Notes from Intersector Meeting with PBGC October 11, 2017

Intersector Group Meeting with the Pension Benefit Guaranty Corporation Notes

October 11, 2017

Twice a year the Intersector Group meets with representatives of the Pension Benefit Guaranty Corporation (PBGC) to discuss regulatory and other issues affecting pension practice. The Intersector Group is composed of two delegates from each of the following actuarial organizations: American Academy of Actuaries (Academy), Conference of Consulting Actuaries (CCA), Society of Actuaries (SOA), and ASPPA College of Pension Actuaries (ACOPA). Attending from the Intersector Group at this meeting were Bruce Cadenhead (CCA), Tom Finnegan (ACOPA), Ted Goldman (Academy), Eric Keener (SOA), Tonya Manning (CCA), John Markley (ACOPA), Maria Sarli (SOA), and Josh Shapiro (Academy). Monica Konaté, Academy staff member supporting the Intersector Group, also attended.

These meeting notes are not official statements of the PBGC and have not been reviewed by its representatives who attended the meetings. The notes merely reflect the Intersector Group's understanding of the current views of the PBGC representatives and do not represent the positions of the PBGC or of any other governmental agency and cannot be relied upon by any person for any purpose. Moreover, the PBGC has not in any way approved these notes or reviewed them to determine whether the statements herein are accurate or complete.

Discussion topics were submitted to the PBGC in advance of the meeting and are shown in regular typeface below; a summary of the discussion is shown in italics.

Part I: Questions from the profession

- Terminated Plans amended for lump sums, lump sums post-NRA calculated as lump sum of NRA benefit plus accumulation of post-NRA monthly benefits, any concerns?

  In a terminated plan amended to permit lump sum payments, there may be participants who are past their normal retirement dates for whom the present value of the normal retirement benefit using 417(e) assumptions is less than the present value of the late retirement benefit commencing immediately (also using 417(e) assumptions). The Intersector Group asked if PBGC was aware of any concerns with plans in this situation paying lump sums equal to the 417(e) value of the normal retirement benefit, even though it is less favorable to participants than the present value of the immediate late retirement benefit.

  This situation can arise when the late retirement increase factors in the plan document are subsidized in comparison to the late retirement increase that would result from the 417(e) assumptions. PBGC representatives indicated that this is an area where the IRS has the authority to interpret the statute and regulations. They expected that the lump sum would typically not be less than the 417(e) value and cautioned against assuming any subsidy would not be payable without further research, especially if plan language is not clearly written.

- Terminated Plans getting PBGC review—timing for requests for additional information.

  The Intersector Group shared an experience related to a terminating plan in which PBGC staff requested a substantial amount of information and expected it to be provided in less than a week.

  PBGC representatives indicated that this is not their normal process and suggested that perhaps there was a mistake or possibly there was a perception that the plan sponsor had not been responsive to previous requests. In general, the agency's intent is only to take an aggressive approach after earlier requests are ignored or other factors lead to the conclusion that the plan sponsor is not being cooperative.

- Request for comment on reducing burdens. What did PBGC hear? How do they develop solutions?

  The Intersector Group asked the PBGC representatives for an update on the feedback they received from the Request for Information related to reducing regulatory burdens. PBGC received 38 comment letters in response to the RFI, and there was minimal overlap between them. As such, there were no particular themes to the responses. Many of the responses came from individuals (28) rather than organizations (10), and the majority of those raised issues that are not directly related to PBGC regulations (e.g., participants in PBGC trusteed plans asking for cost-of-living increases). PBGC will take all of the comments that were received into account as the future regulatory agenda is developed and the focus on reducing burdens continues.

- How did the first round of 4010 filing go under the new rules? How can we assist in improving the process?

  PBGC representatives indicated that the first round of 4010 filings under the new rules went well. Due to the new rules, PBGC experienced a three-fold increase in volume, which was not unexpected. The issues that have been encountered under the new rules are similar to the issues that have been encountered historically, but the volume of issues is higher due to the greater volume of filings.

