Intersector Group Meeting with the Pension Benefit Guaranty Corporation Notes

November 2, 2020 (Conference Call)

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 American Society of Enrolled Actuaries (ASEA). Attending from the Intersector Group at this meeting 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 Stone, Academy senior pension fellow, and Philip Maguire, 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 meeting. The notes are a reflection of the Intersector Group’s understanding of the current views of the PBGC representatives and do not represent the positions of the PBGC nor 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 nor 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.

Multiemployer Topics

1. Does PBGC have additional guidance or feedback it wishes to provide the multiemployer plan community on how plan sponsors approach pre-application conferences for suspensions of benefits and partitions under MPRA? For example, are there certain topics that are commonly covered in these conferences?

   PBGC must certify to Congress that granting assistance via partition does not impair PBGC’s ability to provide assistance to other plans. The plan actuary can’t determine this. It is highly advisable to have a pre-application conference with PBGC regarding whether this criterion is met, or you might be taking up time and money putting together an application that won’t go anywhere. Plan professionals and trustees can put together an outline of the fund’s circumstances and key issues affecting the plan, and PBGC will decide that it (a) clearly doesn’t impair, (b) clearly does impair, or (c) is a gray area and PBGC won’t be able to decide until it gets the full application.

For benefit suspension applications, the best practice is to give Treasury and PBGC a heads up that it is coming. PBGC has never had a circumstance where it wished the applicant had not touched base early (before filing).

So the moral is: Reach out whether it is suspension, facilitated merger, or partition—any MPRA application can benefit from having a discussion with Treasury and PBGC ahead of filing the application. Many applicants have come in and received an informal analysis; PBGC can't always answer all questions that the plan professionals and trustees bring forth, but getting as much information as possible before filing is always helpful, especially in the impairment analysis.

The Group asked whether there are certain things that commonly come up in these pre-application conferences. PBGC mentioned three items.

- *For partitions/facilitated mergers, PBGC has a data request with information to prepare in advance, which includes projected CBUs (especially for partitions). This is an area where PBGC will want to know things like what will happen with no help given and what will it look like with a partition? PBGC will look into whether it is able to share a generic data request.*
- *On the investment return assumption, actuaries can say what investment return they plan to use and the support they intend to provide to gauge PBGC's reaction. PBGC will not be able to give preapproval for the assumption, but talking about the support you will provide is helpful.*
- The *discussion of categories of people and how they will be affected by suspensions needs to demonstrate that cuts are equitably distributed. Treasury has been forthcoming in helping applicants to determine what factors they need to look at if the proposal is not a uniform across-the-board cut. Treasury won't come to conclusions about reasonableness of the proposal but will discuss the standards they apply, and will help guide the thinking on equitable distribution.*

The Group asked if it is better to coordinate a pre-filing conference with one or both agencies—Treasury and PBGC. PBGC staff noted that they will do the coordination for you: Whoever you reach out to first will pull in the other agency. Both Treasury and PBGC have dedicated MPRA email addresses that can be used for this purpose. PBGC suggested that for a discussion of suspension-only plans, initial outreach should be to Treasury, which will pull in PBGC. For both a partition and suspension, it is recommended that you reach out to PBGC, which will pull in Treasury.

2. If a plan actuary is seeking technical advice (e.g., how to calculate PBGC guaranteed benefits in special situations), what's the best way to proceed? Should this be done as part of a pre-application conference, an email, or some other means?

   While questions can be sent directly to individual PBGC staff, their preference is for them to be sent to the two general email boxes they maintain, MPRA.questions@PBGC.gov

and multiemployerprogram@pbgc.gov. Questions can be sent to both addresses and they will pull in appropriate people.

The Group asked whether it's better to provide a lot of detail in the initial outreach or only more basic concepts/high-level information. PBGC indicated that generally the more information the better, but it may still not be able to answer (e.g., QDROs—PBGC would need to see the QDRO, and the questioner probably will be told to consult with fund counsel). But, for example, if you are asking about an unusual payment form, an example is very helpful. Where the answer is clear-cut, it will usually come back in an email. Where it's less clear, a phone conference may be scheduled.

3. Does PBGC have any feedback it wishes to provide to multiemployer plan actuaries, in general?

On Schedule MBs, PBGC is frequently not seeing the responses they want.

