

Intersector Group Meeting with the Pension Benefit Guaranty Corporation Notes

May 3, 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), 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: General Discussion

- Dialogue with PBGC general counsel to discuss what has changed at PBGC under the new administration and what to expect
 - What should we know about how things will operate differently under the new administration that will allow us to better support pension plan sponsors?

PBGC's regulatory program is heavily evidence-based—lawyers, actuaries, and policy analysts work together. This is a time of change; PBGC doesn't yet know the effect on policy areas or what the priorities will be. The PBGC chair was just confirmed. The Commerce and Treasury chairs have a lot to do. There has been no meeting yet of the PBGC Board.

The Office of Management and Budget (OMB) holds regular meetings, and actuaries can always schedule time to talk to OMB—this is a good time to get in the door and make suggestions if the Intersector Group wants OMB to focus on pension policy. PBGC encouraged the Intersector Group to do that.

- How does the new administration affect the current priorities? What's dropped, what's been added? Can/will new regulations be issued?

PBGC's regulatory agenda will be out in about a month—it believes the agenda is mostly deregulatory (as discussed in further detail below).

PBGC tends to be the same across administrations. The top priority recently has been the missing participants program. The goal is to have the missing participants program for defined contribution (DC) plans that are terminating effective by January 2018. PBGC has written the regulation and it is in interagency review now. The merger rule for multiemployer plans is next in line behind the missing participant regulations.

- What are the implications of the focus on repealing regulations; specifically, the resolution to remove two regulations for every one proposed? What counts as a “regulation”?

PBGC did not directly answer the questions because much is unknown, but gave its broad general perspective, as follows:

People want certainty as to how rules apply, so regulations are beneficial because they protect those regulated from arbitrary actions of government and from others who might sue them because of differing interpretations of imperfect statutes.

Recommendations to repeal regulations must be done cautiously because many people want to retain many of the rules. How does government understand what the burden of a regulation is? Not just costs, but opportunity costs. (See Circular A4 of OMB guidance.) The regulatory process itself is a good promoter of dialogue—PBGC collects information and evidence, writes proposed regulations, gets more feedback etc.

PBGC needs to be clear about why it needs information—“get most bang for regulatory buck”. Executive orders (EOs) and guidance have focused attention on these things, with a goal of getting a desired result in the least burdensome way possible. PBGC needs input so it has an empirical way to assess the information it is seeking and how to get it most cost-effectively. If Congress directs PBGC to collect something not needed, PBGC can “collect” the information by being able to request it when it's needed (e.g., at risk liabilities for ERISA Section 4010 filings).

There are really two steps, a cost/benefit analysis and an efficiency/burden assessment. An earlier EO (1996, President Clinton) required a cost/benefit analysis—agencies must prove a regulation is justified by comparing costs to benefits. This analysis has always been tricky because benefits are not always readily quantifiable. Now added to that analysis are additional questions: Is it efficient? Is the burden too much for the agency's need?

The “two-for-one” rule is basically about burden increases. If PBGC is going to adopt regulations that increase burdens it needs to pay for them. The “two-for-one” rule affects PBGC less than one might expect—per OMB, the rule is more

focused on “command and control” regulations. Most of the PBGC regulations are to interpret vague statutory regulations, provide safe harbors, etc.

OMB has said that if a regulation doesn’t impose costs but provides benefits (e.g., provides certainty in an uncertain area), then it will be considered a deregulatory activity that does not activate the “two-for-one” rule, but the agency can still bank any cost savings to use against something that increases costs. For example, if the missing participants program for DC plans reduces costs for plan sponsors and participants, PBGC can use that savings against something that increases costs for plans and participants. PBGC estimates the amount in the bank and OMB reviews.

Even if Congress writes a law that increases burdens, the agencies must still write regulations and the cost offset/repeal of other rules requirements still apply. So performing deregulatory actions and banking them is good policy for the agencies.

PBGC believes that most PBGC guidance should be deregulatory but there will be some regulatory guidance.

The “two-for-one” rule only applies to significant regulations. Most of PBGC’s regulations are significant (OMB considers them so, and so does PBGC, even if the regulations don’t hit the financial thresholds for significance). But even for those that are not significant, if an agency has deregulatory savings, it can still bank those savings; that rule exists to avoid perverse incentives not to deregulate smaller regulations.

