Intersector Group Meeting with
the Pension Benefit Guaranty Corporation (PBGC) Notes
October 6, 2023 (Virtual)

Periodically the "Intersector Group" ("the Group") meets with representatives of the 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 (Academy), Kelsey Mayo (ASEA), Eric Keener (SOA), Ellen Kleinstuber (CCA), Tonya Manning (CCA), and Maria Sarli (SOA). Linda K. Stone, Academy senior pension fellow, Philip Maguire, Academy staff member supporting the Intersector Group, and Joseph Hicks, chairperson of the Academy's Multiemployer Plans Committee, 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 reflect the 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 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.

Discussion Topics

Pension Risk Transfer (PRT) Report

PBGC's most recent PRT report, issued in October 2020, was based on 2015–2018 premium filings. It would be helpful to understand whether PBGC intends to update the report based on more recent activity. We would also welcome any insights you can provide into the impact of PRT activity.

PBGC is working on an update to the report that will include information from the 2019 through 2021 Comprehensive Premium Filings, which is the most recent full year of premium information available. While updating the report, PBGC is analyzing the data to point out trends of interest and identify any conclusions that may be made. PBGC asked the Group for input on aspects of the report we find to be particularly helpful. The Group shared that being able to see an aggregated data source is helpful to practitioners to supplement the anecdotal information we have from working with clients within our own firms. PBGC also shared that there is information included in the PBGC data books that has been or will be updated soon. PBGC also noted that a sensitivity analysis was added in the most recent projections report to show the effect of variability in experience related to standard plan terminations and volume of other PRT *transactions on PBGC's financials. This is an area PBGC continues to monitor, wanting to understand what is going on in the marketplace and the drivers of this activity.*

PBGC Coverage with Retro Amendments

A professional service employer has always had less than 26 active participants but has to bring in an additional participant to comply with Internal Revenue Code (IRC) section 401(a)(26) via retroactive amendment (effective as of first day of prior plan year). Due to the amendment, there are 26 active participants on 1-1-2022, but the amendment wasn't adopted until sometime in 2023 (say 7/1/2023). Would that plan be PBGC covered for 2022, or would coverage begin in 2023?

The PBGC premium filing manual doesn't seem to address this specific question. Given the addition of retroactive amendments in SECURE 2.0, we expect amendments increasing participation could be more frequent, and guidance would be welcomed.

The PBGC guarantee applies as of the retroactive effective date in 2022, as this is when Title IV coverage first begins (assuming the plan was exempt from coverage prior to 1/1/2022). Therefore, premiums would be due for the 2022 plan year. PBGC inquired as to why this is going to be more frequent now under SECURE 2.0. The Group indicated the ability to amend a plan retroactively may present a desirable opportunity for small employers to expand coverage retroactively when there is a year with higher profits to take a tax deduction for contributions in an earlier tax year. The group confirmed that although this can also be helpful in situations where it's necessary to address minimum coverage or participation requirements those situations are not expected to be the primary driver of retroactive participant coverage amendments. PBGC indicated they are open to making clarifications to the premium filing instructions, however they have already made lots of updates and additions to the 2024 premium filing instructions (and specifically to cover retroactive adoption of plans, but not retroactive plan amendments) but it is probably too late to make further clarifications for 2024 to address this question.

Final Premium Filing Deadline for Terminating Plans

A while back (perhaps when PBGC stopped requiring wet signatures) PBGC changed the deadline for filing a premium filing for terminating plans. The current rule is that the filing due date is the earlier of the normal deadline or the date the Form 501 is filed with PBGC.

This causes administrative difficulties because there is a very short window between distributing the assets and filing a Form 501 (30 days ignoring the ability to extend). And the premium is due in the same timeframe but cannot be calculated until we know the last date benefits were distributed, so it provides a very short window. Members have found that they have to delay filing Form 501 while the Comprehensive Premium Filing is being sent out for signature and then wait to see when the premium is paid. Many small plans pay by check, which further delays the Form 501. Additional flexibility on timing to file the final premium filing would be welcomed.

