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

March 7, 2019

Periodically the "Intersector Group" ("the Group") meets with representatives of the Internal Revenue Service (IRS) and the 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 Bruce Cadenhead (CCA), Tom Finnegan (ACOPA), Eric Keener (SOA), Ellen Kleinstuber (Academy), Tonya Manning (CCA), Marty Pippins (ACOPA), Maria Sarli (SOA), and Eli Greenblum (Academy). Monica Konaté, Academy staff member supporting the Intersector Group, also attended.

These meeting notes are not official statements of the IRS or Treasury and have not been reviewed by its representatives who attended the meetings. The notes are a reflection of the Intersector Group's understanding of the current views of 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.

- **Revenue Procedures 2017-56 and 2017-57**
  - Does the IRS wish to provide any pointers based on your experience reviewing filings under the new Rev. Proc.?

    The IRS reiterated the need to be specific in a request as to what has changed and what the plan sponsor is asking to be approved. Noting this information at the beginning of the request rather than throughout is helpful to the reviewers. In addition, an effort should be made to submit all required information initially to avoid the IRS needing to request additional information, which will ultimately delay the review process.

  - Can the IRS please clarify and explain the intent of the limitation on automatic approval to fresh start the Actuarial Value of Assets (AVA)?

    A plan sponsor cannot receive automatic approval to change a plan's asset method to the plan's current method, but with a fresh start that resets the value to the market value of assets on the date of the change. The practitioners observed that Rev. Proc. 2017-56 further appears to limit the new method under the fresh start option to the method that averages asset values as of the valuation date and the two prior valuation dates (after the phase-in period has expired). It was not clear from the discussion whether all were in agreement with that reading, as the IRS representatives did not have access to a copy of the Rev. Proc. during the discussion. However, they did note that a sponsor could still apply for approval to make a change that is not eligible for automatic approval.

- Has the IRS' position changed with regard to a merger that has a transition period that exceeds 12 months? It appears that an interim valuation is now required. If so, can this be communicated so potential filers understand what to expect when requesting approval for such mergers? Ideally, the revenue procedure would be expanded to include automatic approval for these types of mergers.

  Although there was a deliberate decision not to provide automatic approval for transition periods exceeding 12 months, the IRS does not have a stated position on such mergers (e.g., requiring an interim valuation). The practitioners observed that all of the recent rulings that they were aware of that had a transition period of more than 12 months required an interim valuation. The IRS pointed out that any recent rulings only apply to the submitted plans and were based on each plan's specific facts and circumstances. It was noted that the plan's funded status does flow into their decision-making process. They are trying to decide whether to issue guidance, but have not yet decided what the rules should be—deciding that and providing guidance is resource-intensive so practitioners should not expect anything soon.

- Given the amount of time typically required to review a method change request, corrections, if necessary, may not be known at the time that the relevant Schedule SB is filed. Do you have any recommendations for highlighting any ambiguous issues so that preliminary concerns about those issues might be addressed in advance of the formal ruling?

  An IRS ruling cannot be communicated until it has gone through all levels of internal review and is final. The approval process does not permit disclosure of intermediate internal discussions.

  If timing might be a concern, it is recommended that the timing of the filing be accelerated as much as possible and the filer highlight any timing issues with the filing.

  The Intersector Group then asked what could be done if a plan sponsor must file a Schedule SB reflecting a method change prior to receiving a response from the IRS. The IRS stated that any resolution to address IRS approvals that affect a plan's filing would need to be dealt with on a case-by-case basis per the specific facts and circumstances. The IRS noted that it does not have authority to provide relief for contributions that are ultimately deemed less than the minimum required contribution. As such, it is recommended that a plan sponsor make additional contributions to allow for any differences in what is reflected on the SB and the IRS' ultimate ruling. A plan sponsor can also request expedited handling if approval or lack of approval could result in a wide range of contribution requirements.

  IRS indicated that they are working on providing additional guidance on funding method changes but are finding it to be very difficult since there are many potential examples of different facts and circumstances, so they expect it to be a while before any additional guidance is forthcoming.

