy or that would have other substantial impacts. It has been determined that this final rule is not economically significant. Thus, a comprehensive regulatory impact analysis is not required. But PBGC has examined the economic and policy implications of this rule and has concluded that the net effect of the action is to reduce costs in relation to benefits.

This final rule will enable plans to request a facilitated merger, including a request for financial assistance. Given the limits on PBGC's financial assistance for mergers and partitions imposed by the requirement that such assistance not impair PBGC's existing financial assistance obligations,[25] PBGC expects that fewer than 20 plans would be approved for either financial assistance merger or partition over the next three years (about six plans per year), and that the total financial assistance PBGC would provide under both provisions for basic benefits guaranteed for multiemployer plans would be less than $60 million per year.

Even with the limits on PBGC's resources for multiemployer plans, which are financed by insurance premiums, facilitated mergers under this final rule will help plans preserve retirement benefits for America's workers and retirees. In addition to receiving enough financial assistance to remain solvent, merged plans may gain efficiencies from lower administration and investment expenses. As a result, benefits in the merged plan would be more secure.

This final rule has new information requirements pertaining to financial assistance mergers, but the benefits of these facilitated mergers greatly outweigh the costs of the new filing requirements. PBGC estimates that the transfer impacts of this final rule will be about $65.19 million, and the net costs of the final rule will be about $184,500, as shown in the following table and as explained in more detail below.

Annual transfer amounts	Before final rule	After final rule	Net transfer
PBGC financial assistance	$0	$60 million	$60 million.
Benefits preserved above PBGC-guarantee	$0, assumes plan insolvent	$4.68 million	$4.68 million.
Reduced basic plan administrative expenses	($60,000)	($30,000)	$30,000.
Reduced investment management fees	($300,000)	($150,000)	$150,000.
Reduced valuation and actuarial fees	($300,000)	($150,000)	$150,000.
Reduced plan audit and Form 5500 expenses	($360,000)	($180,000)	$180,000.
Total transfer amounts	($1.02 million)	$64.17 million	$65.19 million.

[24] As noted above, section 4231(e)(1) of ERISA requires a determination by PBGC in consultation with the Participant and Plan Sponsor Advocate to approve a facilitated merger. Section 4231(e)(2) of ERISA sets forth four additional statutory conditions that must be satisfied before PBGC may approve a request for a financial assistance merger. PBGC will review each request for a facilitated merger, including a financial assistance merger, on a case-by-case basis in accordance with the statutory criteria in section 4231(e) of ERISA.

[25] *See* sections 4231(e)(2)(C) and 4233(b)(4) of ERISA. Under section 4231(e)(2) of ERISA, PBGC cannot provide financial assistance to facilitate a merger unless its expected long-term loss with respect to the plans involved will be reduced, and its ability to meet existing financial obligations to other plans will not be impaired by the financial assistance.

Annual transfer amounts	Before final rule	After final rule	Net transfer
Annual cost amounts	Before final rule	After final rule	Net cost
Filing requirements	[26] $43,550	$228,050	$184,500.

The ''net'' column shows the effect of this final rule (the ''after'' column minus the ''before'' column). The estimated net transfer amounts and net costs of this final rule are based on financial assistance mergers. The benefits preserved, reduced expenses, and costs are explained in more detail below.

In addition to preserving benefits and enabling administrative efficiencies, this final rule may provide qualitative benefits. First, the merged plan may be able to have additional investment diversification opportunities because of its larger pool of assets. Second, the employer contribution base generally expands and may be more diverse and, thus, less at risk to localized problems.

Benefits Preserved

This final rule preserves participants' benefits that would be reduced if the plan did not merge and became insolvent. When a multiemployer plan becomes insolvent, PBGC guarantees benefits up to the legal limit of $12,870 per year for an individual with 30 years of service. A PBGC study shows that, 54 percent of the time, participants facing a benefit reduction, in plans that have terminated and that are expected to become insolvent, are projected to lose 10 percent or more of their benefits.[27] In 2010, the average monthly benefit received by retirees in all multiemployer plans was $922.[28] PBGC estimates $1,200/participant per year in benefits preserved based on an estimate of $100/participant per month—10 percent of the $922 average monthly benefit (rounded). PBGC further estimates that about 50 percent of participants [29] in the merged plans, or about 650 participants [30] per plan, will have their benefits preserved for an estimated total of $4,680,000 per year ($1,200 × 650 participants × 6 plans).

Reduced Administrative and Investment Expenses

Merged plans may gain administrative and investment efficiencies, preserving assets to pay plan benefits. While expenses vary depending on plan size, PBGC estimates the following expenses would be reduced for each financial assistance merger:

- Basic administrative expenses (estimated $5,000)
- Investment management fees and expenses (estimated $25,000–$35,000)
- One plan valuation instead of two (estimated $10,500–$35,000)
- One plan audit and Form 5500 filing instead of two (estimated $15,000–$40,000)

Filing Requirements

Plan sponsors are required under section 4231(b)(1) of ERISA to file with PBGC notices of proposed merger or transfer. As discussed in this final rule, plan sponsors requesting financial assistance mergers must prepare and file additional information, including the compilation of merger information, plan information, actuarial and financial information, and participant census data information. As discussed further in the Paperwork Reduction Act section (see below), the cost to prepare the notices to PBGC, excluding financial assistance mergers, is $43,550. PBGC assumes that it will receive a total of six requests for financial assistance mergers, with a cost of $184,500.

