

Intersector Group Meeting With the U.S. Department of Treasury and Internal Revenue Service Notes

November 13, 2019

Periodically the “Intersector Group” (“the Group”) meets with representatives of the Internal Revenue Service (IRS) and Department of the Treasury (“Treasury”) 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 ASPPA College of Pension Actuaries (ACOPA). Attending from the Intersector Group at this meeting were Christian Benjaminson (Academy), Bruce Cadenhead (CCA), Tom Finnegan (ACOPA), Eric Keener (SOA)*, Ellen Kleinstuber (Academy), Tonya Manning (CCA)*, Marty Pippins (ACOPA), and Maria Sarli (SOA). Linda K Stone, Academy senior pension fellow, and Philip Maguire, Academy staff member supporting the Intersector Group, also attended. [*Attended remotely by phone.]

These meeting notes are not official statements of the IRS or Treasury and have not been reviewed by its representatives who attended the meeting. The notes are a reflection of the Intersector Group’s understanding of the views expressed by IRS and Treasury representatives and do not represent the positions of the IRS, Treasury, or of any other governmental agency and cannot be relied upon by any person for any purpose. Moreover, the IRS and Treasury have 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 IRS and Treasury in advance of the meeting and are shown in regular typeface below; a summary of the discussion is shown in italics.

- **IRC §404 issues**—At the October 3-5, 2019, American Bar Association meeting in San Francisco, Treasury officials indicated they were starting to look at §404. We welcome that effort, as we have had questions on this ever since PPA was adopted.
 - *While §404 guidance is NOT on this year’s guidance plan, it has been in past years, and IRS/Treasury are working on a fairly comprehensive review of §404; not just limited to §404(o). IRS/Treasury indicated that they plan to update the regulations to reflect changes enacted since ERISA, including the Pension Protection Act and §404(o). They are looking for areas where there may be gaps in existing §404 guidance as well as areas where there are issues, and welcome input.*
 - *IRS/Treasury noted that one example of an area where clear guidance may be helpful is §404(a)(8) deductions for self-employed individuals, which lead to cumbersome circular calculations that will need to be resolved.*
 - *IRS/Treasury indicated that they are primarily looking at qualified plan issues.*
 - *This project does not have a specific schedule. IRS/Treasury indicated that it will take a while as there are a lot of issues and §404 is a long section of the Code.*
 - *Tax Cuts and Jobs Act guidance and executive orders have priority over projects like this, so focus is on things likely to get out.*

- *Comment letters on this, or any other topic are welcome. IRS/Treasury noted that all such letters, even unsolicited letters, will be posted on regulations.gov. They do not redact, so if you include identifying information it will be posted. However, comments may be submitted anonymously.*
- **Executive orders (EOs)**—There are two new EOs dealing with agency guidance processes. Do you anticipate this having any effects on your work that would be of interest to actuaries?
 - *IRS/Treasury did not provide any specific comments other than to note that the executive orders are being looked at agency-wide. They indicated that they will still issue revenue procedures without notice and comment, to address processes. But even before the EOs, IRS was planning on having more of its guidance subject to notice and comment.*
- **Filings under Rev. Proc. 2017-57**—Practitioners have gained some experience with working with IRS on these filings and have generally found the process to be relatively smooth. IRS actuaries have been clearly communicating any concerns or necessary changes, as well as important timeframes for responses. The process is also getting quicker.

The Group believes that plan sponsors, actuaries, and IRS personnel would benefit from publishing IRS guidance regarding how the IRS expects common situations like spinoffs and mergers to be handled from a funding and benefit restriction perspective, and in what situations these events do or do not cause a change in funding method. In the absence of detailed guidance, we believe the focus in the review process should be on the overall reasonability of the approach taken and should not delve so deeply into small details that are not particularly significant. We see Schedule SBs sometimes having to be refiled for what we view as inconsequential changes. We believe Schedule SBs for merger and spinoff situations should not be required to be refiled unless there was a significant deviation from what would be a reasonable approach.