The Group clarified for PBGC that the issue is not confined to having sufficient time to complete the Form 501 filing per se, it is then getting the premium filing also done by that due date given the volume of work involved and the many moving parts that are happening concurrently related to other post-settlement activities. The Group indicated that having a little additional time to complete the premium filing would be helpful and would reduce the incidence of missing the filing deadline. PBGC noted that the change to make the premium filing due with the Form 501 was added back in 2014 when they realized that by the time the premium filing would otherwise be due, the plan sponsor frequently was gone (e.g., in the case of M&A activity) or had moved on from thinking about the terminated plan, and the filings were getting missed entirely. If there is more time needed, they are willing to consider other reasonable timing options that provide more flexibility to plan administrators without jeopardizing the likelihood of filings being made within a reasonable time after the final settlement of benefits.

Technical Update 23-1

Plans with valuation dates outside of the specified date range (10/1/2022 – 3/1/2023) are not eligible for the waiver described in Technical Update 23-1. Nevertheless, these plans must be considered in determining whether other applicable plans are eligible for the waiver. Specifically, such plans must have a Funding Target Attainment Percentage (FTAP) using the standard rules of at least 80%. The notice also requires that all applicable plans have a market based FTAP of at least 85%. Therefore, a higher standard applies to any applicable plan with a valuation date outside of the date range, in that both conditions must be met. Please confirm that this is the intended result.

The PBGC responded that "intent" is a very interesting word in this context. The purpose of that part of the test was to make sure the plan that was triggering the filing was within the specified date range. PBGC indicated they probably did not give significant consideration to a plan that was over 80% on the standard basis but might be under 85% using the alternative market-based approach. One option available to plan sponsors to address this or other similar situations is to submit a facts and circumstances waiver request to PBGC. PBGC has been getting a fair number of facts and circumstances waiver requests. One example shared is a plan stating the FTAP is under 80% on a market value basis but well over 80% on a U.S. GAAP basis (i.e., ASC 715 basis), where funding balances are not subtracted from plan assets. They note that the requirement to reduce assets by the funding balances when calculating the 4010 FTAP is statutory, so they typically do not approve waiver requests simply because a forfeiture of funding balance would move the 4010 FTAP above 80%.

The PBGC shared with the Group that one challenge they face when drafting guidance is addressing situations where there can be a wide variety of possible circumstances for individual plans and sponsors—they must draw the line somewhere. The PBGC noted that this situation (e.g., the effect of maintaining funding balances) is not a market dynamic; rather it's a function of the way the law was written. PBGC indicated that these nuances of evaluating market-driven outcomes vs. other circumstances leading to an undesirable outcome from a plan sponsor/administrator perspective is something PBGC will consider in evaluating these requests.

The waiver does not apply to any filer that had to report under ERISA section 4010 in any of the prior five information years. PBGC regulations define a filer as "a contributing sponsor of a plan and each member of the contributing sponsor's controlled group on the last day of the information year…" Please confirm whether these situations would result in failure to meet the five-year requirement:

- The sponsor of a plan with an FTAP of below 80% in 2018 that had to file under ERISA section 4010 for the 2018 information year has since been acquired by a controlled group that has not had to file under 4010 during the last five years.
- The sponsor of a plan with an FTAP of above 80% in 2018, but that did not meet the definition of exempt entity, had to file under 4010 for the 2018 information year due to another plan in the controlled group with an FTAP of below 80%, has since been acquired by a controlled group that has not had to file under ERISA section 4010 during the last five years.

The waiver PBGC published in Technical Update 23-1 specified a definition for "filer" based on the language in PBGC Regulation 29 CFR section 4010.4. Based on this definition, the situations described fail to meet the five-year lookback requirement.

This definition of filer in 29 CFR section 4010.4 was incorporated into the guidance in the interest of simplicity. The PBGC disregarded these types of different fact patterns so as to create reasonable guidance that addresses most situations that were anticipated to occur.