Regulatory Flexibility Act

The Regulatory Flexibility Act [31] imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present a final regulatory flexibility analysis at the time of the publication of the final rule describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

Small Entities

For purposes of the Regulatory Flexibility Act requirements with respect to this final rule, PBGC considers a small entity to be a plan with fewer than 100 participants. This is substantially the same criterion PBGC uses in other regulations [32] and is consistent with certain requirements in title I of ERISA [33] and the Internal Revenue Code (Code),[34] as well as the definition of a small entity that DOL has used for purposes of the Regulatory Flexibility Act.[35]

Thus, PBGC believes that assessing the impact of this final rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration [36] under the Small Business Act. PBGC requested

[26] The collection of information under part 4231, before this final rule, is approved by OMB under control number 1212–0022.

[27] *See* ''PBGC's Multiemployer Guarantee'' (March 2015) at 7, Figure 6, accessible at *https://www.pbgc.gov/documents/2015-ME-Guarantee-Study-Final.pdf.* This PBGC study of its guarantee for multiemployer plans covered current plans, plans that are insolvent and receiving financial assistance, and plans that have terminated and which PBGC believes are likely to require future financial assistance (future plans).

[28] *See* ''Multiemployer Pension Plans: Report to Congress Required by the Pension Protection Act of 2006'' (Jan. 22, 2013) at 10, accessible at *https://www.pbgc.gov/documents/pbgc-report-multiemployer-pension-plans.pdf.* The average monthly benefit is determined by dividing benefits paid under all plans by the number of retired participants under all plans. The average is somewhat inflated because benefits paid during the year include lump sum payments (mostly de minimis lump sums of $5,000 or less). The average monthly benefit received in 2010 is higher in transportation industry plans ($1,324), where an annual benefit can reach $30,000 or more for a participant with 30 years of service, and in construction industry plans ($1,279); it is lower in retail trade and service industry plans ($620).

[29] *See* ''PBGC's Multiemployer Guarantee'' (March 2015) at 7, Figure 5, accessible at *https://www.pbgc.gov/documents/2015-ME-Guarantee-Study-Final.pdf.* Figure 5 shows that 49 percent of participants in future plans receive their full benefit, and 51 percent of participants in future plans face a benefit reduction.

[30] PBGC estimates that the average plan has 1,300 participants, based on PBGC's experience and participant data from plans that merged in 2014.

[31] 5 U.S.C. 601 *et seq.*

[32] *See, e.g.,* special rules for small plans under part 4007 (Payment of Premiums).

[33] *See, e.g.,* section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

[34] *See, e.g.,* section 430(g)(2)(B) of the Code, which permits single-employer plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

[35] *See, e.g.,* DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).

[36] *See,* 13 CFR 121.201.

comments on the appropriateness of the size standard used in evaluating the impact of its proposed rule on small entities. PBGC received no comments on this point.

Certification

Based on its definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act that the amendments in this rule will not have a significant economic impact on a substantial number of small entities. Based on data for the most recent premium filings, PBGC estimates that only 38 plans of the approximately 1,400 plans covered by PBGC's multiemployer program are small plans. Furthermore, plans may, but are not required to, merge or request financial assistance to merge. As discussed above, plans that merge will obtain economic benefits from reduced expenses and preserved plan benefits. A facilitated merger can improve the plans' ability to remain solvent and to continue paying participants' benefits. Merger may be particularly useful for small plans due to economies of scale. Accordingly, as provided in section 605 of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

Paperwork Reduction Act

PBGC is submitting the information collection requirements under part 4231 to OMB for review and approval under the Paperwork Reduction Act. The collection of information under part 4231 is currently approved under OMB control number 1212–0022 (expires September 30, 2020). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Multiemployer plans requesting a merger or transfer are required to file a notice with PBGC with required information under part 4231. PBGC needs the information submitted by plans to provide a basis for determining whether a merger or transfer satisfies statutory requirements. Plans may also request a compliance determination by providing additional information to enable PBGC to make an explicit finding that the merger or transfer requirements have been satisfied.

PBGC's current approval for the collection of information under part 4231 is for an estimated 14 transactions each year for which plan sponsors submit notices and requests for a compliance determination. Changes in this final rule that affect mergers and transfers that are not subject to the new requirements for facilitated mergers are not expected to have an impact on the burden of the information collection. The current approved annual burden for the collection of information is 10 hours in-house and $42,800 for work done by outside contractors, including attorneys and actuaries.

Most of the information filing requirements under part 4231 are for financial assistance mergers. PBGC estimates that under this final rule there will be six requests for a financial assistance merger. The estimated annual burden is 60 hours in-house (10 hours per application) with an estimated dollar equivalent of $4,500, based on an assumed blended hourly rate of $75 for administrative, clerical, and supervisory time. The estimated annual cost burden is $180,000 ($30,000 per application) for work done by outside contractors, including attorneys and actuaries. This estimate is based on 450 contracted hours (six applications x 75 hours) and assumes an average hourly rate of $400.

The total annual burden for the collection of information under part 4231 to prepare the notices and comply with the additional requirements for financial assistance mergers is 70 hours and $222,800, as shown in the following table:

Respondents	Hour burden (hours)	Hour burden—equivalent cost	Cost burden
Current approved respondents: 14	10	$750	$42,800
Facilitated mergers: 6	60	4,500	180,000
Totals: 20 respondents	70	5,250	222,800

List of Subjects in 29 CFR Part 4231

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, PBGC is amending 29 CFR chapter XL by revising part 4231 to read as follows:

PART 4231—MERGERS AND TRANSFERS BETWEEN MULTIEMPLOYER PLANS

Subpart A—General Provisions

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

PART 4231—MERGERS AND TRANSFERS BETWEEN MULTIEMPLOYER PLANS

Subpart A—General Provisions

§ 4231.1 Purpose and scope.