- *The IRS representatives noted that whether a Schedule SB needs to be refiled is determined on a facts and circumstances basis, with more significant changes requiring refiling.*
 - *The Intersector Group noted that, in cases where the plan sponsor has taken a reasonable approach, but one that differs slightly from the IRS' preferred approach, any minor changes that may be needed could be reflected on the following year's Schedule SB, with an explanation included in the attachments. Such an approach would be helpful, as refiling a Schedule SB actually requires an amended filing of the entire Form 5500, which can be burdensome to the plan sponsor.*
- *The IRS representatives commented that their internal target is to process these cases within 270 days so that, if requests for method changes are filed early enough, it is*

possible the timely filing of the Form 5500 could occur after the IRS review process is complete. The Schedule SB could then reflect any necessary adjustments.

- *IRS/Treasury mentioned that in addition to the §404 project mentioned above, they are also looking into issues and gaps in §430/436 guidance, which could include automatic approval guidance on mergers and spinoffs.*

- **Hybrid determination letters (DLs)**—We appreciate the expanded opportunity to obtain determination letters, both the temporary window for hybrid plans and the more permanent program for merged, acquired plans.

We are particularly interested in discussing the hybrid plan window. Has IRS received (m)any filings? The value to plan sponsors will be if they can, through this process, become comfortable that their plan will be in compliance with the hybrid plan regulations. However, that concern mainly revolves around the unresolved issues in the hybrid regulations. Does IRS plan on providing DLs that cover the plan provisions that relate to the unanswered questions under the hybrid regulations, or will the DL carve those issues out? Some examples:

- How do you get to a “lump sum-based formula” if you currently have a subsidized conversion to an annuity?
- Will IRS rule on whether the annuity conversion is subsidized (seemingly requiring a whipsaw calculation or some sort of §411(d)(6) relief that does not currently exist to remove the subsidy)?
- Will IRS rule on plans where the annuity could be larger for a younger employee than a similarly situated older employee because the plan projects the account to normal retirement date (NRD), converts to an annuity and applies early retirement factors?
- Is the post-NRD interest credit rate high enough to be a reasonable actuarial increase?
- Outstanding PEP questions (e.g., locking in annuity conversion interest rates before commencement, implicit interest rate PEPs with above market rates or that changed from above market rates)
- Issues related to market rate of return plans (e.g., projecting returns for accrual rules, Section 415, nondiscrimination testing, testing for meaningful benefit accruals)

- *The IRS has received a few hybrid plan determination letter submissions during the window.*
- *A plan sponsor should not expect to get a determination letter covering areas in which no guidance is available.*
- *The IRS cannot provide §7805(b) relief through the determination letter process.*
- *It has not yet been determined whether the determination letters will carve out areas where no guidance is available (such as the areas raised in the question above) or if another approach will be used.*

- **More hybrid DLs**—Our understanding is that the IRS will not accept a determination letter application for a qualified defined benefit pension plan that is amended to provide variable annuity benefit accruals for future service.