- **Final Form 5500 Filings**—It is not clear whether a Form 5500 needs to be filed for the disappearing plan when there is a merger on the first day of the disappearing plan's plan year. Many practitioners had understood that a merger on "December 31" and one on "January 1" could both be viewed as "stroke of midnight" mergers that occurred just as one plan year ended and just before the other began. The instructions recently added to the Form 5500 (to address plan terminations, we believe, where assets remain in the trust after the official date of plan termination) that a Form 5500 cannot be labelled as the final Form 5500 unless assets are zero is leading some attorneys to conclude that a Form 5500 filing is required for a one day plan year for the disappearing plan for a "January 1" merger.

The IRS noted that the question of whether a one-day filing is required for a January 1 merger is something that would be settled jointly among the IRS, Pension Benefit Guaranty Corporation (PBGC), and Department of Labor (DOL) and indicated a willingness to include this topic in future discussions with the other agencies. The IRS would like the Intersector Group to follow up with examples as to why a merger would need to be on the first day of a plan year vs. the last day of a plan year before they determine if the two scenarios should lead to the same or different filing requirements.

- **Substitute Mortality Tables (SMTs)**
  - Does IRS want to provide any pointers stemming from their review of SMT filings?

    During discussions, the IRS highlighted a few select issues noted below. It was noted IRS representatives were to participate on a panel for a session on this topic at the 2019 EA Meeting.
    - *Filers should ensure that they follow all of the procedures outlined in Rev. Proc. 2017-55*
    - *Even though Rev. Proc. 2017-55 indicates that submissions may exclude information for ages above 100, the IRS is finding that they need to see all ages (if the simplified rule that only uses participants aged 50-100 is not being employed) to review the results, and they will ask for them if not provided in the submission.*
    - *Even if the request involves using combined male and female experience to determine the mortality ratio, the IRS will want to review the calculations and so will need the male and female information separately, in addition to in combination.*
    - *Even if the filer has determined that the change in coverage during the experience study period is less than 20%, if there has been a noticeable change the IRS will still want a demonstration that the study remains accurately predictive.*
    - *The expected deaths are not always calculated correctly (e.g., projecting improvement to the wrong year, not using the correct mortality improvement scale, or not using combined male and female experience to calculate expected deaths if combining genders to determine the mortality ratio.)*

  - When a plan is approved for a plan-specific mortality table, we understand that the IRS's position is that the mortality assumption is no longer prescribed and therefore is subject to the requirement to be the actuary's "best estimate." Practitioners need clarity around considerations when an actuary needs to determine if a plan-specific table is still representative of future expectations. Also, timing is not clear. If the actuary determines that the plan-specific mortality table is no longer appropriate, when must the actuary no longer use it? Also, if a significant change in population occurs during 2019 (mid-year, post-valuation date), can the table continue to be used for 2019 and 2020, or 2020 and 2021? (In other words, is "the plan year for which there is a significant change in individuals covered by the plan" under the regulations 2019, because the change occurred during 2019, or 2020, because that is when a change was first reflected in a valuation?)

    Regulations require that assumptions be the "best estimates" of future plan experience; however, prescribed assumptions are not subject to this requirement and SMTs (like other mortality choices) are treated as prescribed assumptions. If the threshold for the numeric change in headcount has not been met, there is no affirmative obligation to change the table or demonstrate that it remains accurately predictive, although there might be potential risk on audit if IRS deems it not accurately predictive.

    If there is a 20% change in covered population, the default shifts to having to say whether or not the SMT remains accurately predictive (but still not whether the SMT is a best estimate).

    In both cases, IRS/Treasury noted that they were not opining on whether or how any actuarial standards of practice might apply.