(a) *General*—(1) *Purpose.* The purpose of this part is to prescribe notice requirements under section 4231 of ERISA for mergers and transfers of assets or liabilities among multiemployer pension plans. This part also interprets the other requirements of section 4231 of ERISA and prescribes special rules for de minimis mergers and transfers.

(2) *Scope.* This part applies to mergers and transfers among multiemployer plans where all of the plans immediately before and immediately after the transaction are multiemployer plans covered by title IV of ERISA.

(b) *Additional requirements.* Subpart B of this part sets forth the additional requirements for and procedures specific to a request for a facilitated merger.

§ 4231.2 Definitions.

The following terms are defined in § 4001.2 of this chapter: *annuity, Code, EIN, ERISA, fair market value, guaranteed benefit, IRS, multiemployer plan, normal retirement age, PBGC, plan, plan sponsor, plan year,* and *PN.* In addition, the following terms are defined for purposes of this part:

Actuarial valuation means a valuation of assets and liabilities performed by an enrolled actuary using the actuarial assumptions used for purposes of determining the charges and credits to the funding standard account under section 304 of ERISA and section 431 of the Code.

Advocate means the Participant and Plan Sponsor Advocate under section 4004 of ERISA.

Critical and declining status has the same meaning as the term has under section 305(b)(6) of ERISA and section 432(b)(6) of the Code.

Critical status has the same meaning as the term has under section 305(b)(2) of ERISA and section 432(b)(2) of the Code, and includes ''critical and declining status'' as defined in section 305(b)(6) of ERISA and section 432(b)(6) of the Code.

De minimis merger is defined in § 4231.7(b).

De minimis transfer is defined in § 4231.7(c).

Effective date means, with respect to a merger or transfer, the earlier of—

(1) The date on which one plan assumes liability for benefits accrued under another plan involved in the transaction; or

(2) The date on which one plan transfers assets to another plan involved in the transaction.

Facilitated merger means a merger of two or more multiemployer plans facilitated by PBGC under section 4231(e) of ERISA, including a merger that is facilitated with financial assistance under section 4231(e)(2) of ERISA.

Fair market value of assets has the same meaning as the term has for minimum funding purposes under section 304 of ERISA and section 431 of the Code.

Financial assistance means periodic or lump sum financial assistance payments from PBGC under section 4261 of ERISA.

Financial assistance merger means a merger facilitated by PBGC for which PBGC provides financial assistance (within the meaning of section 4261 of ERISA) under section 4231(e)(2) of ERISA.

Insolvent has the same meaning as insolvent under section 4245(b) of ERISA.

Merged plan means a plan that is the result of the merger of two or more multiemployer plans.

Merger means the combining of two or more plans into a single plan. For example, a consolidation of two plans into a new plan is a merger.

Significantly affected plan means a plan that—

(1) Transfers assets that equal or exceed 15 percent of its assets before the transfer,

(2) Receives a transfer of unfunded accrued benefits that equal or exceed 15 percent of its assets before the transfer,

(3) Is created by a spinoff from another plan, or

(4) Engages in a merger or transfer (other than a de minimis merger or transfer) either—

(i) After such plan has terminated by mass withdrawal under section 4041A(a)(2) of ERISA, or

(ii) With another plan that has so terminated.

Transfer and *transfer of assets or liabilities* mean a diminution of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan or plans (including a plan that did not exist prior to the transfer). However, the shifting of assets or liabilities pursuant to a written reciprocity agreement between two multiemployer plans in which one plan assumes liabilities of another plan is not a transfer of assets or liabilities. In addition, the shifting of assets between several funding media used for a single plan (such as between trusts, between annuity contracts, or between trusts and annuity contracts) is not a transfer of assets or liabilities.

Unfunded accrued benefits means the excess of the present value of a plan's accrued benefits over the plan's fair market value of assets, determined on the basis of the actuarial valuation required under § 4231.5.

§ 4231.3 Requirements for mergers and transfers.

(a) *General requirements.* A plan sponsor may not cause a multiemployer plan to merge with one or more multiemployer plans or transfer assets or liabilities to or from another multiemployer plan unless the merger or transfer satisfies all of the following requirements:

(1) No participant's or beneficiary's accrued benefit is lower immediately after the effective date of the merger or transfer than the benefit immediately before that date (except as provided under § 4231.4(b)).

(2) Actuarial valuations of the plans that existed before the merger or transfer have been performed in accordance with § 4231.5.

(3) For each plan that exists after the transaction, an enrolled actuary—

(i) Determines that the plan meets the applicable plan solvency requirement set forth in § 4231.6; or

(ii) Otherwise demonstrates that benefits under the plan are not reasonably expected to be subject to suspension under section 4245 of ERISA.

(4) The plan sponsor notifies PBGC of the merger or transfer in accordance with §§ 4231.8 and 4231.9.

(b) *Compliance determination.* If a plan sponsor requests a determination that a merger or transfer that may otherwise be prohibited by section 406(a) or (b)(2) of ERISA satisfies the requirements of section 4231 of ERISA, the plan sponsor must submit the information described in § 4231.10 in addition to the information required by § 4231.9. PBGC may request additional information if necessary to determine whether a merger or transfer complies with the requirements of section 4231 and subpart A of this part. Plan sponsors are not required to request a compliance determination. Under section 4231(c) of ERISA, if PBGC determines that the merger or transfer complies with section 4231 of ERISA and subpart A of this part, the merger or transfer will not constitute a violation of the prohibited transaction provisions of section 406(a) and (b)(2) of ERISA.