PBGC will be looking for empirical evidence on burden vs. benefit of its regulations. PBGC hasn’t been slowed down so far because it already had a jump on the analysis. PBGC believes its regulations on multiemployer plan mergers will reduce burdens.

- How will repeal work? For example, must an entire regulation be repealed, or can only sections or subsections be repealed, leaving the rest intact?

Not discussed.

- Would it be helpful for the Intersector Group to provide a list of regulations to consider, along with discussion of the reasons for their inclusion?

Yes. Input on the regulatory program in general and also priorities for regulations would be helpful. PBGC’s regulatory staff is down to five, so PBGC needs to focus its resources where they will be most useful. What are the regulatory staffers doing that they shouldn’t be doing? What should they be doing that they aren’t?

PBGC’s efforts in the missing participant arena were well received and are proving very useful—PBGC believes it would be beneficial if it could assist with

missing participants for ongoing plans, but PBGC believes it doesn't currently have statutory authority. Possibly it may have authority to do that in the future.

PBGC addressed an issue related to paying interest on overpayments. It indicated that there is no longer a real need because plan sponsors no longer pay the fixed premium early and true up the premium later, so PBGC no longer sees significant overpayments. Also PBGC sends out notices quickly when it sees something wrong. PBGC tries to work on things that affect a lot of people, and this issue doesn't. Things that don't affect many people PBGC addresses by exception. Currently, overpayments typically only happen because of data errors or premium calculation mistakes discovered by actuaries or plan sponsors.

Part II: Input from the profession

- Specific issues for discussion
 - Single Employer
 - What is PBGC's plan with respect to mortality assumptions now that the IRS proposed regulations have been released?

PBGC is looking at updating its mortality assumptions in conjunction with interest rates. Currently PBGC uses an implicit approach to determine rates (looking at annuity purchase prices in total, and solving for the interest rate using current PBGC mortality). PBGC is hoping to issue a proposed regulation this year.

PBGC is looking to match the way insurers would price a similar pension claim. It is possible that insurers may like the shape of a table that is different than the SOA table. PBGC is seeking input on static vs. projected tables (what can the pension community readily handle with respect to generational tables?). PBGC has heard all actuarial firms can use yield curves. PBGC asked if firms can use generational mortality with no problem, or does a projected static table need to remain available? Does the answer vary for different parts of the actuarial community? PBGC doesn't believe the difference matters as much for their purposes because it is looking at liabilities for a population, not individuals. If the Intersector Group has any views on ability to use generational mortality in things like ERISA §4044 calculations, etc., PBGC would like to hear them.

The Intersector Group said that the yield curve is fine, and use of generational mortality is not a problem for large plans but may be for small third-party administrators and actuarial shops—they would need a "fairly long runway" to get there. In any event, PBGC will again ask for input on this.

The Intersector Group discussed having a rule based on plan size. PBGC questioned whether it was practical because plans can flip back and forth across any size threshold. The Intersector Group indicated that for a small plan, all it really does related to PBGC is premium filing—not other PBGC filings.

- Is PBGC moving forward with review of all other assumptions (e.g., ERISA §4044), and what can be expected on that front?

Two years ago, PBGC started down the path of reviewing/updating all its assumptions. Expected Retirement Age (XRA) is next on the agenda. XRA is difficult to apply because the benefit changes during the projection period, thus changing the appropriate XRA table.

PBGC cannot use IRC §430 actuarial assumptions used for retirement rates because PBGC is trying to replicate the price of an annuity—where the fact that people will begin benefits early if the employer is not in business is very relevant.

PBGC is trying to reduce the lag between observed annuity prices and the published interest rates.

- Are there any plans to propose guidance on ERISA §4062(e)?

PBGC has not been focused on ERISA §4062(e) (requirements related to the cessation of operations at a company facility or business segment). The statute narrowed it so much that there are very few filings, so it doesn't make sense to use regulatory resources to provide guidance. PBGC doesn't even have a statistically significant sample of cases that it could use to inform guidance. Fewer than a dozen have been identified since the new law was enacted (December 2014). PBGC is not out looking for ERISA §4062(e) situations.

