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Notes from Intersector Meeting with PBGC May 28, 2020

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Intersector Group Discussion Topics for Pension Benefit Guaranty Corporation
May 28, 2020

Periodically the "Intersector Group" ("the Group") engages with representatives of the Pension Benefit Guaranty Corporation (PBGC) to discuss regulatory and other issues affecting pension actuarial 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 American Society of Enrolled Actuaries (ASEA). Joining this meeting call from the Intersector Group were Bruce Cadenhead (CCA), Tom Finnegan (ASEA), Eric Keener (SOA), Ellen Kleinstuber (Academy), Tonya Manning (CCA), Marty Pippins (ASEA), Maria Sarli (SOA), and Jason Russell (Academy). Linda K. Stone, Academy senior pension fellow, and Philip Maguire, Academy staff member supporting the Intersector Group, also joined.

These call notes are not official statements of the PBGC and have not been reviewed by its representatives who joined the meeting. The notes are a reflection of the Intersector Group's understanding of the views expressed by 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 by the Intersector Group to the PBGC in advance of the call and are shown in regular typeface below; a summary of the discussion is shown in italics.

Single-Employer Plans

1. 4062(e)—The Group had questions where it would be helpful to get clarification, e.g., how to count participants working in different locations, or how multiple plans are impacted when a company exceeds the 15% threshold.

The Group noted that this issue has increased importance given the current economic environment. For example, consider a situation where a company sponsors both a union plan and salaried plan. There is a shutdown at the union location, which could affect the salaried plan even though everyone laid off was hourly. Does PBGC have any further guidance on how to treat such a situation under section 4062(e)?

PBGC indicated they would prefer not to go through hypotheticals, as section 4062(e) is a very fact-specific part of the statute. This section of the statute was amended in 2014. It defines a substantial cessation of operations as a permanent reduction of 15% of all eligible employees. In a situation to which 4062(e) may apply, PBGC would look at the reduction at the facility, which is a different approach than under the old statute. It is also important for employers to look at what is a "facility," which in and of itself is very fact-specific. It is difficult to give more guidance than that.

On the issue of multiple plans being affected, it is theoretically possible. PBGC has not seen such a situation yet. It is important to do separate reporting for each plan, although one plan may have an exemption and another may not; in that case the plan sponsor should mention the other plan having the exemption when they report on the plan for which reporting is required. New forms are designed to make reporting easier.

The Group asked regarding the original example, consider if the company shuts down one location, covering only union employees, which represents 20% of the company's workforce. Would this shutdown affect the company's salaried plan, because the total number of eligible employees was reduced by more than 15%? No direct answer was provided.

2. Uncashed checks for missing participants in a plan termination—The Group had questions around this that were submitted as part of the "Blue Book" process; PBGC may be planning on posting a response on the practitioner Q&A page, but it would be helpful if there was information to share now.

The Group noted that with respect to uncashed checks for participants in the missing participant program under section 4050, PBGC accepts participants as missing under certain circumstances. The Group has questions about participants in other situations. For example: (1) uncashed checks from before plan termination; (2) when someone who has several uncashed checks but has since resumed cashing later checks; or (3) when someone dies before cashing check(s).

PBGC elaborated on these scenarios. First, discussing a participant who took a lump sum, did not cash the check, and then the plan subsequently terminated: An individual in a situation like this would qualify for the missing participant program.

Next, take the situation of a participant with one or more missed checks who cannot be located and who has no named beneficiary. If the participant cannot be located and cannot be confirmed as deceased, then yes, they are considered to be missing and would qualify for the program.

By contrast, a participant would not qualify as missing if they failed to cash a number of checks but are now cashing later checks. In this situation, the plan sponsor should be able to contact the person and get them to cash their prior uncashed checks. While such a participant would not qualify for the missing participant program, the plan sponsor can contact PBGC for assistance.

Lastly, consider the example of a participant who took a lump sum cash out but died before cashing the check and did not have a named beneficiary. In this situation, whether the participant qualifies for the missing participant program would be a facts and circumstances determination. If the plan sponsor cannot sort out the issue on its own, it should contact the PBGC to determine the best path forward.