- *Line 3 (Contributions made to the plan) indicates that if withdrawal liability payments are included in the contributions, there must be an attachment, but sometimes the attachment isn't there even though there are withdrawal liability payments included in plan assets in the audit report.*

- *Line 4(f)—In this line you enter the year of expected emergence from critical status, and the answers are often not consistent with the Line 4(b) indication of Critical or Critical and Declining status. PBGC will look at the instructions and try to clarify.*

- *Line 6(e)—expense load in normal cost—Everyone calculates this differently; PBGC will provide better instructions so there is more consistency in reporting to help PBGC gain a better understanding of expense load data.*

End-of-Year Events

1. Guidance would be appreciated on the process of transferring people to insurance companies and how to determine when they leave the group considered for PBGC premiums, especially when there is an administrative delay caused by the insurer gearing up to make payments.

   Annuity purchases often tend to happen later in the year. The Group asked for clarification of when someone is no longer in the plan for PBGC premium purposes. Often the insurer can't set up payments in its administration system immediately even though it has financial responsibility for future benefit payments. In this situation the plans often pay benefits for a couple of months, with money funded by the insurer or held back from the premium payment. Sometimes the payments are made from a separate account but sometimes they are made through the pension trust.

We discussed an example where the annuity contract was purchased in December for a calendar-year plan year, and all experience thereafter accrues to the insurer, but money is left behind to pay a couple of months of benefit payments. Typically, in such a situation the liabilities and the assets to cover those couple of months would not be included in the actuarial valuation. Would those participants also be excluded for premium purposes? Does it matter how the contract describes the price (e.g., $Y for benefit payments beginning January 1, less $X left behind to cover January 1 and February 1 payments, with the insurer beginning direct payments March 1, vs. a price of $Y-$X for payments beginning March 1, if in both cases gains and losses accrue to the insurer)?

PBGC indicated it would consider whether to provide guidance, possibly through the practitioner FAQ page.

2. Guidance would also be appreciated to address uncertainties and confusion about mergers and spin-offs that occur on the last day of a plan year.

The Group noted that plan sponsors are being charged 1/12 of annual premium for December 31st spin-offs. PBGC confirmed that if the reported effective date is 12/31/2020, the MyPAA system expects a 2020 filing with a 1/12 of the annual premium for the spun-off plan (since a one-day plan year in 2020 triggers one month of premium), and the plan administrator will get an automatically generated letter. If it is actually an "end of year" spin-off, for the new plan the filing preparer needs to put 1/1/2021 as the first day of the plan year rather than 12/31/2020 to avoid a one-month premium assessment. If the preparer puts 12/31, the Participant Count Date is 12/31 for that one-day plan year, and the plan administrator will get the 1/12 premium letter. If the preparer enters 1/1, there is no 1/12 premium assessed because the spun-off people are picked up in the new plan for the first plan year because the new plan uses the first day of the plan year as the Participant Count Date.

PBGC has not questioned premium filings that show a spin-off date on the premium filing as the first day of the spun-off plan's plan year, even if it says 12/31 on the Form 5500 (some people have said "stroke of midnight" in an attachment, but that is not necessary). PBGC does not have a problem with this difference. This is an automatically generated letter—the plan administrator can correct the premium filing—that is, they can refile using 1/1/2021.

PBGC seemed to agree that for non de minimis merger and plan-to-plan transfer transactions on 12/31 or 1/1, the Participant Count Date is the date of the transaction, and the counts are the counts after the transaction. So for a beginning-of-year, non de minimis merger, 1/1 is used as the Participant Count Date and participants from both plans are counted in the surviving plan. If the merger date is 12/31, participants are

counted after the merger occurs, so again participants from both plans are counted in the surviving plan. For a plan-to-plan transfer, again counting happens after the transfer occurs, so everyone is counted, counted once, and counted in the plan they end up in.

PBGC will think about whether additional examples in the PBGC premium instructions would be helpful.