- Are there any changes in the types of issues PBGC is seeing on audits of plan terminations or premium filings?

Plan Termination

Most plans that do a standard termination are small. The number of plan terminations per year has been fairly steady for the past three years or so.

PBGC finds larger plans filings tend to be cleaner, with fewer issues. IRS discovers the most issues in plans with 300-500 participants.

Some plans distribute assets without filing for a standard termination with PBGC. The Premiums group identifies plans that stop filing.

There were 260 plan termination audits in 2016; 25 percent were not in compliance with plan provisions or laws/regulations. The result was \$4.5 million worth of additional benefits. Most were small plans, generally 300-500 participants.

PBGC provided a litany of errors it commonly discovers, mostly resulting in incorrect benefit amounts, including:

- *Incorrect compensation and/or service*
- *Not fully vesting those terminated within five years of plan term (unless deemed cash out language exists, presumably)*
- *Not protecting benefits in a prior plan as required by IRC §411(d)(6)*
- *Not applying, or incorrectly calculating, top-heavy minimum (e.g., top-heavy calculation not based on right number of years)*
- *Prorating benefits according to existing plan assets*
- *Deducting processing fee from participant benefits (PBGC sees this happen frequently)*
- *For lump sums, the wrong interest rates, age, or mortality table being used, not using alternative plan assumptions, using post-date of plan termination (DOPT) assumptions that provide a lower benefit, GATT/PPA transition issues, incorrect stability period/look-back month*
- *Non-majority owners waiving benefits*
- *Election forms without all benefit options listed*
- *Missing spousal consent*
- *Missing participant benefits not handled in accordance with ERISA §4050 (e.g., rolling over missing participant benefits to an IRA if between \$1,000 and \$5,000, which is not permitted; the plan administrator must buy an annuity or pay the missing participant amount to PBGC.)*

PBGC only considers underpayments (not overpayments) to be errors.

PBGC also mentioned that changes in actuarial firms cause problems upon plan termination. Often, backup data about how the accrued benefit was calculated is missing. Plan sponsors must retain benefit calculation backup for six years after plan termination. PBGC implied that if an actuary signs the Form 500 filing as EA (Schedule EA-S), he or she should make sure that data is being retained. This was not discussed further due to time constraints.

PBGC is seeing a lot of risk transfer and clean-up activities happening before plan terminations. De-risking activities (including bulk lump sum programs) in the year before plan termination are also included in audits.

PBGC discussed de-risking and its effect on PBGC and indicated that many people focus only on lost premiums after a de-risking event rather than on elimination of potential risks, but PBGC is more concerned about the mix of de-risking actions between “good risks” and “bad risks.” PBGC’s initial review suggests de-risking is happening in both groups. It has an ongoing project to study this. It also notes that while there has been a huge increase in de-risking activity (from an initially very low level), as a percentage of the total market it still is not huge. Insurance

capacity comes into play as well—it has changed from a buyer's market to a seller's market.

PBGC premium common mistakes

Here is a list of the most common mistakes PBGC sees:

- *Plans sending money to the wrong place (e.g., required contributions go to PBGC rather than the plan's trust). Or sponsors sending premiums to the old lockbox.*
- *Problems with debit blocks—When a plan sponsor does an electronic transfer, it can either (i) tell the bank to send the money to PBGC (MyPAA), or (ii) give PBGC permission to reach into its account and take the money (PBGC.gov). If you do (ii) but don't give your bank PBGC's code, it won't let PBGC reach in—these problems usually result in premiums being at least seven days late, so a one-month late payment penalty kicks in. As much as 25 percent of these debits result in debit block problems.*
- *Small plans get the interest rate lookback wrong, or sometimes they use the right lookback for the actual valuation date used but fill out the premium form incorrectly, leading PBGC to believe the plans used the wrong rate. PBGC looks at the valuation date listed to determine whether a plan is using the small plan lookback; sometimes a sponsor puts Jan. 1 as the valuation date when it is really using Dec. 31.*
- *Bad Enrolled Actuary (EA) numbers—PBGC matches the EA numbers with the Joint Board's list—PBGC has discovered people using someone else's EA number. Sometimes in a small shop, someone other than the EA will sign the form using his or her own name and the EA's EA number. The Intersector Group pointed out that sometimes it is just a mistake—the EA has changed and the prior EA's number is inadvertently used.*
- *Risk transfer questions—PBGC is getting lots of answers that don't make sense (for example, a plan says it has four terminated vested participants (TVs) but says in the de-risking section that it offered lump sums to hundreds of TVs).*
- *Questions about plan freeze—PBGC also gets answers that don't make sense here (e.g., form indicates that there is a hard freeze but the plan is not closed to new entrants).*
- *PBGC always compares the market value of assets on the premium filing to that reported on the Schedule SB, and will send a letter to the plan sponsor if there's a difference.*
- *Form 5500—A lot of people incorrectly answer the questions about critical and declining status on Form 5500. PBGC asked whether there were ways (like checklists) to encourage folks to be more careful?*

