December 12, 2022

The Honorable Gordon Hartogensis
Director
Pension Benefit Guaranty Corporation
c/o Regulatory Affairs Division
Office of the General Counsel
445 12th Street SW, Washington, DC 20024-2101

[Submitted via electronic mail: reg.comments@pbgc.gov]

RE: Comments on the Proposed Rule for Actuarial Assumptions for Determining an Employer's Withdrawal Liability

Dear Director Hartogensis:

On behalf of the Multiemployer Plans Committee of the American Academy of Actuaries,[1] I respectfully submit the following comments on the 4213 proposed rule issued by the Pension Benefit Guaranty Corporation (PBGC) that provides interest rate assumptions for determining an employer's withdrawal liability. The proposed rule was first released by the PBGC on October 13, 2022, and published in the *Federal Register* on October 14, 2022.

The Multiemployer Plans Committee is supportive of the proposed rule in allowing a range of interest rates to be used to select the assumption to determine withdrawal liability. This is consistent with the wide range of actuarial practice across the multiemployer community as documented in our April 2020 Issue Brief[2] "Determining Withdrawal Liability for Multiemployer Pension Plans: A Range of Approaches to Actuarial Assumptions". Our comments are organized below based on the questions PBGC posed in the proposed rule. We would welcome the opportunity to meet with PBGC representatives to discuss our comments if that would be helpful to you.

Allowable Range of Interest Rates

PBGC requested comments on *"whether the final rule should restrict the allowable options to a narrower range of interest rates or to only specific methodologies for determining rates. In particular,*

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[1] The American Academy of Actuaries is a 19,500-member professional association whose mission is to serve the public and the U.S. actuarial profession. For more than 50 years, the Academy has assisted public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.
[2] https://www.actuary.org/sites/default/files/2020-04/Withdrawal_Liability.pdf

should the top of the range of permitted interest rates under section 4213(a)(2) be lower than the typical funding interest rate assumption….”

As discussed in the *Overview of the Regulation* the rule being proposed under 4213(a)(2) *“specifically permits the use of an interest rate anywhere in the spectrum from 4044 rates alone to funding rates alone.”* Our committee does not believe that the PBGC should narrow the range of permissible rates.

As stated in the *Regulatory Impact Analysis* Section (2) – *Introduction and Need for Regulation* – second paragraph, the “*proposed rule is needed to clarify that a plan actuary’s use of 4044 rates represents a valid approach….”* Narrowing the range of permissible rates does not help clarify that understanding.

Additionally, some actuaries utilize the funding interest rate for withdrawal liability purposes. Lowering the top end of the range, below the funding rate, could lead to a conflict with that view and may lead to further litigation questioning the appropriateness of withdrawal liability assumptions or this regulation. PBGC recognized that recent litigation and court decisions have introduced uncertainty, delay and added expense associated with withdrawal liability challenges and has been harmful to multiemployer plans. As such, the committee does not believe that lowering the top end of the permissible range would further PBGC’s goal of reducing future litigation.

Further, some actuaries are currently using either the funding rate or the 4044 rate for withdrawal liability purposes. While narrowing the range would not prohibit actuaries from continuing the current practice under 4213(a)(1), it could lead to disputes as to whether such a rate is acceptable based on these regulations. There are actuaries already using a rate that is based on the expected return on assets—the current top end of the range—but reduced to reflect future administrative expenses. Accordingly, actuaries may use a lower rate than the top end of the range when they deem it to be appropriate for a plan.

The most likely source of a dispute on the appropriateness of a rate for withdrawal liability will be a withdrawing employer. Withdrawing employers are unlikely to challenge withdrawal liability calculated using a rate at the top end of the range, as it will generate a lower withdrawal liability assessment.

Lastly, it would be helpful if the interest rate assumption under 4213(a)(1), the actuary’s best estimate, is also within the range of the rates noted in 4213(a)(2), then it is deemed permissible.

<u>Proposed Change for Certain Circumstances</u>

The funding interest rate is currently for most plans higher than the 4044 rate; however, that may not be the case for all plans, or in the future. In those circumstances it might be appropriate for PBGC to consider widening the permissible range of interest rates to allow the funding rate to be decreased to reflect anticipated administrative expenses when it is the low end of the range.

Relationship with other Factors

"PBGC requests comments on what should be the relationship, if any, between (a) the estimated date of plan insolvency, expected investment mix, and/or funded ratio, and (b) permitted withdrawal liability assumptions."

For many plans, the actuary considers the estimated date of plan insolvency, investment mix and funded ratio, among other items, when setting the funding interest rate. Therefore, these factors are already taken into account under 29 CFR 4213.11(b)(3), by allowing one end of the range of interest rates to be the funding interest rate.

Any further restrictions on setting the interest rate assumption for withdrawal liability purposes would remove flexibility in setting the appropriate rate for a plan.