Standard Terminations

PBGC has previously indicated that smaller terminating plans that do not get any qualified insurers to bid on the final annuity settlement should contact PBGC to discuss the situation. If a plan sponsor could ascertain that some insurers would be willing to bid but for the existence of certain features in a plan that they find undesirable from either a risk or administrative standpoint, is there a possibility of PBGC granting permission on a case-by-case basis to exclude such a provision from the annuity contract? If so, what criteria might PBGC evaluate in making such a determination? Consider the following examples:

- A lump sum, non-spouse death benefit for a plan that has a history of difficulties in locating a valid beneficiary despite engaging in a diligent search process.
- A Social Security level income option that has not been frequently elected by plan participants.

For small employers, insurers typically don't want deferred participants. In prior meetings, the Group discussed with PBGC the difficulties some plan sponsors have had in finding insurers to bid on some of these plans to facilitate the final settlement in a standard termination. Other problematic situations are arising where insurers are unwilling to bid on plans with certain undesirable features. Examples include lump sum non-spouse death benefits with missing beneficiaries; Social Security level income options (SSLIOs); and qualified joint and survivor pop-up options. SSLIO and pop-up options are rarely elected but often can't settle the plan because of these options. How would PBGC react to excluding those provisions from the annuity contract?

PBGC indicates that this falls under IRS' purview—benefits are protected by the anti-cutback requirements so PBGC cannot grant any exceptions, but IRS does have some rules around things like burdensome provisions. Any amendment to the plan to facilitate obtaining annuity bids must meet IRC section 411(d)(6) regulations.

PBGC also doesn't have a position on whether you can amend the plan after the date of plan termination to take provisions out of the plan (e.g., if the removal does meet the section 411(d)(6) exceptions)—that is up to IRS. (The Intersector Group notes—IRS generally takes the position that benefits cannot be removed from the plan after the date of plan termination, although benefits can be improved).

PBGC noted that best practice is to look at the plan provisions in advance of the termination and amend out non-protected benefits that could be problematic. For those benefits that can be

reduced but not amended out of the plan before the termination, PBGC does have the ability to make exceptions to the deadlines while the plan sponsor is trying to work through these issues.

Another problem can occur when you open a lump sum window, a lot of people take the lump sums, but then there is not much liability left to settle, and no insurer wants it. PBGC cautioned that plan sponsors must consider that possibility as they move into the plan termination process.

Distress Terminations

There is an expectation that distress termination filings will spike. We would like to get information on how plan sponsors can prepare for a pre-filing consultation, and would like to hear PBGC's perspective about the specific factors considered, the timing of the process, mistakes plan sponsors make in the filing process, the factors PBGC considers when weighing funding waivers vs. plan termination, etc.

The email box (distress@pbgc.gov) and phone number (202-229-4070) to use to contact PBGC to initiate a pre-filing consultation or submit questions is available on the PBGC Distress Terminations page. A pre-filing consultation is a very high-level look at the company, and PBGC can provide informal feedback on whether the distress test is likely to be met and what the plan sponsor needs to demonstrate or supply for PBGC review. PBGC will want to see the actuarial valuation report, financial statements or tax returns for the plan sponsor and all members of the controlled group, and information on the controlled group. Having this information available allows PBGC to do a "quick and dirty" determination as to whether it thinks the distress test criteria might be met. The consultation is generally scheduled within a week of getting the preliminary information. The consultation must include the plan sponsor, and can include attorneys and actuaries. PBGC goes over the distress termination process and things it noticed in the materials that were provided, and talks about how to settle termination liability. PBGC can tell the company what the hurdles will be to substantiating the criteria for a distress termination to be approved. PBGC also provides the plan sponsor with insights on what to expect during the process and if/when the termination is approved. The consultations typically last about an hour.

Before COVID-19, there was about one pre-filing consultation per month; now about one a week. In March-April, it was mostly companies already having trouble before pandemic. Since then PBGC has seen lots of nonprofits, including hospitals and organizations that rely on fundraising through events to generate operating revenue. In the last 30 days it has been quiet, but PBGC does expect more applications. PBGC noted that the current financial crisis is a little different than previous ones. Back in 2008, lots of companies went straight to liquidation. Now companies have access to capital and government relief, and the timing for it to end is unknown.

The pandemic is difficult to predict, so it is challenging to create the financial projections required, but PBGC asks companies to do their best. The more the company can do to support

their projections, etc., the faster things go. After the pre-filing consultation, a case team can be assigned automatically (if the company so desires) or individual PBGC staff may be available as a sounding board while preparing the application. PBGC shared an example where one company sent in sample financial projections and got input from PBGC on whether they were detailed enough, and that ultimately saved time.