  PBGC representatives highlighted a few areas where filers can help to improve the process. One area where filers often make mistakes is when the plan sponsor is part of a controlled group that includes foreign entities. These foreign entities do need to be reflected in the 4010 filings. PBGC representatives indicated that the filings should be more efficient in future years, as basic information about the plan sponsors that was entered during a previous 4010 filing will be pre-populated in the online system, making it only necessary to enter any changes that have occurred. In the event that a filing is due for one year, and then not due for the next year, in any future year where a filing is due it should *still be possible to pre-populate the information from the form that was filed prior to the gap when no filing was necessary.*

Another area where filers can help improve the process is to plan ahead for the possibility that the individual responsible for completing the online filing is not available in future years. If there has been a staff change, it is a good idea to begin the process early to ensure that any effort necessary to obtain online access is completed before the filing deadline. As a matter of long-term planning, it is also advisable that the filing coordinator take steps to transfer the filing coordinator designation ("reassign the filing") to another staffer before they leave. Additionally, a back-up coordinator should also be designated.

- For reportable events, if company is financially sound, how has experience been since the change? How is it playing out with the overall level of reportable events?

PBGC representatives reviewed several statistics with the Intersector Group to illustrate the recent experience with the low default risk waiver. Since 2016, there have been 290 events reported where the low default risk waiver could have applied (PBGC based this solely on the publicly available default probabilities, so this is overstated). This represents 30 percent of the total volume of events that were reported, which was consistent with the prior year. PBGC has reviewed these events and concluded that approximately 70 of them were filed by plan sponsors that appear to have been sufficiently financially sound that they could have avoided filing the events due to the low default risk waiver.

PBGC is in the process of reaching out to these plan sponsors in an effort to determine why they filed the reportable events instead of using the low default risk waiver and not filing. It is suspected that some sponsors filed the reportable events instead of using the waiver simply out of an abundance of caution. It is also likely that some companies either did not look into the waiver criteria or did not understand it. In some cases the time or effort required to determine if a waiver applied might have exceeded the time or effort necessary to simply complete the form and file the reportable event. PBGC will continue to look into this issue and may look for ways to make the waiver criteria easier to understand.

PBGC representatives also offered some additional comments on reportable events. Missed end-of-year and quarterly contributions continue to represent more than 60 percent (with 15 percent > $1 million (Form 200) and 45 percent < $1 million (Form 10)) of the events that are reported. Separately, one area of clarification is that PBGC does not need to receive multiple reports of what is essentially the same event, which sometime occurs when there is a series of related changes in a plan participant population. If there are any concerns in this area plan sponsors should reach out to the PBGC to confirm. There is also a continued high rate of late filings, with approximately 35 percent being received after the deadline. In many cases this experience is tied to missed quarterly events, where the sponsor does not realize that the quarterly contribution is late, and, therefore, is not aware that a reportable event has occurred. This situation is most common among small plans (70 percent of late reporting is attributable to *small plans).*

- Multiemployer—now that the first partition has been approved, is there a clear standard for non-impairment and long-term loss? What assumptions should be used?

  PBGC representatives directed the Intersector Group to a FAQ page that has been added to the PBGC's website and includes a section on the non-impairment requirement: https://www.pbgc.gov/prac/pg/mpra/partition-faqs-for-practitioners#impairment.

  PBGC generally considers a proposed partition to satisfy the non-impairment requirement if the partition does not materially accelerate the projected insolvency of the multiemployer insurance program. For this purpose, a partition that accelerates the projected insolvency of the PBGC multiemployer program by only a few days likely would not be considered material.

  Since PBGC has attached a materiality threshold to the non-impairment requirement, it may be easier for small plans to have partitions approved than large plans, since any adverse effect on PBGC solvency will tend to be smaller. PBGC representatives acknowledged that this is the case but also emphasized that the partition of a large plan that accelerates PBCG insolvency by more than a few days might also be approved if the long-term reduction in PBGC's liabilities associated with the partition is especially large. In addition, PBGC indicated strategies should be implemented that minimize the number of participants impacted. For example, if results can be achieved by prioritizing vested terminated participants and then actives (those not in pay status), that would be a preferable approach.