(c) *Certified change in bargaining representative.* Transfers of assets and liabilities pursuant to a change of collective bargaining representative certified under the Labor-Management Relations Act of 1947 or the Railway Labor Act, as amended, are governed by section 4235 of ERISA. Plan sponsors involved in such transfers are not required to comply with subpart A of this part. However, under section 4235(f)(1) of ERISA, the plan sponsors of the plans involved in the transfer may agree to a transfer that complies with sections 4231 and 4234 of ERISA. Plan sponsors that elect to comply with sections 4231 and 4234 of ERISA must comply with the rules in subpart A of this part.

(d) *Informal consultation.* A plan sponsor may contact PBGC on an informal basis to discuss a potential merger or transfer.

§ 4231.4 Preservation of accrued benefits.

(a) *General.* Section 4231(b)(2) of ERISA and § 4231.3(a)(1) require that no participant's or beneficiary's accrued benefit may be lower immediately after the effective date of the merger or transfer than the benefit immediately before the merger or transfer. Except as provided in paragraph (b) of this section, a plan that assumes an obligation to pay benefits for a group of participants satisfies this requirement only if the plan contains a provision preserving all accrued benefits. The determination of what is an accrued benefit must be made in accordance with section 411 of the Code and the regulations thereunder.

(b) *Waiver.* PBGC may waive the requirement of paragraph (a) of this section, § 4231.3(a)(1), and section 4231(b)(2) of ERISA to the extent the accrued benefit is suspended under section 305(e)(9) of ERISA contemporaneously with the merger or transfer. If waived, the plan provision described under paragraph (a) of this section may exclude accrued benefits only to the extent those benefits are suspended under section 305(e)(9) of ERISA contemporaneously with the merger or transfer.

§ 4231.5 Valuation requirement.

The actuarial valuation requirement under section 4231(b)(4) of ERISA and § 4231.3(a)(2) is satisfied if an actuarial valuation has been performed for the plan based on the plan's assets and liabilities as of a date not earlier than the first day of the last plan year ending before the proposed effective date of the transaction. If the actuarial valuation required under this section is not complete when the notice of merger or transfer is filed, the plan sponsor may provide the most recent actuarial valuation for the plan with the notice, and the actuarial valuation required under this section when complete. For a significantly affected plan involved in a transfer (other than a plan that is a significantly affected plan only because the transfer involves a plan that has terminated by mass withdrawal under section 4041A(a)(2) of ERISA), the valuation must separately identify assets, contributions, and liabilities being transferred and must be based on the actuarial assumptions and methods that are expected to be used for the plan for the first plan year beginning after the transfer.

§ 4231.6 Plan solvency tests.

(a) *General.* For a plan that is not a significantly affected plan, the plan solvency requirement of section 4231(b)(3) of ERISA and § 4231.3(a)(3)(i) is satisfied if—

(1) The plan's expected fair market value of assets immediately after the merger or transfer equals or exceeds five times the benefit payments for the last plan year ending before the proposed effective date of the merger or transfer; or

(2) In each of the first five plan years beginning on or after the proposed effective date of the merger or transfer, the plan's expected fair market value of assets as of the beginning of the plan year plus expected contributions and investment earnings equal or exceed expected expenses and benefit payments for the plan year.

(b) *Significantly affected plans.* The plan solvency requirement of section 4231(b)(3) of ERISA and § 4231.3(a)(3)(i) is satisfied for a significantly affected plan if all of the following requirements are met:

(1) Expected contributions equal or exceed the estimated amount necessary to satisfy the minimum funding requirement of section 431 of the Code for the five plan years beginning on or after the proposed effective date of the transaction.

(2) The plan's expected fair market value of assets immediately after the transaction equals or exceeds the total amount of expected benefit payments for the first five plan years beginning on or after the proposed effective date of the transaction.

(3) Expected contributions for the first plan year beginning on or after the proposed effective date of the transaction equal or exceed expected benefit payments for that plan year.

(4) Expected contributions for the amortization period equal or exceed the unfunded accrued benefits plus expected normal costs for the period. The enrolled actuary may select as the amortization period either—

(i) The first 25 plan years beginning on or after the proposed effective date of the transaction, or

(ii) The amortization period for the resulting base when the combined charge base and the combined credit base are offset under section 431(b)(5) of the Code.

(c) *Rules for determinations.* In determining whether a transaction satisfies the plan solvency requirements set forth in this section, the following rules apply:

(1) Expected contributions after a merger or transfer must be determined by assuming that contributions for each plan year will equal contributions for the last full plan year ending before the date on which the notice of merger or transfer is filed with PBGC. If expected contributions include withdrawal liability payments, such payments must be shown separately. If the withdrawal liability payments are not the assessed amounts, or are not in accordance with the schedule of payments, or include future assessments, include the basis for such differences, with supporting data, calculations, assumptions, and methods. In addition, contributions must be adjusted to reflect—

(i) The merger or transfer;

(ii) Any change in the rate of employer contributions that has been negotiated (whether or not in effect); and

(iii) Any trend of changing contribution base units over the preceding five plan years or other period of time that can be demonstrated to be more appropriate.

(2) Expected normal costs must be determined under the funding method and assumptions expected to be used by the plan actuary for purposes of determining the minimum funding requirement under section 431 of the Code. If an aggregate funding method is used for the plan, normal costs must be determined under the entry age normal method.

