

Intersector Group Meeting With the Pension Benefit Guaranty Corporation Notes

November 13, 2019

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

These meeting notes are not official statements of the PBGC 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 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 meeting and are shown in regular typeface below; a summary of the discussion is shown in italics.

- **PBGC Changes**—Update on any PBGC organizational changes, staffing and priorities.

Andy Banducci was appointed chief policy officer in August. Andy leads the Office of Policy and External Affairs, which has oversight for the Policy Research and Analysis Department (PRAD) and Communications Outreach and Legislative Affairs Department.

The PRAD team is almost fully staffed after having several open positions. PRAD has hired several new actuaries with much real-world experience, including Evan Inglis, David Hudecek, and Catherine Zhu.

PBGC headquarters will be relocating in the next few years to another D.C. location.

- **Pilot Mediation Program**—When the Intersector Group met with PBGC in March, only one case had been mediated since the pilot program was made permanent in January. Are there any updates that might be helpful on experience with the types of cases and how they were resolved?

Two cases have now been successfully resolved through the mediation program; both were related to single-employer plan termination liability. The program has not been heavily used so far. It is a voluntary effort at alternative dispute resolution when PBGC and a plan sponsor are not able to agree on a negotiated settlement. An experienced mediator from the Federal Mediation and Conciliation Service is used. The mediation program is part of a broader, government-wide effort to seek alternatives to litigation. PBGC believes the reason the program has not been heavily used is that negotiations are generally successful. In plan termination situations, PBGC receives a lot of financial information, and its assessment of the plan sponsor’s ability to pay and the resulting liability reflects that. Sometimes these cases do go to litigation, though. The mediation program is available in three areas: termination liability, transactions identified through the early warning program that may unreasonably increase PBGC’s risk,

and fiduciary breach issues. Only termination liability cases have come to the mediation program so far; cases in other areas have been settled through the negotiation process.

- **Discussion of PBGC Regulatory Agenda**—What areas is PBGC focusing on (besides the ERISA §4044 assumptions) and what are we likely to see sooner rather than later? We see the following in the guidance plan; which are being actively worked on?
 - Timing for finalization of “housekeeping” regulations to make miscellaneous corrections, clarifications, and improvements to PBGC’s regulations.
 - Expected timing to finalize other proposed regulations currently in the comment period:
 - Benefit payment and asset valuation regulations.
 - Administrative review of agency decisions.
 - Proposal to freeze PBGC lump sum assumptions used by corporate plans at the 10-year average ending in July 2019—Many plans still use these rates, and the still relatively low level (even with the 10-year historical average applied) has plan sponsors concerned about not being able to reflect a future rise in interest rates. There is also concern about whether IRS/Treasury will allow plans referencing PBGC lump sum rates to update to §417(e) (the literal reading of plan language) or require an approach that conflicts with the clear meaning of current plan language.
 - Clarify and codify policies on the determination of guaranteed benefits for participants in multiemployer plans.
 - Clarify rules on arbitration procedures for multiemployer plans.

The fall 2019 regulatory agenda will be posted on the PBGC website soon and will be similar to the spring 2019 agenda.

The comments received on the housekeeping regulations were helpful; PBGC is now working on the final regulations, but they likely will not be out before early 2020. Another round of housekeeping regulations is anticipated at some point.

PBGC is looking forward to receiving comments on regulations that are still in the comment period. It does not expect many comments on the benefit payment and administrative review regulations, as these likely do not affect actuaries’ day-to-day work with plan sponsors very much. As always, comments that include specific suggestions are most helpful.

The Group noted that, regarding the proposed change to the PBGC lump sum assumptions, there are many plans that still use these rates. Some plan sponsors may not want to be locked into the new fixed rates forever, so publication of a proxy that varies as the interest rate environment changes (for example, the 30-year Treasury rate adjusted by appropriate margin) would be helpful. PBGC could also provide information on how the PBGC rates have historically been determined in the event plan sponsors would like to explicitly define how an alternative rate might be determined. PBGC indicated that it likely could not add something different from its initial proposal to final regulations without reproposing the regulations.

PBGC representatives indicated that they are still putting together a regulation on determination of guaranteed benefits for participants in multiemployer plans. The regulation will include a lot of examples and will formalize procedures that have been in place for years.