The plan sponsor should also consider what the plan document says to do in these situations. It is difficult to answer hypothetical questions broadly, because there are so many variables. The plan sponsor should do its best to administer the plan according to the plan's provisions. Again, if the plan sponsor is struggling or reaches a roadblock, it can contact PBGC for guidance.

PBGC also noted that the PBGC website has a practitioner FAQ page: https://www.pbgc.gov/prac/faqs. PBGC is in the process of updating this page, but has been prioritizing other matters recently. PBGC encourages plan sponsors to check the FAQ page, as well as the applicable regulations, to determine whether an individual would qualify for the missing participant program.

PBGC also noted the importance of recognizing that the applicable regulations are specifically concerned with a participant who is still missing when the plan is terminated, not participants who are missing when the plan is ongoing. In any event, the plan sponsor must conduct a diligent search and send the required notices before the participant can be considered "missing."

3. Plan termination audits—Does PBGC anticipate any changes to the 300-participant threshold for random audits vs. auditing every termination?

The Group expressed its understanding that PBGC's current policy is to have a 100% audit rate for terminating plans with at least 300 participants, and to randomly audit plans below that threshold. The Group has heard a rumor that there currently are not enough plans terminating to reach the number of audits PBGC is targeting each year. Does this mean there will be close to a 100% audit rate, even for smaller plans?

PBGC indicated that there is no truth to that rumor. There are enough plans terminating so that small plans will not be subject to a higher audit rate.

4. Reportable Events and Early Warning Program—Is PBGC looking at any specific areas more closely? E.g., the Group saw one situation where PBGC seemed to ask more questions around an active participant reduction.

The Group recounted, with respect to reportable events, situations where there have been very detailed follow-up questions on active participant reductions. The Group would like to get a sense of whether PBGC is paying closer attention to some areas than others. Are some events considered greater risks than others?

PBGC answered that processes have not changed. As one could imagine, there is more activity with these programs during an economic downturn. PBGC reviews public information and does its own research. A number of companies that are filing could qualify for the low default risk waiver. PBGC typically does not follow up on these situations.

Single-cause events tend to raise more questions about the nature of the shutdown or restructuring. This may be a sign there is more trouble coming for the company. Plans with very few actives may be more likely to trigger reporting thresholds, but they often do not require much follow-up.

The Group asked whether there has been any change in policy/metrics for the Early Warning Program. PBGC confirmed that there is no change in PBGC's policies and methodologies. That said, activity levels and risk levels change with economic circumstances.

PBGC encourages companies to consider low default risk waivers. PBGC does not want companies and the PBGC to utilize too much time and resources preparing and reviewing filings when the risk is low. PBGC is willing to walk plan sponsors through the determination of the low default risk waiver.

PBGC has added reporting requirements for active participant reduction filings, including actuarial reports and company financial statements. It is important for plan sponsors to make sure filings are complete. PBGC emphasizes that these filings should include company financial statements, not plan financial statements.

PBGC also mentioned that many plans have reported that they missed contributions due April 15, 2020. Contributions not paid on this date were not "missed contributions," because Congress moved the deadline to January 1, 2021, under the CARES Act.

Plan sponsors and practitioners should sign up for "what's new" emails from PBGC to learn of any changes or developments.

PBGC noted they are working mostly on COVID-19-related guidance.

PBGC has observed that many loan defaults ($10 million or more) have gone unreported. When a company defaults on a loan, that is a reportable event. In these situations, PBGC has found there is often a disconnect between the company and the actuary. PBGC encourages plan actuaries and plan administrators to talk with companies about reportable events in advance, and not wait for the reportable event to occur. PBGC has raised this issue before and wants to re-emphasize it.

The Group noted that in many cases, the people at the company (e.g., human resources) with whom the actuaries are working are not the same people who are connected to events like a loan default (e.g., finance).

PBGC noted that PBGC's website has a printout on reportable events to make it easier for practitioners to talk to plan sponsors about reportable events.