  In terms of process, PBGC representatives strongly recommended plan sponsors to engage in a dialogue with PBGC early in the partition process, before finalizing a proposed partition approach. As part of this process, PBGC staff will test the proposed partition structure using the PIMS system to determine the effect that it would have on the projected insolvency date.

- Multiemployer—for insolvent plans: if PBGC eventually cannot pay guaranteed benefits, how does the plan implement lower benefits?

  PBGC representatives indicated that they are aware of the interest in this issue from the multiemployer community but have not yet reached any conclusions. The primary focus of the agency's efforts is to ensure that it is never necessary to implement lower benefits due to an inability to pay the full guaranteed amounts. This topic may be addressed in the next quinquennial report on the financial condition of the multiemployer insurance program that is issued by the agency.

- Multiemployer—how does the agency see reform proposals playing out?

  PBGC representatives indicated that they are aware of some of the various reform proposals that have been suggested but have not been asked to prepare any substantive analyses.

Part II: Questions from the PBGC

Plan terminations where an annuity provider cannot be found.

The Intersector Group and PBGC representatives discussed the issue of plan terminations where it is impossible to find an insurance company willing to bid on the annuities. This situation places plan sponsors in a catch-22, where they are legally permitted to terminate, but they are also obligated to find an annuity provider. One suggestion is to try and engage in these transactions early in the year before insurance companies reach their annual quotas or fill their budgeted capacity.

PBGC is aware of this issue but does not currently have a project on this topic at the top of its agenda. One potential solution that has been discussed within the community is for PBGC to serve as the annuity provider in situations like this. This approach would require legislative action, however, and there is currently nobody pushing for any such legislation.

- Insolvent multiemployer plans with active contributing employers.

  The Intersector Group and PBGC representatives discussed the situation where a multiemployer plan has exhausted its assets and is receiving PBGC financial assistance but also continues to have contributing employers that have not withdrawn from the plan. This situation is permissible under the law and regulations, as there is no guidance that prevents employers from remaining in an insolvent plan. Doing so would prevent the assessment of either ordinary or mass withdrawal liability, and active participants would continue to earn new benefit accruals, albeit at the PBGC guarantee level.

  PBGC representatives questioned why the trustees of the plan would not choose to not accept any further contributions under collective bargaining agreements, which would force a mass withdrawal and the associated withdrawal liability assessments. If this action increases the resources available to pay participant benefits, the trustees might have a fiduciary duty to take this step. The Intersector Group responded that some plan sponsors that are close to insolvency are considering this question right now. In some cases it may be possible to increase the cash flow into the plan through mass withdrawal liability assessments, though in other cases those assessments may push companies into bankruptcy, which could actually reduce the cash flow into the plan. There is also a possibility of engaging independent fiduciaries to help make these decisions, as both the labor and management trustees may have conflicts of interest in these situations.

- Treasury Department interpretation of requirement to lift benefit suspensions after a merger between a distressed multiemployer fund and a larger healthy fund.

  PBGC representatives indicated that they are aware of Treasury's position that benefit suspensions must be eliminated prospectively, even if those suspensions *took place in a distressed multiemployer plan prior to its merger with a larger healthy plan. This position may make it impossible for large healthy plans to assist smaller troubled plans with a merger, representing a missed opportunity to preserve a higher level of benefits above the PBGC guarantee. This decision rests with Treasury's authority and PBGC has no ability to issue guidance on this topic, but PBGC staff is in contact with Treasury staff in the hope that a solution may be found.*

- Missing participants.

  PBGC representatives indicated that the final regulation on missing participants is under Office of Management and Budget (OMB) review. OMB has 90 days to review so PBGC is hopeful the regulation will be effective for 2018.

- New IRC §430 mortality regulations.

  PBGC representatives indicated that they will not be taking a position as to whether a plan sponsor that chooses to defer recognition of the updated IRC §430 tables until 2019 for funding purposes (which then affects PBGC variable-rate premium calculations) did so appropriately under the final regulations, as that determination is within IRS's purview.

Part III: Agency Deep Dive

- Overview of PBGC multiemployer program and solutions.

  This topic was discussed during Parts I and II of the meeting.