Other Assumptions

"PBGC requests comments on whether the final rule should specify assumptions or methods other than interest rates. Also, if PBGC were to specify assumptions under section 4213(a) of ERISA that included demographic assumptions, such as mortality assumptions, that differed from plans' demographic assumptions, would plans be unlikely to use the PBGC assumptions because of those difference? If so, why?"

Multiemployer pension plans cover populations in various industries and geographic locations and offer unique benefits that result in different behaviors. As a result, each plan's population exhibits varying employment/retirement patterns and life expectancies. For example, consider a plan covering blue collar workers and a plan covering white collar workers. Blue collar workers generally have lower life expectancies than white collar workers. No single mortality assumption would be reasonable for use by both plans. A plan's actuary is in the best position to review a plan's covered population and select reasonable assumptions for purposes of measuring an employer's withdrawal liability.

Specifying assumptions and methods, other than interest assumptions, under 29 CFR 4213 could yield unintended consequences—particularly in situations where a specified assumption differs significantly from the anticipated future experience of the plan. In such situations, the determination of a plan's unfunded vested benefits could be meaningfully understated or overstated. This could result in either (1) lower withdrawal liability for employers, which could put the benefit security for plan participants at risk, or (2) increased withdrawal liability for employers beyond their fair share, which could incentivize less participation from employers in the future. Either outcome could be detrimental to a plan.

Given this, plans may be hesitant to—or outright refuse to—utilize the alternative basis for assumptions used in determining withdrawal liability under the Employee Retirement Income Security Act of 1974 (ERISA) section 4213(a)(2) if PBGC were to specify assumptions under 29 CFR 4213 that included demographic assumptions that differ significantly from anticipated future experience of the plan. This would not relieve plans of the current situation of costly and timely litigation, where the interest rate assumption is often contested.

Other Comments

PBGC invites comments on any other issue relating to section 4213 withdrawal liability assumptions.

Who Decides: One significant question in the proposed regulation is whether the selection of the interest rate moves from the actuary to the plan sponsor. Certainly, actuaries have experience setting this assumption, as has been the case for years under 4213(a)(1). However, given the broad range of permissible interest rates and the absence of the actuary's best estimate requirement, the selection of the interest rate assumption under the proposed rule might be considered a fiduciary function and plan actuaries are not fiduciaries when acting in a normal role. Conversely, if the assumption is determined by the plan sponsor, then they can continue to rely upon their professionals as they do for other decisions (asset allocation, funding method, etc.). That being said, there may be situations where the board of trustees has opposing views leading to disputes and possible arbitrations, which may be counter to PBGC's goal of limiting time and expenses related to this issue.

Effective Date: Another important procedural item is the effective date. The proposed change applies to employer withdrawals that occur on or after the effective date of the final rule. This could pose problems for withdrawals in the same plan year being treated differently and/or under different statutory sections. We recommend PBGC reconsider the effective date as applying prospectively to the plan year following the final rule or retroactively to include the current plan year; particularly with respect to the timing of assumption changes.

Similarly, the meaning of the statement, "the proposed rule does not preclude the use of an interest rate assumption described [in this proposed rule]…before the effective date of the final rule" is unclear. It would be helpful if the final rule gave direction that the use of the provisions of the interest rate assumption is permissible prior to the effective date of the final rule. One intent of the proposed regulation is to reduce litigation. Clarifying that the use of interest rates within the allowable range under the regulation is appropriate prior to the effective date of the final rule would help reduce litigation for plans that utilize rates within the range.

Payment Schedule: Under 4219(c) for the determination of the payment schedule of withdrawal liability, "[t]he determination of the amortization period described…shall be based on the assumptions used for the most recent actuarial valuation for the plan." Under the proposed rule, what is considered the "assumptions used for the most recent actuarial valuation" with regard to the interest rate?

Prior Pools: If the main purpose of the final rule is designed to reduce or eliminate plan expenses for legal disputes, we suggest PBGC make reference to how the final rule will affect prior "pools" of unfunded vested benefits for plans using the presumptive method. That is, if future "pools" are done in accordance with the final rule, does that leave all prior pools open to continued legal challenges? Further, it would be helpful to allow building and construction industry plans a one-time "fresh-start"[3] of the pools under the presumptive method once a plan is operating under PBGC regulations, even if a plan has unfunded vested benefits. This is currently allowable for non-building and construction industry plans.

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[3] See 29 CFR §4211.12(d)(3)

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The American Academy of Actuaries' Multiemployer Plans Committee appreciates the opportunity to submit this comment letter. We would be happy to discuss any of the issues raised in this letter at your convenience. Please contact Philip Maguire, the Academy's pension policy analyst (202-785-7868 or maguire@actuary.org) if you have any questions or would like to discuss these issues further.

Sincerely,

Christian Benjaminson, MAAA, FSA, EA
Chairperson, Multiemployer Plans Committee
American Academy of Actuaries