(3) Expected benefit payments must be determined by assuming that current benefits remain in effect and that all scheduled increases in benefits occur.

(4) The plan's expected fair market value of assets immediately after the merger or transfer must be based on the most recent data available immediately before the date on which the notice is filed.

(5) Expected investment earnings must be determined using the same interest assumption to be used for determining the minimum funding requirement under section 431 of the Code.

(6) Expected expenses must be determined using expenses in the last plan year ending before the notice is filed, adjusted to reflect any anticipated changes.

(7) Expected plan assets for a plan year must be determined by adjusting the most current data on the plan's fair market value of assets to reflect expected contributions, investment earnings, benefit payments and expenses for each plan year between the date of the most current data and the beginning of the plan year for which expected assets are being determined.

§ 4231.7 De minimis mergers and transfers.

(a) *Special plan solvency rule.* The determination of whether a de minimis merger or transfer satisfies the plan solvency requirement in § 4231.6(a) may be made without regard to any other de minimis mergers or transfers that have occurred since the most recent actuarial valuation.

(b) *De minimis merger defined.* A merger is de minimis if the present value of accrued benefits (whether or not vested) of one plan is less than 3 percent of the other plan's fair market value of assets.

(c) *De minimis transfer defined.* A transfer of assets or liabilities is de minimis if—

(1) The fair market value of assets transferred, if any, is less than 3 percent of the fair market value of assets of all of the transferor plan's assets;

(2) The present value of the accrued benefits transferred (whether or not vested) is less than 3 percent of the fair market value of assets of all of the transferee plan's assets; and

(3) The transferee plan is not a plan that has terminated under section 4041A(a)(2) of ERISA.

(d) *Value of assets and benefits.* For purposes of paragraphs (b) and (c) of this section, the value of plan assets and accrued benefits may be determined as of any date prior to the proposed effective date of the transaction, but not earlier than the date of the most recent actuarial valuation.

(e) *Aggregation required.* In determining whether a merger or transfer is de minimis, the assets and accrued benefits transferred in previous de minimis mergers and transfers within the same plan year must be aggregated as described in paragraphs (e)(1) and (2) of this section. For the purposes of those paragraphs, the value of plan assets may be determined as of the date during the plan year on which the total value of the plan's assets is the highest.

(1) A merger is not de minimis if the total present value of accrued benefits merged into a plan, when aggregated with all prior de minimis mergers of and transfers to that plan effective within the same plan year, equals or exceeds 3 percent of the value of the plan's assets.

(2) A transfer is not de minimis if, when aggregated with all previous de minimis mergers and transfers effective within the same plan year—

(i) The value of all assets transferred from a plan equals or exceeds 3 percent of the value of the plan's assets; or

(ii) The present value of all accrued benefits transferred to a plan equals or exceeds 3 percent of the plan's assets.

§ 4231.8 Filing requirements; timing and method of filing.

(a) *When to file.* Except as provided in paragraph (g) of this section, a notice of a proposed merger or transfer, and, if applicable, a request for a compliance determination or facilitated merger (which may be filed separately or combined), must be filed not less than the following number of days before the proposed effective date of the transaction—

(1) 270 days in the case of a facilitated merger under § 4231.12;

(2) 120 days in the case of a merger (other than a facilitated merger) for which a compliance determination under § 4231.10 is requested, or a transfer; or

(3) 45 days in the case of a merger for which a compliance determination under § 4231.10 is not requested.

(b) *Method of filing.* PBGC applies the rules in subpart A of part 4000 of this chapter to determine permissible methods of filing with PBGC under this part.

(c) *Computation of time.* PBGC applies the rules in subpart D of part 4000 of this chapter to compute any time period for filing under this part.

(d) *Who must file.* The plan sponsors of all plans involved in a merger or transfer, or the duly authorized representative(s) acting on behalf of the plan sponsors, must jointly file the notice required by subpart A of this part, and, if applicable, a request for a facilitated merger under § 4231.12.

(e) *Where to file.* See § 4000.4 of this chapter for information on where to file.

(f) *Date of filing.* PBGC applies the rules in subpart C of part 4000 of this chapter to determine the date a submission under this part was filed with PBGC. For purposes of paragraph (a) of this section, the notice, and, if applicable, a request for a compliance determination or facilitated merger, is not considered filed until all of the information required under this part has been submitted.

(g) *Waiver of timing of notice.* PBGC may waive the timing requirements of paragraph (a) of this section and section 4231(b)(1) of ERISA if—

(1) A plan sponsor demonstrates to the satisfaction of PBGC that failure to complete the merger or transfer in less than the applicable notice period set forth in paragraph (a) of this section will cause harm to participants or beneficiaries of the plans involved in the transaction;

(2) PBGC determines that the transaction complies with the requirements of section 4231 of ERISA; or

(3) PBGC completes its review of the transaction.

§ 4231.9 Notice of merger or transfer.

Each notice of proposed merger or transfer required under section 4231(b)(1) of ERISA and this subpart must contain the following information:

(a) For each plan involved in the merger or transfer—

(1) The name of the plan;

(2) The name, address and telephone number of the plan sponsor and of the plan sponsor's duly authorized representative, if any; and

(3) The plan sponsor's EIN and the plan's PN and, if different, the EIN or PN last filed with PBGC. If no EIN or PN has been assigned, the notice must so indicate.

(b) Whether the transaction being reported is a merger or transfer, whether it involves any plan that has terminated under section 4041A(a)(2) of ERISA, whether any significantly affected plan is involved in the transaction (and, if so, identifying each such plan), and whether it is a de minimis transaction as defined in § 4231.7 (and, if so, including an enrolled actuary's certification to that effect).