- The IRS issued Revenue Procedure 2019-20, which allows plan sponsors of statutory hybrid formulas to apply for a new determination letter between September 1, 2019, and August 31, 2020. For this purpose, a statutory hybrid formula generally includes cash balance plans, pension equity plans, and certain variable annuity plans with a hurdle rate below 5%. We would encourage discussion of expanding this program to include variable annuity plans using a hurdle rate of 5% or higher.
- Would the IRS consider issuing a favorable determination letter through a Private Letter Ruling (PLR)? This would be for a plan that is amended to provide variable annuity benefit accruals for future service, utilizing a hurdle rate of at least 5%.
 - *IRS representatives indicated that the determination letter window for statutory hybrid plans includes variable annuity plans with a hurdle rate below 5%.*
 - *At this time, there is no intent to change or expand the parameters of the window to include plans that are not statutory hybrid plans.*
 - *Whether there will be another window in the future, and what types of plans might be covered by that window, has not been determined.*
 - *Rev. Proc. 2019-1 states that the IRS will not issue determination letters on qualification issues through the PLR process. A ruling could be issued on a certain specific legal issue affecting qualified plans (e.g., a PLR on qualified plan features intended to facilitate student loan repayment), but this would not be a determination letter.*
 - *So, while a sponsor may be able to request and get a PLR covering some of the issues that arise for variable annuity plans with a hurdle rate greater than or equal to 5%, they will not be able to get a determination letter with attendant §7805(b) relief for the plan.*
- **Employer discretion**—Discussion of change in philosophy about employer discretion in document vs. operational basis (i.e., can get a determination letter if plan language appears it may allow for employer discretion, but if the plan is operated on a discretionary basis that is fair game during a later examination, and the plan may be subject to disqualification and would not get relief under 7805(b)).
 - *The IRS representatives indicated that, in the past, the IRS has objected to plan language that would allow for employer discretion, and looked to remove the potential for discretion before a determination letter would be issued. Under the IRS' current approach, if the plan does not specifically allow discretion, it would not cause the IRS to withhold a determination letter. However, if in operation the plan language is actually used in a discretionary manner, the IRS would object to this and there would be no §7805(b) relief.*
 - *IRS noted that an example of such a provision is a "Special Bonus" included in plan compensation that might give the sponsor discretion over pensionable pay.*
 - *It was noted that if a determination letter reviewer finds this type of language in a document, the reviewer is under no obligation to warn the plan sponsor. It was*

suggested that plan sponsors can protect themselves against operational issues by using clearer plan language.

- *IRS also gave an example of things it used to require to be added “just in case,” like an add-back to compensation of a transit subsidy salary deferral election in case the plan sponsor added such a benefit in the future. There is now less emphasis on changes “just in case.”*
- **Substitute Mortality Tables (SMTs)**—Is IRS planning on any guidance on the procedure for certifying that a SMT remains accurately predictive when the population changes by 20%? We don’t believe it is well understood that a filing may be required every year after a 20% change, even if there are no additional significant changes. The procedure for certifying is also not well known. It would be useful to the profession for IRS to release a revenue procedure or similar guidance on the process for an actuary to certify that a SMT remains accurately predictive, as well as when (e.g., how often) that is required. We believe the process (as we understand it) is very workable, but the information about the process is filtering out to practitioners only informally.
- *The IRS representatives asked whether it would be helpful to include specific language in ruling letters explaining the procedures for certifying that an SMT remains accurately predictive. The Group agreed that this would be helpful.*
 - *The IRS representatives noted that, in some cases, such language has been included where there has been a change in population that is already at or near the threshold.*
 - *The Group indicated that getting the word out would still be useful because there are a number of sponsors with SMTs for whom that information was not provided in their letters.*
- **Funding balance elections**—We believe that the whole structure of elections to apply, reduce, and create funding balances is a trap for people who are not sufficiently diligent about paperwork. Often things fall through the cracks when responsibilities are transitioned at the actuarial firm or at the plan sponsor (especially because the rules about when “the plan’s enrolled actuary” changes are unclear). IRS rules are inflexible, resulting in potential excise taxes or acceleration of contributions. We ask that IRS consider improved defaults or a process for retroactively correcting elections to match the clear intent of those involved. The Academy sent a letter in 2012 with various ideas to fix the problem:

<https://www.actuary.org/sites/default/files/files/publications/Academy-Letter-on-Funding-Balance-Elections.pdf>

- *The IRS representatives noted that the regulations have deadlines for various elections based on when things need to happen and the implications for subsequent actions.*
- *The Intersector Group noted that there are inevitably human errors despite having procedures in place, and there are many circumstances where a later election would have no material effect on the plan. It would be helpful to have some way of documenting the plan sponsor’s intent and allowing it to apply retroactively to the deadline in these situations, either automatically or with approval.*

- *The IRS representatives indicated that they are looking for areas in §430/436 that are not working well and would welcome comment letters. The Intersector Group noted that an Academy comment letter from 2012 on this issue was limited in scope, but that it could be updated and expanded.*
- **Phased retirement**—IRS guidance around things like paying partial pensions or in-service distributions to employees who are in a phased retirement program, including any requirements for such a program and any nondiscrimination implications, would be helpful.