- **Plan termination issues**

- Options for finalizing distribution of assets related to uncashed checks in plans with unresponsive annuity participants/payees
- Prorated premium refunds process and timing
- Involuntary rollovers prior to plan termination
 - Before any formal termination decision
 - After decision to terminate is made but before proposed date of plan termination (DOPT)
 - After proposed DOPT

The Group noted that, in plan termination situations, it is not uncommon for there to be participants with uncashed annuity checks. In some cases, these participants may be unresponsive, or refuse to cash the checks, when the plan sponsor reaches out. This presents an obstacle to completing the termination process. PBGC indicated that the missing participant regulation does not explicitly allow PBGC to take on the liability for unpaid benefits in these situations, but it can sometimes do things to help. Plan sponsors in this situation should contact PBGC (the Standard Termination Compliance division) and it will try to work with the plan sponsor to resolve the situation.

PBGC noted that if a plan sponsor pays premiums for the full year but the final distribution of assets subsequently occurs before the end of the year, the premium system will automatically determine the amount of any overpayment once the post-distribution certification (Form 501) has been filed. To request a refund in this situation, the plan administrator or a representative can go to the “Quick Links” section at the top of the plan page on MyPAA, select “Premium Refund” under “Submit a Request,” and indicate where the refund should be sent (by ACH or check). The refund is sent where indicated (i.e., it does not automatically go back to the plan if the plan paid it).

The Group noted that there is some confusion among practitioners about when involuntary rollover distributions to nonresponsive participants, such as in a terminated vested cashout sweep or under an automatic plan provision that applies when such employees terminate employment and become subject to a mandatory cashout under the plan, need to stop prior to a standard plan termination. PBGC indicated that, once the first Notice of Intent to Terminate (NOIT) has been issued, distributions generally cannot occur before the end of the PBGC review period, at which point nonresponsive participants entitled to lump sum distributions become missing participants who are turned over to PBGC. However, there is an exception for participants who terminate employment and receive a distribution pursuant to the plan’s normal course of business (i.e., following practices established well before the plan termination) during this period; such “normal course” distributions, including rollovers for nonresponsive participants, can continue until the final distribution of plan assets occurs. There is nothing in the regulations that would prevent a lump sum window or cashout sweep prior to the issuance of the NOIT. Involuntary rollover of nonresponsive active participants entitled to de minimis cashouts cannot occur at any point during the termination process, because they are only receiving a distribution because of the plan termination, and so they would become “missing participants” (termed “unresponsive” by the Missing Participant Program) to be turned over to PBGC even though the plan sponsor is able to locate them.

PBGC reserves the right to review these distributions for accuracy. PBGC will also consider how they might clarify the guidance on these issues.

It was also noted that there are some smaller, more complex plans, especially cash balance plans, where insurers may be unwilling to write an annuity contract. The statute does not currently allow the Missing

Participant Program to be used for these situations. Some annuity brokers have “blanket” contracts enabling an annuity to be purchased in these situations, but fiduciaries may have concerns about whether the premiums and fees are reasonable.

- **Multiemployer Plans**

- Withdrawal Liability Court Cases

PBGC indicated that it reserves the right to exercise its authority to regulate withdrawal liability assumptions. However, it did not indicate whether, or when, it might do so.

- We are interested in an update on PBGC’s proposed simplified methods for withdrawal liability calculations, including potential changes to the February 2019 proposed rules and an estimated finalization date.

The comment period on the proposed rules is now closed, and PBGC is working on final rules. Anticipated timing will likely be discussed in the fall 2019 regulatory agenda.

- Multiemployer Pension Reform Act (MPRA) suspension / partition applications

- Guidance in Rev. Proc. 2017-43 has been working well.

- Eleven unique applications were ruled on in 2018 and only four in 2019. What does PBGC expect for 2020?

The Group noted that practitioners have found the guidance in the Rev. Proc. helpful in submitting applications. Only 28 plans have filed for MPRA intervention, leaving over 100 plans in critical and declining status that are unable to file, have chosen not to, or are waiting to do so. PBGC encourages plans to model the impact of waiting to file, as the amount to suspend will likely increase. Furthermore, if plans wait too long, suspension alone may no longer be a viable solution. There is uncertainty about the economic environment, and potentially lower returns than in past years (e.g., Morgan Stanley projects a 1% return on government bonds and 5% returns on equities over the next 10 years). Some plans may be waiting for legislative action, thinking it would not make sense to go through the application process if there is a chance MPRA may be repealed.

There are also likely a fair number of plans where benefit suspensions would not avoid insolvency. These plans could apply for both suspension and partition. However, if the plan’s insolvency date is after PBGC’s insolvency date, it may not be able to satisfy the impairment test.

- PBGC released an August 2019 report on Orphan and Inactive participants. The report mentioned less than 30% of plans reported any orphans and more than 60% of plans left the orphan field blank (based on 2015 Form 5500s). Given the significant portion of plans that did not report, will any additional guidance be released on this item?