(c) The proposed effective date of the transaction.

(d) Except as provided under § 4231.4(b), a copy of each plan provision stating that no participant's or beneficiary's accrued benefit will be lower immediately after the effective date of the merger or transfer than the benefit immediately before that date.

(e) For each plan that exists after the transaction, one of the following statements, certified by an enrolled actuary:

(1) A statement that the plan satisfies the applicable plan solvency test set forth in § 4231.6, indicating which is the applicable test, and including the supporting data, calculations, assumptions, and methods.

(2) A statement of the basis on which the actuary has determined under § 4231.3(a)(3)(ii) that benefits under the plan are not reasonably expected to be subject to suspension under section 4245 of ERISA, including the supporting data, calculations, assumptions, and methods.

(f) For each plan that exists before a transaction (unless the transaction is de minimis and does not involve either a request for financial assistance, or any plan that has terminated under section 4041A(a)(2) of ERISA), a copy of the most recent actuarial valuation report that satisfies the requirements of § 4231.5.

(g) For each significantly affected plan that exists after the transaction, the following information used in making the plan solvency determination under § 4231.6(b):

(1) The present value of the accrued benefits and plan's fair market value of assets under the valuation required by § 4231.5, allocable to the plan after the transaction.

(2) The fair market value of assets in the plan after the transaction (determined in accordance with § 4231.6(c)(4)).

(3) The expected benefit payments for the plan for the first plan year beginning on or after the proposed effective date of the transaction (determined in accordance with § 4231.6(c)(3)).

(4) The contribution rates in effect for the plan for the first plan year beginning on or after the proposed effective date of the transaction.

(5) The expected contributions for the plan for the first plan year beginning on or after the proposed effective date of the transaction (determined in accordance with § 4231.6(c)(1)).

§ 4231.10 Request for compliance determination.

(a) *General.* The plan sponsor(s) of one or more plans involved in a merger or transfer, or the duly authorized representative(s) acting on behalf of the plan sponsor(s), may file a request for a determination that the transaction complies with the requirements of section 4231 of ERISA. If the plan sponsor(s) requests a compliance determination, the request must be filed with the notice of merger or transfer under § 4231.3(a)(4), and must contain the information described in paragraph (c) of this section, as applicable.

(b) *Single request permitted for all de minimis transactions.* A plan sponsor may submit a single request for a compliance determination covering all de minimis mergers or transfers that occur between one plan valuation and the next. However, the plan sponsor must still notify PBGC of each de minimis merger or transfer separately, in accordance with §§ 4231.8 and 4231.9. The single request for a compliance determination may be filed concurrently with any one of the notices of a de minimis merger or transfer.

(c) *Contents of request.* A request for a compliance determination concerning a merger or transfer that is not de minimis must contain—

(1) A copy of the merger or transfer agreement; and

(2) For each significantly affected plan, other than a plan that is a significantly affected plan only because the merger or transfer involves a plan that has terminated by mass withdrawal under section 4041A(a)(2) of ERISA, copies of all actuarial valuations performed within the 5 years preceding the date of filing the notice required under § 4231.3(a)(4).

§ 4231.11 Actuarial calculations and assumptions.

(a) *Most recent valuation.* All calculations required by this part must be based on the most recent actuarial valuation as of the date of filing the notice, updated to show any material changes.

(b) *Assumptions.* All calculations required by this part must be performed by an enrolled actuary based on methods and assumptions each of which is reasonable (taking into account the experience of the plan and reasonable expectations), and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

(c) *Updated calculations.* PBGC may require updated calculations and representations based on the actual effective date of a merger or transfer if that date is more than one year after the notice is filed, based on revised actuarial assumptions, or based on other good cause.

Subpart B—Additional Rules for Facilitated Mergers

§ 4231.12 Request for facilitated merger.

(a) *General.* (1) The plan sponsors of the plans involved in a proposed merger may request that PBGC facilitate the merger. Facilitation may include training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies. Facilitation may also include financial assistance to the merged plan. PBGC has discretion under section 4231(e) of ERISA to take such actions as it deems appropriate to facilitate the merger of two or more multiemployer plans if it determines, after consultation with the Advocate, that the proposed merger 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 any of the plans involved in the proposed merger. For a facilitated merger, including a financial assistance merger, the requirements of section 4231(b) of ERISA and subpart A of this part must be satisfied in addition to the requirements of section 4231(e) of ERISA and this subpart. The procedures set forth in this subpart represent the exclusive means by which PBGC will approve a request for a facilitated merger under section 4231(e) of ERISA.

(2) *Financial assistance.* Subject to the requirements in section 4231(e) of ERISA and this subpart, in the case of a request for a financial assistance merger, PBGC may in its discretion provide financial assistance (within the meaning of section 4261 of ERISA). Such financial assistance will be with respect to the guaranteed benefits payable under the critical and declining status plan(s) involved in the facilitated merger.

(b) *Information requirements.* (1) A request for a facilitated merger, including a request for a financial assistance merger, must be filed with the notice of merger under § 4231.3(a)(4), and must contain the information described in § 4231.10, and a detailed narrative description with supporting documentation demonstrating that the proposed merger is in the interests of 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 any of the plans. If a financial assistance merger is requested, the narrative description and supporting documentation may consider the effect of financial assistance in making these demonstrations.

(2) If a financial assistance merger is requested, the request must contain the information required in §§ 4231.13 through 4231.16 in addition to the information required in paragraph (b)(1) of this section.