Regarding timing, if an SMT is being used for 2019, and a 20% change in covered population occurs during 2019, the SMT can be used for 2019 and 2020 and could not be used for 2021 absent a demonstration, approved by IRS, that the SMT remains accurately predictive. In this case the change is treated as occurring during 2019, rather than as of the valuation date in 2020, so 2021 is the second plan year following the year in which the change occurred. If the change in population results in the table no longer being accurately predictive, then 2021 is also the year following the year in which the table is no longer accurately predictive. In either case, the SMT could continue to be used in 2020 but not in 2021 (absent an IRS-approved demonstration).

Each 20% change needs to be certified. For example, if there were 10,000 participants in the experience study, and then the covered population later dropped to 7,000, the enrolled actuary would need to certify that the table remained accurately predictive to continue to use it. If the covered population later rose to 9,500, the enrolled actuary would need to certify again, because there was a change of at least 20% from the 7,000.

- **Market Rate of Return (ROR) Plans—**In 2017, both the Academy and ACOPA wrote comment letters to IRS with respect to more appropriate measures to project variable rates, especially market-based variable rates, into the future for Code sections 410(b), 401(a)(4), 401(a)(26) and other purposes. This was based on an understanding that the Service was looking at those issues at that time. Any updates? The lack of alternative measures is particularly troubling since there are now a large number of ROR plans in the small plan marketplace that had negative returns in 2018. If the negative rate is forecast, or even if zero is forecast, the plans face potential Code section 401(a)(26) failures.

  There is no accrued benefit definition for purposes of Code section 401(a)(26). The IRS recognizes that further guidance is needed and, as such, this is an active project, but the IRS anticipates it will be some time before the project is complete.

- **Multiemployer Technical Correction—**There is a need for technical corrections to address the situation where a multiemployer plan is in the red zone at the end of its rehabilitation period and still has a funding deficiency such that excise taxes might apply. Practitioners were hoping for technical corrections to fix this issue. What can or should be done without these corrections?

  The practitioners indicated that plans are reaching the point where this matters. Some plans were in the red zone in 2008, and it is theoretically possible that a plan had its 10-year rehabilitation period end 12/31/2018. Certainly, there are plans with Rehabilitation Periods that will end 12/31/2019. Practitioners believe there should be an exemption from the excise tax, but there have been no technical corrections nor guidance that addresses this. The excise tax falls on the employers, not the plan. When the Schedule MB shows a deficiency, will the excise tax be assessed? Nothing on the Schedule MB actually shows when the rehabilitation period ends. Of course, if the plan emerges from critical status "on time," it is not an issue.

  The IRS is aware of the need for corrections and the issue with timing and agrees that the language in the statute is "challenging." A three-agency report issued in 2010 or 2011 noted this ambiguity. No advice was offered.

- **Adjusted Funding Target Attainment Percentages (AFTAPs) and Annuity Purchases—**Retiree annuity purchases have become a lot more common. It is rarely possible to determine with complete accuracy which of these participants were non-highly compensated employees (NHCEs), and even when it is it may not be possible to assign a portion of the annuity purchase price specifically to that group. This appears to be a situation where there is missing data and where an assumption must be made for that missing data. Given the consequences of being wrong and certifying an AFTAP in the wrong range, some in this situation have elected to take a conservative approach to setting the assumption. What is

conservative in this context depends on the situation. For example, if the AFTAP would be below 80% if annuity purchases are fully excluded and above 80% if fully included in the AFTAP, the conservative approach might be to make an assumption that errs on the side of underestimating the proportion of former NHCEs in the annuity purchase group and then have the sponsor make a contribution to get the plan to at least 80% on that basis (so that additional information, if it becomes available, would most likely support an AFTAP greater than 80%—but within the certified range). Can you confirm that making a reasonable assumption for missing data is a valid approach and the AFTAP is therefore considered final?