PBGC indicated, in addition to leaving the field blank, it has seen cases where the changes from year to year in the number of orphans reported did not make sense. It is proposing changes to Line 14 of the 2020 Form 5500 Schedule R. The proposal was released in the Nov. 13, 2019, Federal Register; comments are due Dec. 13, 2019.

- ERISA §4041A(f)(1) permits terminated plans to pay lump sum benefits if the value of the entire nonforfeitable benefit does not exceed \$1,750. Guidance on whether this provision is applicable to partitioned plans would be helpful.

PBGC confirmed that a participant in a partitioned plan with a lump sum value of less than \$1,750 can be involuntarily cashed out. This applies specifically to a participant whose entire benefit is being paid

from the successor plan. The situation is more complicated for a participant who has benefits in both the original and successor plans.

- We encourage discussion and analysis on how PBGC premiums compare to total administrative expenses.

PBGC indicated that it is currently gathering data on administrative expenses for multiemployer plans, which can be analyzed based on industry, plan size, and other factors. It has not yet looked at PBGC premiums compared to total plan expenses per se.

- New guidance on valuation and reporting for terminated multiemployer plans—objectives and feedback?

PBGC indicated that it needs to record a liability for financial assistance to insolvent plans, including the cost of administration, and the valuation and reporting information is needed for this purpose. For smaller plans, valuations might be required only every five years rather than annually. Alternatives to a full valuation might include providing information such as present values for different participant categories.

- **Other PBGC Topics**—PBGC provided comments or requested input on the following additional topics:

- Reportable events and ERISA §4010 reporting

PBGC noted that the comment period is still open for the recent proposed changes to the reportable events forms and instructions; these changes would require the use of PBGC's e-filing portal for all reportable events and require plan sponsors to provide additional information regarding missed contribution events. Proposed changes to the Form 5500 Schedule R would also require additional information to be provided when an unpaid minimum required contribution is reported on the Schedule SB, such as whether the missed contribution was reported to PBGC, and if not, the reason why.

PBGC pointed out the recent ERISA §4010 reporting guidance in Technical Update 19-1, which waives additional financial reporting for each member of a controlled group when consolidated financials have been provided and the ultimate parent is not a foreign entity.

- Church plans

PBGC noted that some church plans that are not covered by the PBGC may be acquired by entities that are covered by the PBGC. It also asked whether the Group was aware of any source of information on all church plans; the Group was not aware of any such source of information.

- Issues PBGC should focus on as an agency

PBGC asked whether there were particular issues it should focus on as an agency. The Group indicated that some plan sponsors are concerned about whether financial resources from the single-employer insurance program could potentially be used by the multiemployer program. PBGC responded that the programs are separate and operated separately; any use of single-employer resources by the multiemployer system would require a legislative change.

- Risk transfers

PBGC asked about the prevalence of risk transfer activity. The Group indicated that there is continued activity around annuity purchases and terminated vested lump sum offerings, whether as part of a plan termination or to reduce plan size. Activity around retiree lump sum offers has been more limited. PBGC noted that the 2020 premium instructions have added retiree lump sums to the risk transfer question. PBGC is about to publish its 2017 Data Book, which will include risk transfer data.

- Lump sum interest rates

PBGC noted that the lump sum interest rates under ERISA §4022 recently went to zero, and indicated that there had been inquiries from participants about this. This has triggered a discussion about what happens if interest rates were to go negative in the future.

- Cash contributions

PBGC indicated that estimating how much plan sponsors may contribute to their plans is a challenge and asked the Group for thoughts on how PBGC might do this. The Group indicated that plan sponsors are following a variety of strategies. Some plan sponsors may contribute the minimum, while others may contribute to avoid variable-rate premiums or ERISA §4010 reporting, or use funding balances to stabilize contributions for some period of time. There have been recent proposals to further extend interest rate stabilization for minimum funding purposes, but it is unclear how likely such proposals are to be enacted.

- §4044 interest rate proposal

PBGC indicated that it is considering what guidance to provide here, and whether using current interest rates as of a transaction date (e.g., Treasury rates plus a margin) would pose any problems. Rates are currently known in advance for each quarter. In general, the Group thought using a current market rate would not be a problem. There might be situations where a plan sponsor would want to know the rate in advance of a transaction (e.g., a spinoff in a merger and acquisition situation), but current market rates would better tie to the transaction date.

- Study of guaranteed benefits

PBGC indicated that it has performed an updated study on the percentage of benefits covered by the PBGC guarantee. The results are similar to those in previous studies (e.g., in both the current study and the last study eight years ago, 84% of participants covered by single-employer plans receive their full benefits; the study breaks down the reasons the remaining 16% receive less than full benefits).