(3) PBGC may require the plan sponsors to submit additional information to determine whether the requirements of section 4231(e) of ERISA are met or to enable it to facilitate the merger.

(c) *Duty to amend and supplement.* During any time in which a request for a facilitated merger, including a request for a financial assistance merger, is pending final action by PBGC, the plan sponsors must promptly notify PBGC in writing of any material fact or representation contained in or relating to the request, or in any supporting documents, that is no longer accurate or was omitted.

§ 4231.13 Plan information for financial assistance merger.

A request for a financial assistance merger must include the following information for each plan involved in the merger:

(a) The most recent trust agreement, including all amendments adopted since the last restatement.

(b) The most recent plan document, including all amendments adopted since the last restatement.

(c) The most recent summary plan description (SPD), and all summaries of material modification issued since the most recent SPD.

(d) If applicable, the most recent rehabilitation plan (or funding improvement plan), including all subsequent amendments and updates, and the percentage of total contributions received under each schedule of the rehabilitation plan (or funding improvement plan) for the most recent plan year available.

(e) A copy of the plan's most recent IRS determination letter.

(f) A copy of the plan's most recent Form 5500 (Annual Report Form) and all schedules and attachments (including the audited financial statement).

(g) A current listing of employers who have an obligation to contribute to the plan, and the approximate number of participants for whom each employer is currently making contributions.

(h) A schedule of withdrawal liability payments collected in each of the most recent five plan years.

(i) If applicable, a copy of the plan sponsor's application for suspension of benefits under section 305(e)(9)(G) of ERISA (including all attachments and exhibits).

§ 4231.14 Description of financial assistance merger.

A request for a financial assistance merger must include the following information about the proposed financial assistance merger:

(a) A detailed description of the proposed financial assistance merger, including any larger integrated transaction of which the merger is a part (including, but not limited to, an application for suspension of benefits under section 305(e)(9)(G) of ERISA).

(b) A narrative description of the events that led to the plan sponsors' decision to submit a request for a financial assistance merger.

(c) A narrative description of significant risks and assumptions relating to the proposed financial assistance merger and the projections provided in support of the request.

(d) A detailed description of the estimated total amount of financial assistance the plan sponsors request for each year, including the supporting data, calculations, assumptions, and a description of the methodology used to determine the estimated amounts.

§ 4231.15 Actuarial and financial information for financial assistance merger.

A request for a financial assistance merger must include the following actuarial and financial information for the plans involved in the merger:

(a) A copy of the actuarial valuation performed for each of the two plan years before the most recent actuarial valuation filed in accordance with § 4231.9(f).

(b) If applicable, a copy of the plan actuary's most recent annual actuarial certification under section 305(b)(3) of ERISA, including a detailed description of the assumptions used in the certification, and the basis under which they were determined. The description must include information about the assumptions used for the projection of future contributions, withdrawal liability payments, and investment returns, and any other assumption that may have a material effect on projections.

(c) A detailed statement certified by an enrolled actuary that the merger is necessary for one or more of the plans involved to avoid or postpone insolvency, including the basis for the conclusion, supporting data, calculations, assumptions, and a description of the methodology. This statement must demonstrate for each critical and declining status plan involved in the merger that the date the plan projects to become insolvent (without reflecting the merger) is earlier than the date the merged plan projects to become insolvent (the merged plan may reflect the proposed financial assistance). Include as an exhibit annual cash flow projections for each critical and declining status plan involved in the merger through the date the plan projects to become insolvent (using an open group valuation and without reflecting the merger). Annual cash flow projections must reflect the following information:

(1) Fair market value of assets as of the beginning of the year.

(2) Contributions and withdrawal liability payments.

(3) Benefit payments organized by participant type (*e.g.,* active, retiree, terminated vested).

(4) Administrative expenses.

(5) Fair market value of assets as of the end of the year.

(d) For each critical and declining status plan involved in the merger, a long-term projection (at least 50 to 90 years) of benefit disbursements by participant type (*e.g.,* active, retiree, terminated vested) (without reflecting the merger) reflecting reduced benefit disbursements at the PBGC-guarantee level (which may be estimated) beginning with the proposed effective date of the merger (using a closed group valuation and no accruals after the proposed effective date of the merger). Include the supporting data, calculations, assumptions, and, if applicable, a description of estimates used for this projection.

(e) A detailed statement certified by an enrolled actuary that financial assistance is necessary for the merged plan to become or remain solvent, including the basis for the conclusion, supporting data, calculations, assumptions, and a description of the methodology. Include as an exhibit annual cash flow projections for the merged plan with the proposed financial assistance (based on the actuarial assumptions and methods that will be used under the merged plan). Annual cash flow projections must reflect the information listed in paragraphs (c)(1) through (5) of this section. In addition, include as an exhibit a statement certified by an enrolled actuary of whether the merged plan would be in critical status for purposes of paragraph (e)(1) or (2) of this section, including the basis for the conclusion.

(1) If the merged plan would be in critical status immediately following the merger without the proposed financial assistance (as reasonably determined by the enrolled actuary or as set forth in this paragraph), the enrolled actuary's certified statement must demonstrate that the merged plan will avoid insolvency under section 305(e)(9)(D)(iv) of ERISA and the regulations thereunder (excluding stochastic projections) with the proposed financial assistance. The enrolled actuary may determine whether the merged plan would be in critical status based on the combined data and projections underlying the status certifications of each of the plans for the plan year immediately preceding the merger, including any selected updates in the data based on the experience of the plans in the immediately preceding plan year (reasonable adjustments are permitted but not required).