The Intersector Group noted that a number of plan sponsors have been exploring phased retirement programs but are concerned about pension plan implications. In most cases, the plan sponsor would like to allow a participant to commence a portion of their benefit based on their reduction in work hours, rather than simply allowing all active participants to elect an in-service distribution of the entire benefit at a certain age (e.g., 62). There are a number of areas of uncertainty, including:

- *How do you determine whether a program is discriminatory?*
 - *Based on criteria for program availability?*
 - *Based on actual usage?*
 - *Based on approval rates where management review and approval are required?*
- *The IRS/Treasury representatives noted that proposed regulations were issued prior to the Pension Protection Act (PPA). These proposed regulations allowed commencement of a portion of the accrued benefit based on the reduction in work hours. This included a testing regime to compare the actual and expected reductions in work hours. The associated recordkeeping concerns generated some negative feedback.*
- *IRS/Treasury indicated that the benefits, rights, and features (BRF) questions were not that hard to address, but they struggled with other issues such as how to determine additional accruals for phased retirees with reduced pay and service (e.g., continuing to use a final average earnings that reflects prior full-year pay along with elapsed time service, which would provide full service accruals, would effectively increase the rate of accrual for phased retirees, many of whom are likely to be highly compensated employees (HCEs). The Intersector Group pointed out that many plans are frozen, and many others are accumulation plans where these issues do not apply. There are not that many final average pay plans still providing benefit accruals where the annualization questions would come up. But even if it did, there are ways to annualize pay and prorate service to make it nondiscriminatory toward HCEs.*
- *IRS/Treasury noted that the Great Recession, which reduced the funded status of plans and the ability to allow in-service distributions at age 62 under PPA, seemed to reduce interest in phased retirement, so this has not been a high guidance priority since then.*
- *The IRS/Treasury representatives noted that they request comments on their priority guidance plan that is issued each spring. They recommended providing specific comments on what guidance is needed when that request is made, because all comments made in response to that request are tracked and considered in their prioritization—while comments received at other times are welcome, they are more*

likely to fall through the cracks and not be remembered when the prioritization occurs. They also noted that resources are limited, so prioritizing areas where guidance is needed is important.

- **Mortality for IRC §430/ §436**—Does IRS plan to revisit the RP-2014 basis by looking at Pri-2012, or is the intent not to make an update so quickly after the last one because you only are required to review every 10 years?
 - *The IRS/Treasury representatives noted that they are aware of the Pri-2012 study and have started studying the issue.*
 - *They also noted that the statutory language on CSEC (cooperative and small employer charity plans) and multiemployer plans requires a table update every five years rather than every 10 years.*

- **Weekend/holiday rule for funding**—IRS has long stated that the funding contribution deadline is not extended for weekends or holidays; thus Sept. 15 is the due date for contributions in any given year for calendar year plans, and a section 4971 excise tax is owed on Form 5330 if the contribution is made after Sept. 15. Is this still the IRS position? Is IRS going to clarify this rule in any published guidance?
 - *This is still the IRS position as far as the representatives in the room were aware. They do not believe it has changed, although they indicated it was a wider topic and the attendees in the room would not be the ones to make a decision about any change.*