Distress termination is the path of last resort. PBGC prefers the waiver approach if the hardship is temporary and that will help the company meet the funding obligations. For calendar-year plans, the deadline for 2019 plan year funding waiver applications was March 15, 2020, so some filers this year had missed that deadline due to the pandemic being in its early stages. PBGC noted that everyone received a temporary funding waiver through the CARES Act legislation and encouraged plan sponsors to begin planning for the next filing deadline for calendar-year plans that is coming up in March 15, 2021, for the 2020 plan year. PBGC also encouraged plan sponsors to be looking ahead to contributions that have been delayed to January 1, 2021. If the sponsor will have difficulty making those payments, it is encouraged to begin discussions with PBGC soon.

PBGC noted is has seen some situations arise where a plan sponsor contacted PBGC too late to qualify for a distress termination. For example, a company that effectively shut down operations two years ago needed to apply for a distress termination at that time. Additionally, PBGC noted that if the company is no longer operating—i.e., is closing the business and will no longer be generating revenue—that is a reportable event (when the decision is made) and the company needs to tell the PBGC at that time, not later. This situation (where a delay has occurred between the shutdown of operation and notification to PBGC) is likely to turn into an involuntary termination.

The Group asked two follow-up questions. First, does PBGC anticipate any capacity issues in handling pre-filing consultations or reviewing distress termination filings? PBGC responded that there are no anticipated issues at this time. PBGC has been through a surge in filings before and is prepared to respond. One of the options is to move resources around within PBGC to accommodate the increased demand for staff to review these filings. Second, when in the process is the best time to come in for these pre-filing discussions? Is it better to wait until it is better known whether the business will rebound, or better to do it early in the process when the need for a distress termination is just a possibility? PBGC said sometimes a plan sponsor initiates discussions when it is too early (e.g., they had enough money to get through the next 12-18 months), but sometimes the discussion helps the company anyway to better understand the process and prepare for when it does become necessary. Another example given was a conversation that related to the controlled group structure, where PBGC was able to clarify that a distress termination was not likely because other controlled group entities had sufficient financial resources to allow for a standard termination to proceed. PBGC emphasized that while consultation is not required, it is highly recommended.

PBGC asked the Group whether companies are open to having these conversations freely, or do they fear that doing so will put them on PBGC's radar if they aren't already? Some companies

are already on PBGC's radar and have been submitting supplemental information, so for these organizations it's just a chance for PBGC to gather more information before the plan sponsor submits a filing. The Group noted that there may still be hesitation from plan sponsors that have not previously had contact with PBGC about their plans.

The Group also asked whether the decision to apply for a funding waiver could be part of a discussion with PBGC and whether there is any difference in how PBGC views funding waivers compared to distress terminations in the current environment. PBGC noted that the review and approval of funding waivers is in IRS' purview, not PBGC's. PBGC only consults with IRS for waivers over $1 million. PBGC will look at the plan sponsor's situation to see whether approval of a waiver will solve the short-term financial problem, but it can't control whether a company ultimately receives a waiver approval from IRS.

Involuntary Terminations

Is PBGC anticipating more activity in this area? Does it ever happen outside of bankruptcy? Does PBGC only initiate termination when the sponsor is resistant to a distress termination or is liquidating? In other words, what causes the termination to become involuntary and not distress?

PBGC definitely expects an increase, as this activity goes hand-in-hand with an economic crisis. Most activity comes from smaller plans sponsored by smaller companies that are liquidating outside of court. Larger employers usually go through a formal bankruptcy process because there are more creditors, etc. They have a number of involuntary terminations through bankruptcy, but also observe that some companies just sell their assets and close their doors without any legal proceedings.

PBGC monitors its entire portfolio of plan sponsors through Dun and Bradstreet. It keeps a close eye on certain sectors, and with this financial crisis certain sectors—retail, nonprofit, travel/entertainment/vacations—are most problematic.

PBGC shared an example where one company came forward after two years of a liquidation process, and other creditors had taken too much money from the residual assets. The company thought it could do a standard termination but ran out of money during the liquidation process. This should have been a reportable event to PBGC when the decision to liquidate was made, which would have allowed PBGC to intervene sooner. This caused what would have otherwise been a standard or distress termination situation to become an involuntary termination.