(2) If the merged plan would not be in critical status immediately following the merger without the proposed financial assistance (as reasonably determined by the enrolled actuary or as set forth in paragraph (e)(1) of this section), the enrolled actuary's certified statement must demonstrate that the merged plan is not projected to become insolvent during the 20 plan years beginning after the proposed effective date of the merger with the proposed financial assistance (using the methodologies set forth under section 305(b)(3)(B)(iv) of ERISA and the regulations thereunder). If such a demonstration is possible without the proposed financial assistance, or if the amount of financial assistance requested exceeds the amount needed to satisfy this demonstration, the enrolled actuary's certified statement must demonstrate that financial assistance is necessary to mitigate the adverse effects of the merger on the merged plan's ability to remain solvent. The demonstration that financial assistance is necessary to mitigate the adverse effects of the merger on the merged

plan's ability to remain solvent may be based on stress testing over a long-term period (and may reflect reasonable future adverse experience), using a reasonable method in accordance with generally accepted actuarial standards.

(f) If applicable, a copy of the plan actuary's certification under section 305(e)(9)(C)(i) of ERISA.

(g) The rules in § 4231.6(c) apply to the solvency projections described in paragraphs (c) and (e) of this section, unless section 305(e)(9)(D)(iv) of ERISA and the regulations thereunder apply and specify otherwise.

§ 4231.16 Participant census data for financial assistance merger.

A request for a financial assistance merger must include a copy of the census data used for the projections described in § 4231.15(c) through (e), including:

(a) Participant type (retiree, beneficiary, disabled, terminated vested, active, alternate payee).

(b) Gender.

(c) Date of birth.

(d) Credited service for guarantee calculation (*i.e.,* number of years of participation).

(e) Vested accrued monthly benefit.

(f) Monthly benefit guaranteed by PBGC.

(g) Benefit commencement date (for participants in pay status and others for which the reported benefit will not be payable at normal retirement age).

(h) For each participant in pay status—

(1) Form of payment, and

(2) Data relevant to the form of payment, including:

(i) For a joint-and-survivor benefit, the beneficiary's benefit amount and the beneficiary's date of birth;

(ii) For a Social Security level income benefit, the date of any change in the benefit amount, and the benefit amount after such change;

(iii) For a 5-year certain or 10-year certain benefit (or similar benefit), the relevant defined period; or

(iv) For a form of payment not otherwise described in this section, the data necessary for the valuation of the form of payment.

(i) If an actuarial increase for postponed retirement applies, or if the form of annuity is a Social Security level income benefit, the monthly vested benefit payable at normal retirement age in normal form of annuity.

§ 4231.17 PBGC action on a request for facilitated merger.

(a) *General.* PBGC may approve or deny a request for a facilitated merger, including a request for a financial assistance merger, at its discretion if the requirements of section 4231 of ERISA are satisfied. PBGC will notify the plan sponsor(s) in writing of its decision on a request. If PBGC denies the request, PBGC's written decision will state the reason(s) for the denial. If PBGC approves a request for a financial assistance merger, PBGC will provide a financial assistance agreement detailing the total amount and terms of the financial assistance as soon as practicable after notifying the plan sponsor(s) in writing of its approval.

(b) *Final agency action.* PBGC's decision to approve or deny a request for a facilitated merger, including a request for a financial assistance merger, is a final agency action for purposes of judicial review under the Administrative Procedure Act (5 U.S.C. 701 *et seq.*).

§ 4231.18 Jurisdiction over financial assistance merger.

(a) *General.* PBGC will retain jurisdiction over the merged plan resulting from a financial assistance merger to carry out the purposes, terms, and conditions of the financial assistance merger, the financial assistance agreement, sections 4231 and 4261 of ERISA, and the regulations thereunder.

(b) *Financial assistance agreement.* PBGC may, upon providing notice to the plan sponsor, make changes to the financial assistance agreement in response to changed circumstances consistent with sections 4231 and 4261 of ERISA and the regulations thereunder.

William Reeder,

Director, Pension Benefit Guaranty Corporation.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2018–0871]

Drawbridge Operation Regulation; Sacramento River, Sacramento, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Tower Drawbridge across the Sacramento River, mile 59.0, at Sacramento, CA. The deviation is necessary to allow the community to participate in the Farm-to-Fork Dinner event. This deviation allows the bridge to remain in the closed-to-navigation position during the deviation period.

DATES: This deviation is effective from 12 noon through 10 p.m. on September 30, 2018.

ADDRESSES: The docket for this deviation, USCG–2018–0871, is available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Carl T. Hausner, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516; email *Carl.T.Hausner@uscg.mil.*

SUPPLEMENTARY INFORMATION: The California Department of Transportation has requested a temporary change to the operation of the Tower Drawbridge over the Sacramento River, mile 59.0, at Sacramento, CA. The drawbridge navigation span provides a vertical clearance of 30 feet above Mean High Water in the closed-to-navigation position. The draw operates as required by 33 CFR 117.189(a). Navigation on the waterway is commercial and recreational.

The drawspan will be secured in the closed-to-navigation position from 12 noon through 10 p.m. on September 30, 2018, to allow the community to participate in the Farm-to-Fork Dinner event. This temporary deviation has been coordinated with the waterway users. No objections to the proposed temporary deviation were raised.

Vessels able to pass through the bridge in the closed position may do so at anytime. The bridge will be able to open for emergencies with a 2-hour notification to the bridge owner and there are no immediate alternate routes for vessels to pass. The Coast Guard will also inform the users of the waterway through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessel operators can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.