This is another situation where it may be appropriate to file a facts and circumstances waiver request. Such a request might be summarized as follows:

- *Company X is still Company X, even if they were in Controlled Group A before and is now in Controlled Group B.*
- *The only reason Company X was a filer in the past is because another employer in Controlled Group A triggered the filing at a time when Company X didn't sponsor a plan.*
- *Now as part of Controlled Group B, Company X sponsors a plan that otherwise would not trigger reporting for Company X's plan or Controlled Group B.*

Although they could not say with certainty, the PBGC indicated that this situation may present reasonable grounds for granting a facts and circumstances waiver. It might also be a reasonable basis for a waiver If the acquired employer sponsored a plan, but that plan didn't trigger the *previous 4010 reporting. For example, the PBGC suggested that a situation where a plan sponsor doesn't want to waive funding balances to meet the relief requirements may not be viewed as qualifying for a facts and circumstances reporting waiver.*

Allocation of Prior Year Contributions to Spun-off Plans

In corporate transactions involving a pension plan spinoff, it is common for either the predecessor plan or spun-off plan to be less well-funded than the other plan following the allocation of assets under IRC section 414(l) and ERISA section 4044. This can result in adverse consequences to sponsors and participants, such as the imposition of benefit restrictions under IRC section 436, at-risk status under IRC section 430, or PBGC reporting requirements under ERISA section 4010 for controlled groups that have not otherwise been required to file under ERISA section 4010. Historically, many sponsors in this situation have made excess contributions for the prior plan year, following the date of the spinoff, and allocated those contributions to either plan as needed to achieve desired funding thresholds for the current plan year and avoid such adverse consequences. Neither IRC section 414(l) nor ERISA section 4044 prohibits such an approach, and past informal guidance has not indicated any concerns with such an approach. However, based on practitioner experiences with recent funding method change filings, it appears that IRS thinking on this issue may have changed, suggesting that post-spinoff excess contributions for the prior plan year may need to be allocated in the same manner as pre-spinoff contributions or post-spinoff contributions needed to satisfy the minimum required contribution, making it much more difficult to achieve desired funding thresholds for the less well-funded plan.

It would be helpful to understand PBGC's perspective on whether there are concerns regarding the allocation of post-spinoff excess contributions; in particular, whether such contributions could be allocated to either plan as described above without violating ERISA section 4044 and regulations thereunder.

The PBGC has not issued guidance in this area and did not have any comment on this situation. They noted that this is an area for IRS or Treasury to opine on. The PBGC noted there was a comment letter sent to Harlan Weller and Andrew Zuckerman back in 2011, and the PBGC reiterated that they feel that is the appropriate avenue for addressing these questions. The reason the Group included this item on the PBGC agenda is that IRC section 414(l) relies on the definition of "plan assets" used for ERISA section 4044, so whether the receivable contributions need to be treated as plan assets for IRC 414(l) should depend on whether the contributions must be included for ERISA section 4044 purposes.

Multiemployer Plan Topics

- ***Benefit reductions and amount of SFA***. It is unclear how practitioners should reflect benefit reductions with effective dates after the SFA measurement date, but prior to submitting an SFA application. Plan sponsors of SFA-eligible plans are considering benefit reductions to improve the plan's long-term solvency. However, they are reluctant to adopt benefit reductions if there is a chance that such amendments would offset the amount of SFA that would ultimately be received. PBGC's final rule specially addressed contribution increases agreed to on or after July 9, 2021 and clarified that these increases should be excluded when determining the amount of SFA. This clarification encouraged plans to be proactive in taking steps to restore their long-term financial health. Practitioners are considering using the same logic for benefit reductions. We speculate the approach could be affected depending on whether the benefit change effective date is after filing an SFA application, but prior to receipt of SFA funds?

The PBGC has received several questions about to the meaning of "no contribution rate increases on or after July 9, 2021." Some examples of such questions they cited include whether salary increases granted or new employers added to the fund are effectively contribution rate increases.

PBGC stated that the information provided in the SFA guidance is specific to the contribution rate.

Specifically with respect to reductions, the PBGC stated that anything that happens to reduce future accruals both before the application is submitted and during the SFA application period must be reflected in determining the amount of SFA for which a fund is eligible, and that the Trustees should run the plan in the way they see fit (without violating any statutes or published guidance) after the SFA transaction with the PBGC.