Other Items

PBGC typically publishes its fall regulatory agenda around this time of year. Is it still the intent to release an update this fall (we note that a spring agenda was not issued in May 2020, as is customary)? Are there any matters that will be discussed in the regulatory agenda that PBGC can discuss at this time and would like us to document in the meeting notes?

<u>This topic was not discussed, in favor of providing time for the PBGC to ask certain questions of the Group.</u>

<u>Questions From PBGC to Intersector Group</u>

PBGC noticed that contributions for 2018 were low compared to 2017 and asked about contribution strategies the Group is seeing plan sponsors adopt. PBGC hypothesized that 2017 plan year contributions were likely accelerated due to the change in tax law. Does the Group expect 2019 plan year contributions to be low? Have a lot of plan sponsors elected to defer contributions to January 1, 2021?

The Group noted that employer contribution strategies are heavily driven by PBGC premiums. Sponsors of plans at the variable rate premium cap may not be inclined to prefund. Reducing headcount is the most effective way to reduce premiums among the least well-funded plans. Also, some plans not at the variable rate premium cap are not great credit risks and can't easily borrow to fund at favorable rates. Others are saying with everything that is going on, is this where I want to tie up my available credit (i.e., implementing a borrow-to-fund strategy)? The Group noted that generally plan sponsors will not take action to fully fund a plan until they are ready to terminate. PBGC commented that with variable premium rates now up to 4.5% it was expecting to see more plan sponsors implementing borrow-to-fund strategies due to the immediate annual guaranteed ROI.

The Group also noted that plan sponsors are grateful that PBGC issued guidance allowing them to refile premium filings and claim credit for contributions delayed on account of the CARES Act.

PBGC also asked whether plan sponsors typically wait until later to contribute (e.g., "9/15"?).

The Group confirmed that generally, yes, this is the approach plan sponsors take. An alternative example was offered of plan sponsors with adequate cash flow accelerating contributions to avoid the interest discount and thus reducing cash by paying the full expected MRC early in the plan year.

Do plan sponsors use separate annuitant and nonannuitant tables for accounting, or do they use blended tables?

The Group responded that generally larger plans use separate tables. For public company plans, the auditors will question the mortality assumption if separate tables are not used. As such, separate tables are standard practice for larger plans.

Regarding Pri-2012—Contingent survivors have higher mortality than annuitants, and the table supplied different mortality assumptions for contingent annuitants while retiree is alive vs. after the retiree has retired. Is use of such separate contingent mortality typical?

The Group confirmed that yes, it is relatively standard to use separate mortality for contingent survivors after retirees have died. Many actuarial valuation systems have been updated to accommodate this, but data may not reliably indicate which annuitants are actually survivors of deceased retirees. The more complicated question discussed by the Group is what mortality assumption to use for the contingent annuitant while the primary annuitant is still living but is assumed to die in the future. Here, some systems may not be able to handle a "switchover" from one table to another at each future contingency date, while others are being modified to handle this calculation.

Do companies use separate mortality for disabled lives? Are mortality improvement scales used?

The Group shared that with respect to disability assumptions, there is less of a standard approach. The effect of disability varies a lot plan to plan. The Society of Actuaries' Retirement Plans Experience Committee (RPEC) disability tables don't tie to Social Security eligibility, which makes it difficult in some cases to assess their applicability to a particular plan. The question of mortality improvement projection is more difficult to assess. Plans using the SOA RPEC disability tables are more likely using one of the standard MP projection scales. If a company is using an older disabled mortality table, it is not likely to be using an improvement scale. Data on improvement in mortality among disabled persons is incomplete at best. If the disability liability is not material to the measurement of the liability, it is often easiest to just use a standard projection scale rather than trying to ascertain disability-specific mortality improvement.

Finally, PBGC reminded the Group that it has published a couple of new studies: *Benefit Provisions in Multiemployer Defined Benefit Pension Plans* and *Analysis of Single-Employer Partial Pension Risk Transfers* (and the companion *Single-Employer Partial Pension Risk Transfer Data Tables*). PBGC would appreciate any feedback as to whether these were helpful.