- Can PBGC share the types of events/financials that trigger outreach to plan sponsors requesting information regarding defined benefit (DB) plans, because practitioners are seeing more of these requests for information, and it is not always clear what the triggers are?

What triggers PBGC outreach: In terms of the number of cases in PBGC's Corporate Finance and Restructuring Division, the number has not gone up over the past three to five years; it has remained remarkably steady, in fact. There are about 550 cases currently open.

If a plan sponsor gets a letter from PBGC and it is not clear why, call and ask—the trigger should be clear in the letter, but if it isn't, PBGC will make it clear over the phone.

Common triggers are:

- *Reportable events (trending down; 800 per year currently; were at 1,000-1,200 in aftermath of financial crisis).*
- *Have formalized Form 5500 project—PBGC looks at Forms 5500 that indicate a missed contribution and looks for the Form 10 or Form 200. It always did this, but it is more formal now (PBGC has a template letter for this case).*
- *Referral from premiums department—Multiple years of missed premiums.*
- *Early Warning Program—PBGC is proactively monitoring the largest DB plans; \$50 million in underfunding or 5,000 aggregate DB participants; 1,000-1,500 companies being monitored. PBGC issued an updated fact sheet in December 2016. PBGC recognizes that there was some concern after it published the fact sheet that it has expanded the program, but it has not—it expanded the explanation of how the program works, and people took it as an expanded program. PBGC plans to follow up with Q&A's soon to clarify some areas of the fact sheet and is actively soliciting questions for the Q&A's.*

[Note: The PBGC has since posted the Q&A's at <https://www.pbgc.gov/prac/risk-migration-q-and-a>]

- Multiemployer
 - If no relief is provided, what will happen to the multiemployer program if financials play out the way they are expected to and funds become insufficient to cover guaranteed benefit levels? Is there anything the actuarial profession can do to help identify long-term solutions to the multiemployer challenges?

Not discussed.

- Does PBGC expect to finalize the multiemployer plan merger regulation, and are any changes likely from the proposed regulation?

The Intersector Group indicated that it is seeing growing activity in this area. Many employers are interested in exploring a spin-off of their people as an alternative to a withdrawal. The numerical tests for solvency are hard or impossible to satisfy for many plans, which means that transactions are only permissible if the actuary “otherwise demonstrates” that benefits are not reasonably expected to be reduced. It is unclear how PBGC interprets this rule, which makes it difficult for people to understand what they can and cannot do.

PBGC replied that 10 to 15 percent of multiemployer participants are in plans that will fail. The fact that a plan sponsor has to go through more scrutiny to do something novel is not surprising, and PBGC will want to see that going down that path will help the situation. Novel ideas require scrutiny because the system is in such trouble. The Intersector Group indicated that the more that can be learned about the framework that will be applied in reviewing transactions, the better chance people have of coming up with something that will withstand PBGC’s scrutiny. If there is a well-worn path to show a transaction won’t threaten plan solvency that would work best.

PBGC encourages actuaries to reach out and request a call or an informal meeting to get a preliminary PBGC reaction to what they are thinking.

- Are there any key takeaways from the responses that PBGC received to the request for information on two-pool withdrawal liability methods?

Not discussed, plan to have a follow-up discussion on this topic.

- Is there any additional follow-up from the recent meeting with the Academy’s Multiemployer Plans Subcommittee regarding the Multiemployer Pension Reform Act?

Not discussed.