5. The Group expects that there may be a surge in funding waiver requests—What are PBGC's thoughts on (a) the ability of IRS/PBGC to handle a surge and (b) the demonstration that the financial difficulty is temporary and the company will be able to handle the funding requirements in the future? No one really knows how quickly the economy/certain industries will (or won't) bounce back, so any thoughts on what the company might need to provide to demonstrate this would be helpful.

PBGC answered that they can handle the surge in funding waiver requests but cannot speak to IRS' capacity. Only waivers over $1 million require PBGC input, but all waiver requests are reportable events. Note that calendar year 2020 waiver requests are due by March 15, 2021, and contribution requirements are delayed until January 1, 2021, under the CARES Act. PBGC hopes to know more about the current situation by then.

As for financial projections, the best practice is to be as detailed as possible, including the documentation of underlying assumptions. If a company is doing its best possible prediction, it needs to document the rationale for key assumptions. For example, if a company says its revenue will decline by 20%, PBGC will ask for information that forms the basis of that assumption.

The Group responded that companies may want to file early, but asked whether there will be pushback from the agencies for companies to wait until more is known about the current situation and recovery. PBGC deferred to the IRS but opined that it is likely that they would require the company to wait until the end of 2020. PBGC suggests that the Intersector Group raise this question with the IRS.

6. Is PBGC planning to answer some of the questions submitted in lieu of the Blue Book on the Practitioner Q&A page? In particular, the question about whether PBGC wants to receive reportable event filings related to the "75% of prior year" active participant reduction attrition event trigger – if that happened during 2019 (i.e., before March 5, 2020), technically that falls under the old regulations and would need to be reported later this year.

PBGC replied that yes, those events are required to be reported, but PBGC doesn't see many that trip the 75% threshold but not the 80%. Plan sponsors can always ask PBGC for a waiver for a reportable event. Form 10 provides instructions on how to request a waiver via email, including the information to include in the email.

Some of the other questions will be answered on the FAQ page when PBGC is done with COVID-19 guidance.

7. Any update on possible timing for release of guidance regarding PBGC lump sum assumptions?

PBGC has been working on guidance on lump sum assumptions and is taking the comments seriously but has been prioritizing other matters related to the COVID-19 crisis. PBGC hopes it will release guidance before the end of the year. PBGC understands that time for implementation is needed and assures that the guidance won't put tight timeline restrictions on plan sponsors.

8. There are a lot of questions about how the funding restoration plan requirements for Cooperative and Small Employer Charity (CSEC) plans work—is that something PBGC would expect to work with IRS on guidance about? Or does this not affect enough plans to be on PBGC's radar?

PBGC always reviews IRS guidance but doesn't work with IRS on the guidance. It is premature to know whether guidance is forthcoming.

The Group mentioned that there are only about 30 CSEC plans; whether these plans will be in funding restoration status depends on how this year turns out.

PBGC encourages plan sponsors to reach out to PBGC to discuss. These are special cases.

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PBGC Questions to Intersector Group

What concerns are you hearing from plan sponsors in the pandemic?

Perhaps the biggest concern from plan sponsors is their ability to make required contributions. Some plan sponsors are considering early retirement windows to reduce their workforce. Some plan sponsors that were moving toward plan termination are now deciding to delay.

On the topic of funding waivers or delayed contributions, it is important to note there is a wide range of company situations. Some companies are fine, some are not fine, and some are in between. Reasons for delayed contributions are varied and depend on the company's situation. Some companies want to preserve capital, just in case.

Multiemployer Plans

1. Pending regulations on withdrawal liability—The Group understands PBGC may be working on regulations for withdrawal liability. Are there any updates to share?

PBGC is considering regulations under section 4213 of ERISA, related to actuarial assumptions for determining employer withdrawal liability. Still working on finalizing 2019 MPRA proposed regulations. Other than that, PBGC has no updates to report.

2. Further updates to Schedule MB—Are there further updates to the Form 5500 Schedule MB under consideration? Is there any input the actuarial organizations could provide?