The IRS noted that the structure of Code section 436 puts a premium on accuracy and there is not really any room to be "off." The IRS must administer the law as written. A plan sponsor is required to maintain appropriate records, and IRS views this as an issue with missing data but not one that can be managed by making a reasonable assumption with respect to missing data. Further, the IRS cannot write a rule to address missing data as this would create an incentive for a plan sponsor to not retain data. Still, the IRS recognizes that, prior to the passage of Pension Protection Act (PPA), plan sponsors were not aware of the need to retain a record of which former employees were highly compensated employees (HCEs) for AFTAP purposes. In many cases it can be demonstrated that the AFTAP would be in the same range regardless of which participants covered by the purchase were former NHCEs and therefore any subsequent data correction would not result in a material change in AFTAP. When there is uncertainty, the IRS recommends a plan sponsor make sufficient contributions so that the AFTAP would remain in the same range regardless of what might be found with regard to missing data.

- **Life Expectancy Tables—**The life expectancy tables used under Code section 7520 are supposed to be updated every 10 years, and the last update was issued back in 2009. Does IRS plan to issue new tables later this year? If so, will there be sufficient time between the date of issuance and effective date to allow for implementation?

  The IRS is working on this issue. The life expectancy tables under Code section 7520 are based on U.S. population data from the Centers for Disease Control and Prevention (CDC). However, updated information from the CDC is not yet available. As a result, guidance will likely need to wait until this information is available. The timeline for availability of the CDC data, and IRS' subsequent revision to the Code section 7520 tables, is unknown.

- **Retiree Lump Sum Payments—**The IRS recently released guidance indicating there is no longer an intention to propose modified Code section 401(a)(9) regulations to address retiree lump sum windows. Is there anything you can share regarding this decision beyond what is indicated in Notice 2019-18? Are there any specific features of such an offering that might raise particular concern when the IRS reviews whether the amended plan satisfies the requirements of the Code noted in section III of the Notice?

  The IRS is no longer intending to modify the Code section 401(a)(9) regulations and, as stated in Notice 2019-18, does not intend to challenge retiree lump sum windows as a section 401(a)(9) issue. In Notice 2019-18, the IRS pointed out that other Code sections must still be satisfied. However, they have not recently engaged in analysis of specific issues that might be of concern with regard to these other Code sections. The IRS reiterated that the requirements of the section 401(a)(9) regulations need to be met.

- **'New Form 5500'—**Is the 'New Form 5500;' still in development, or has the project been abandoned?

  The modernization project is still active and is a coordinated effort across the three agencies. The DOL oversees the project, including contracting with the outside vendors that support the work of the

agencies. The IRS and Treasury personnel in attendance were not in a position to address the timeline for any potential updates.

- **Plan Factors—**Is there anything IRS would like to share regarding recent litigation around plan factors (plan actuarial equivalence) and the lack of guidance and workable solutions?

  No. IRS is not a party to these lawsuits. Per IRS guidance under Code section 411, actuarial factors must be "reasonable" or there is a forfeiture of vested accrued benefits. IRS has not given guidance on what is reasonable.

- **Guidance Plan—**The Intersector group asked for an update on guidance for the following areas:
  - Missing Participants

    The IRS is actively working on this issue with the DOL and PBGC. As the three agencies coordinate, many issues have been raised. As such, it is expected that this will be a large and significant piece of guidance. IRS is looking to determine whether there are pieces they can work on independently that do not involve issues under the purview of DOL, but the issues may need to be addressed in their totality. There are also discussions about how definitive any guidance should be, or whether acceptable approaches should be more dependent on facts and circumstances. While it is difficult to provide guidance that would be helpful in the interim, the IRS is open to suggestions on any simple steps they might take while plan sponsors await guidance. They are also interested in hearing what plan sponsors are actually doing in this area while they await more guidance. For example, what do plan sponsors do to try to maintain updated addresses for participants and beneficiaries? IRS welcomes any input both on the overall project and on any pieces IRS can tackle independently if it is different or additive to the input already received in the last few years.

  - Section 404

    The IRS continues to work on its project to update guidance under Code section 404 to reflect statutory changes, including PPA. In the meantime, the IRS asked that they be provided with a formal list of issues or situations plan sponsors or practitioners would like for them to address, in particular those that deal with Code sections other than section 404(o).