- **Comment periods**—We would like to request a standard comment period for agency guidance of at least 90 days (e.g., recent PBGC proposed regulations use 60 days, and the proposed regulations on minimum required distribution life expectancy tables also allow only about 60 days).
 - *IRS/Treasury noted that, for the most part, 90 days remains the default, though there is no statute/regulation requiring it. When it is accelerated, it is generally due to the importance and/or time sensitivity of the guidance—they need to balance getting guidance out quickly against receiving input.*
 - *The Intersector Group members pointed out that anytime the comment period is less than 60 days, it may create time problems for organizations where those responsible for government relations meet only once per month, for instance.*
 - *IRS/Treasury noted that comments submitted after the official deadline will still be considered, but the later they are, the more difficult it will be to consider them as final guidance is developed.*

- We would encourage the annual summarization and distribution of audit findings. Currently these seem to filter out by word-of-mouth based on experiences with other plans. Having an annual report would give plans a head start on correcting or addressing known concerns.
 - *IRS/Treasury noted that employee plans sometimes puts out “Issue Snapshots” on compliance-related topics*
 - *The broad disclosure of audit results has been historically viewed as problematic.*
 - *Some see it more as “tipping IRS’ hand” and providing a roadmap for what taxpayers can get away with rather than promoting compliance.*

- *Tax Exempt & Government Entities Division (TE/GE) issued a program letter that indicates what Employee Plans and Exempt Organizations are going to be looking at, including their top five audit triggers, a few weeks ago. It can be found on the Retirement Plans page on irs.gov—<https://www.irs.gov/pub/irs-pdf/p5313.pdf>.*
- *IRS annually publishes a [list of the most common mistakes](#).*
 - *The Intersector Group notes that there are also lists of common mistakes posted at: <https://www.irs.gov/retirement-plans/ep-compliance-trends-and-tips>.*
- Multiemployer Plans
 - Pension reform discussion
 - *IRS/Treasury could not discuss potential legislation (e.g., Butch Lewis Act, upcoming Republican proposal, which was released after our meeting)*
 - Technical correction—The issue of excise taxes for plans in the red zone at the end of their rehabilitation period has been discussed in the past. There seemed to be an agreement that a technical correction was needed.

On a similar note, regarding plans that were meeting scheduled progress until recently and are unable to emerge within the remaining Rehabilitation Plan Period, we lack clarity about the existence of options other than the all-reasonable-measures provision. Similarly for Endangered Plans where the Funding Improvement Period is almost over

- *IRS/Treasury noted this is better phrased as requiring statutory correction than technical correction. This is on IRS's radar screen; they realize it will start happening. IRS indicated that there is no room for interpretation in the statute unless they get more legislation; accordingly IRS has not issued any guidance or interpretation.*
- MPRA Suspension / Partition application—Eleven unique applications were ruled on in 2018 and only four in 2019. What is IRS expecting for 2020?
 - *IRS representatives in attendance noted that they were not the correct group at the IRS to address this question.*
 - *Office of MPRA Implementation is at Treasury—they evaluate applications in coordination with PBGC. The Office of Tax Policy works with them to interpret regulations (along with IRS—it is a joint IRS/Treasury regulation). They do not have any insight into the number of applications to expect.*

Part II: From the agencies to the profession

- *The IRS noted that it has received a few requests for three-year waivers of minimum funding. The representatives pointed out that waivers are given year-by-year ... not for a three-year period. They want certain information available when they review a waiver request that cannot become available in advance.*
- *Notice 2019-60 was issued with respect to closed plans:*

- *Provides relief for BRFs for plans closed under the conditions described in Notice 2014-5 (except it is not required that the plan satisfied amounts testing for 2013 without using the “minimum aggregate allocation gateway”)*
- *Different and broader relief than the 2016 proposed regulation*
 - *Proposed regulation only provided relief for plans that changed form (e.g., traditional to cash balance)*
- *Leadership change at TE/GE*
 - *Tammy Ripperda is the new TE/GE commissioner*
 - *Edward Killen is the new TE/GE deputy commissioner*
 - *Cathy Jones is acting director, employee plans in TE/GE*
 - *Bill Dolce is acting director, employee plans examination*
 - *Khin Chow is director, employee plans rulings & agreements*