PBGC has nothing definitive they can talk about at this point in terms of new items on the Schedule MB. PBGC, however, raised the following points related to the Form 5500:

> *New instructions for reporting business code on Form 5500: For 2019, PBGC proposed updates to the instructions related to business codes on the Form 5500. For example, plan sponsors should not describe the plan as a labor organization, financial institution, or insurance company, but instead indicate the industry of the employers and covered participants (such as construction, transportation, etc.). PBGC emphasizes that there are new instructions to the Form 5500 that should be clearer on how plan sponsors should report the business codes for their plans.*
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> *Actuaries should work to ensure Schedule MB entries are correct on the Form 5500 filing. PBGC also encourages actuaries to work more closely with the Form 5500 preparer. PBGC has observed many cases in which the Form 5500 filing contains blank or incorrect entries for the Schedule MB. These data gaps and errors make it more difficult for PBGC to perform analyses on these plans.*
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> *Two new Schedule MB items to note: PBGC notes there are two new items on the 2018 Schedule MB that are often being handled incorrectly. One is the required attachment to Line 3, which should report the amount of withdrawal liability payments included in contributions for the plan year. If this attachment is missing, PBGC will be calling the plan actuary or plan sponsor. The other item is Line 4f, which should indicate whether a plan in critical status is projected to emerge from critical status or become insolvent, and in which year the event is projected to occur. PBGC notes that this line is often filled out incorrectly and urges plan actuaries to review the applicable instructions closely.*

3. Survey of plan provisions, accrual rates—The Group understands that PBGC has been working on a study of benefit levels for multiemployer plans. Does this study focus on accrual rates only, or does it include other plan provisions? Are there any updates to share on this study?

PBGC answered that the study focuses on accrual rates and types of benefit formulas. It also covers retirement ages, ancillary benefits, and optional forms of payments. PBGC is still working on it.

4. Study on administrative expenses—The Group also understands that PBGC has been working on a study of administrative expenses for multiemployer plans. Are there updates to share on this study? Are there key findings worth discussing?

PBGC released a new supplemental data table on administrative expenses at the end of 2019, which updates the 2017 study. The study reviews administrative expenses for multiemployer plans, both as a percentage of benefits paid and per participant. The study looks at expenses for plans by zone status, industry, and plan size. There are no significantly different conclusions or trends from the prior report, but the latest report includes a few new exhibits that bullet point key issues.

This type of report is a valuable resource for plan sponsors to use in benchmarking their cost of administration against other multiemployer pension plans. PBGC will explore means to increase awareness of this report within the multiemployer community and would appreciate advice.

5. Final rule for terminations and insolvencies—The Group understands that PBGC has been working on final guidance for plan terminations and insolvencies. Are there any updates to share on this front?

PBGC published the final rule on terminations and insolvencies at the end of 2019 (see link below). The final rule is effective July 1, 2019, and covers three areas. Under the new rule, plan sponsors can send participants a combined notice (Combined Notice of Insolvency and Notice of Insolvency Benefit Level). Also, a plan terminated by mass withdrawal must complete a valuation only once every five years if the liability is $50 million or less (previously was every three years if $25 million or less).

https://www.pbgc.gov/sites/default/files/final-terminated-insolvent-reg-instructions.pdf

In situations involving terminated and insolvent plans, PBGC wants as much information as possible on withdrawal liability assessments. For example, plan sponsors should specify reasons certain employers weren't assessed, payment schedules, etc. This is new information required for future plan years. Plan sponsors should see the PBGC website for more information.

Plan sponsors should note that all related applications and filings should be done through the e-filing portal. Users must establish a profile, then they can attach documents through the portal. Plan sponsors will find the e-filing instructions helpful.

6. Guidance on facilitated mergers—PBGC recently approved its first financially assisted facilitated merger. Does PBGC have any commentary or guidance to share from this experience?

PBGC has only gotten one formal application for a financially assisted facilitated merger, which was approved in December 2019. The situation involved two Laborers plans in New York state. PBGC believes there have not been more applications because the requirements for financially assisted facilitated mergers are restrictive in terms of which situations will qualify.