Amounts eligible to be paid by SFA assets. SFA assets may be used by a plan to make benefit payments and pay administrative expenses.

a. <u>Eligible expenses</u>. It is unclear whether a plan can use SFA assets to pay investment-related expenses for non-SFA assets. Investment-related expenses are usually determined as a percentage of assets and paid net of investment returns; however, these expenses can also be paid via an alternative arrangement (e.g., direct payment from a plan).
b. <u>Benefit payments and expenses in the month SFA is received</u>. It is unclear whether a plan can use SFA assets to pay for benefit payments or expenses in the month that a plan receives SFA. For example, consider a plan that receives SFA on July 15, 2023. Plans may desire to use SFA assets to pay benefits and expenses for the month of July 2023 already paid for by the plan prior to receipt of SFA?

The basic rule under ERISA section 4262 is that basic expenses paid from the plan can be paid from SFA assets. That said, for implicit expenses the fund is paying out of the investment return on plan assets, the fund isn't typically seeing a direct quantification of these expenses. To quantify these implicit expenses would require the trustees to set up an audit process to track what these expenses are on a dollar basis.

Mathematically, the two approaches (direct and implicit) may be the same, however in practice they are not the same. The PBGC expressed concern that implicit expenses seem like a manufactured or "phantom" expense as it relates to determining what can be paid from SFA assets. They posited that an alternative approach is to restructure the fee arrangement with the investment advisor so that the fund gets a direct bill that can be paid and explicitly tracked. If there is no trace of a bill being paid, the PBGC is uncertain how they would be evaluated as "paid."

The PBGC noted that SFA assets are used to pay benefits and expenses, and it's acceptable to use those funds to pay expenses incurred before physical receipt of SFA funding to the trust. Whether a specific expense may be paid using SFA assets could depend to some extent on whether benefits (or expenses) are paid at the beginning or end of the month (i.e., benefits or expenses paid before SFA is received may not be reimbursable from SFA funds). For example, if SFA assets are received on October 15, they may be used to pay benefits due for October, however SFA funds could not be used to pay benefits due for months before October.

- ***Lock-in application and census data***. Plans that file their initial SFA application under PBGC's final rule must determine the amount of SFA on census data used to prepare the plan's actuarial valuation report, either (i) for the plan year in which occurs the plan's SFA measurement date, or (ii) if there is no such report for that plan year, for the preceding plan year. It is unclear how filing a lock-in application interacts with the census data that must be used to determine the amount of SFA. For example, consider a plan with a July 1 through June 30 plan year that filed a lock-in application on March 31, 2023. This plan has an SFA measurement date of December 31, 2022. This plan must utilize the census data used to prepare the plan's July 1, 2022 actuarial valuation report (or, if unavailable, the plan's July 1, 2021 actuarial valuation report) to determine the amount of SFA. If the plan's July 1, 2022 actuarial valuation report was published after March 31, 2023 (i.e., after the plan's lock-in application filing date), it is not clear what data must be used (July 1, 2022 or July 1, 2021)?

PBGC reminded the Group that a lock-in application is technically an initial application and, at the point it is made, a fund is locking in its base data. If the actuarial valuation report is not published at the lock-in date, the actuary must use the prior year's census data in determining the amount of SFA. The lock-in application sets the measurement date and locks in both the interest rates and the base data.

Other discussion topics from the PBGC

The PBGC noted there was a very recent (at the time of the meeting) change in the lock-box address for submitting PBGC premium payments made by check. An email was sent to everyone who has a MyPAA account, and the Group was asked to work with clients to make sure physical payments are sent to the right place. This is also an opportunity to encourage plan sponsors to use the electronic payment options.

The PBGC also noted they will be updating their e-filing portal in the near future to require a login.gov account like the change already implemented for the MyPAA premium filing portal. A communication will be sent to everyone with an e-filing account.

They also reminded the Group that a proposed rule on ERISA section 4044 assumptions was issued and the comment period is still open for a few days (at the time of the meeting). Hearing comments from practitioners is useful to them in ensuring that they hear a range of perspectives before finalizing regulations (rather than after the regulations are final and adjustments require issuing a new proposed regulation).

The Group inquired as to anticipated timing for release of the 2023 PBGC annual report, which the PBGC indicated is currently scheduled for release in mid-November, as usual.