For example, consider a large green zone plan in the same trade as a small critical and declining plan. Unfortunately, the rules prevent a financially assisted facilitated merger between two such plans. One of the requirements is that the financial assistance must be needed for the merged plan to become or remain solvent. Another is that benefit security not be impaired. As a result, situations that may appear ideal for a facilitated merger will not meet the requirements for PBGC financial assistance.

Another barrier is that the Treasury Department has interpreted the applicable statute to say that benefit suspensions must be undone if a plan that was previously in critical and declining status is merged with another, unless the suspension is needed for the merged plan to remain solvent.

PBGC's intent with regulations it issued in 2018 was to give as much flexibility as possible on demonstrating solvency. Plan sponsors may anticipate some level of reasonable adverse experience to demonstrate the merger would create solvency issues. The preamble to the regulations noted how the projections could use expected returns worse than the median capital market assumptions, for example, one half of one standard deviation lower. Stochastic simulations could also be used. For example, a plan could demonstrate a significant change in its probability of projected insolvency. Yet another way is to replay the investment returns over some period of time in a deterministic projection (without manipulating the start and end dates).

The financial assistance from PBGC must be needed to prevent a significant worsening of the plan's ability to remain solvent. For example, a 1-percentage-point difference in a funded percentage is not going to be considered to be significant.

7. Guidance on partitions—To date, PBGC has approved a few partitions, which have been combined with maximum benefit suspensions under MPRA. Does PBGC have guidance to share that would facilitate the application process? This guidance could either supplement or reinforce the guidance provided in the Academy's notes from meetings with Treasury, PBGC, and DOL.

PBGC is continuing to do informal consultations with plan sponsors interested in a partition. PBGC can do an informal analysis on whether a proposed partition would reduce PBGC's risk with respect to the plan or impair PBGC's ability to provide assistance to other plans.

PBGC would like to highlight the Academy's notes from its March 14, 2019, meeting with the regulators (see link below), which has a section on assumed contribution base units. PBGC notes this is a difficult assumption to make and requires input from the plan sponsor. PBGC will ask plan sponsors to provide recent information, showing that current work levels are consistent with assumptions. PBGC notes it is not asking these questions because of the pandemic; this has always been the procedure. That said, new applications do need to take into account the effects of the pandemic. PBGC also notes that some projections are highly sensitive to changes in projected contribution base units, while others are not.

https://www.actuary.org/sites/default/files/2019-09/AAA_Treasury_PBGC_DOL_09062019.pdf

8. Guidance on two-pool withdrawal liability methods—In 2017, PBGC issued a request for information regarding two-pool withdrawal liability methods. In 2018, PBGC issued guidance on withdrawal liability settlements. Does PBGC have further guidance on alternative withdrawal liability methods, including two-pool methods? These methods could include "jumping" or not.

PBGC has no further guidance on alternative withdrawal liability allocation methods. PBGC encourages plan sponsors to engage PBGC with informal discussions ahead of time if they are considering applying for an alternative method. For plan sponsors interested in a two-pool method, PBGC will share a sample plan amendment that has been approved, which does not include "jumping" from the old pool to the new pool.

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PBGC Questions to Intersector Group

PBGC asked the Intersector Group about the ability of multiemployer plans to be able to handle an increase in costs related to a mandated cap on the actuarial interest rate assumption.

The Group responded that a significantly reduced interest rate assumption that takes effect immediately would be hard for most plans to bear. Many plans, however, could achieve a modest reduction in the assumption, especially if the reduction is phased in over time. Of course, the ability of plans to handle increased costs will be affected by the economic effects of the pandemic, the severity and duration of which are not yet known.

PBGC also asked about the appeal of the "composite plan" proposals, which was most recently included in the HEROES Act (H.R. 6800).

The Group responded that many plan sponsors view the proposal favorably because composite plans do not have withdrawal liability and do not pay PBGC premiums. There is significant opposition to the proposal, however, by groups that do not want to see the traditional defined benefit model compromised.

Final Remark

PBGC is in the process of reorganizing the content on its multiemployer page. Please send any feedback or suggestions directly to Julie Cameron at Cameron.Julie@pbgc.gov.