Intersector Group report to the Society of Actuaries'[1] Retirement Section Council

Meeting with the Pension Benefit Guaranty Corporation (PBGC) February 3, 2022 (Conference Call)

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[1] The Society of Actuaries is an educational, research and professional organization dedicated to serving the public and Society members. The SOA's vision is for actuaries to be the leading professionals in the measurement and management of risk.

Intersector Group Meeting With the Pension Benefit Guaranty Corporation Notes

February 3, 2022 (Conference Call) and February 28, 2022

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 (Academy), Eric Keener (SOA), Ellen Kleinstuber (CCA), Tonya Manning (CCA), Kelsey Mayo (ASEA), David Pazamickas (Academy), Maria Sarli (SOA), and Virginia Wentz (ASEA). 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.

Reportable Events

- Consideration of additional waiver of the "active 20% reduction" reportable event due to the prevalence of closed plans with small number of active participants

  In general, a reportable event occurs for a plan if there is a reduction in the number of active participants as of the beginning of a plan year that exceeds 20% at any point during such plan year. Closed pension plans with a small number of active participants could easily reach the reportable event threshold during a plan year due to attrition.

  PBGC indicated that it has considered an additional waiver for this purpose in the past and concluded that other existing waivers usually apply in these circumstances.

  PBGC reported that approximately 50 reportable event notices were received from plan sponsors during fiscal year 2021. PBGC believes that many of these plan sponsors could have met an existing waiver but elected to file rather than determining whether a waiver applied. The "low-default-risk" waiver was specifically mentioned. PBGC encourages practitioners and plan sponsors to review other waivers available before filing and does not see the need for additional waivers with such a small number of current filings. PBGC mentioned that it is willing to work with plan sponsors on a case-by-case basis for reportable event notices that create a large administrative burden where no waiver exists.

PBGC noted that the question posed focuses on attrition events, but usually the "active participant reduction" reportable event threshold is triggered due to the combination of attrition and other involuntary workforce reductions (e.g., layoffs), especially during the pandemic.

<u>Standard Termination</u>

- Establishment of plan termination final distribution date due to stop payment/reissue process

  The Group indicated that they have experienced standard terminations where final distributions to individual participants have been delayed by several months due to stop payments and reissued checks. This has typically occurred due to incorrect mailing addresses, bank account information, and missing participants. How do these administrative delays affect when a plan sponsor is required to file its Post-Distribution Certification?

  PBGC indicated that the final distribution of plan assets occurs when all payments are initially processed for distribution (i.e., when checks are put in the mail). Checks that are returned to the plan sponsor are exceptions and considered administrative cleanup, whether they are returned before or after the Post-Distribution Certification is filed. In general, this should not delay the Post-Distribution Certification—even when the plan sponsor is aware of individuals who require administrative cleanup on the date of the final filing. However, PBGC noted that the number of individuals is important here. If the plan sponsor is aware of "hundreds" of individuals who need administrative cleanup vs a few "stragglers," then this may be an issue that needs to be resolved before filing the Post-Distribution Certification.

- Conditioning of lump sum timing on securing an annuity provider in connection with a request to extend final asset distribution date in plan termination.

  It is common in a plan termination for a plan to offer lump sums during a window period to participants who are not otherwise eligible for a lump sum. For active participants, for example, the lump sum can only be offered in connection with a plan termination. This window period typically occurs after the PBGC's 60-day review period for a number of reasons. Because these are generally not normal-course lump sums, they cannot be provided before the review period ends. In addition, in many situations, the plan sponsor will wait for a determination letter before completing the termination, which will delay the timing of the lump sum offer because active participants under age 59½ cannot receive lump sums, so plan sponsors need to be sure the termination will occur before paying such lump sums.

  It is generally preferable in these situations from the plan sponsor's perspective to be able to close the lump sum window before securing the annuity purchase because it allows the sponsor to provide a more complete and up-to-date listing of those participants who will be covered by the purchase. Although it is possible to delay lump sums beyond the elected annuity starting date, it is preferable to avoid a significant delay. It has been common industry practice for many years to pay out lump sums before completing the annuity purchase.

  It came to our attention in a recent transaction that as a condition of securing an extension of the time to make a final distribution of assets, PBGC is requiring that the lump sum distributions

be delayed until after the annuity purchase has been secured. We understand that there are potential policy concerns, such as a sponsor being unable to secure an annuity purchase for the residual group after lump sums have been paid or being unable to afford the resulting annuity premium. We also understand that PBGC has raised a potential concern about compliance with ERISA Section 4044 when full payments are made to the lump sum group, without regard to priority category, before assets are distributed to complete the annuity purchase (although might the same concern apply to a distribution of assets to complete the annuity purchase that occurs before the payment of lump sums?).

The commitment that the plan sponsor makes to contribute sufficient funds to complete the annuity purchase should provide some protection against these concerns. Furthermore, it is often typical for the insurer market to be engaged by the time lump sums are actually distributed. During the time the plan administrator is processing the lump sum elections, it is common for the sponsor to have secured positive bid intentions from a subset of the insurer market placement. Having insurers engaged and committed to bid by the time the lump sums are actually distributed should help provide some comfort that the annuity can be placed.

It would be helpful to better understand PBGC's position in these situations.

PBGC's main concern is that lump sums might be paid before having certainty that the annuity purchase will be completed. Paying lump sums before this point runs the risk of violating ERISA Section 4044 because assets would be distributed to participants with lower priority benefits without being assured that distribution could be made for all of the higher priority benefits. The same generally would be true if the annuity contract is purchased before lump sums are paid. PBGC recognizes that it is not practical for the lump sums to be paid and the annuity contract to be purchased at precisely the same time or to make final distributions by priority category but wants to be sure it is certain all priority categories will be satisfied before any termination distributions are made. Therefore, PBGC's position when the lump sums are paid first is that the annuity purchase must be "secured" before lump sums are actually paid. There is no formal definition of what it means to secure an annuity; however, it does not require that the payment for the annuity contract has already been made. One possibility is to have a signed contract with the insurer at a price that the sponsor can afford. It may be possible to have certainty that the transaction will be completed before the actual signing of a contract. For example, the sponsor may have a commitment to bid or other documentation from at least one insurer with sufficient information on the population to be insured (e.g., the population that ultimately does not take a lump sum) that makes it clear the insurer is willing to bid and the sponsor can afford to complete the transaction. In any case, when lump sums are paid first, the PBGC expects there shouldn't be a significant time gap between the date the lump sums are paid and the date the annuity is purchased.

Intersector Group observation: Note that it would still appear to be possible to have a lump sum window with an annuity starting date (as defined in IRC 417(f)(2)) that winds up preceding the date that the annuity contract is secured. In this case, the actual payment of the lump sums may have to be delayed beyond the annuity starting date.

Effect of American Rescue Plan Act of 2021 (ARPA) on ERISA Section 4010 Reporting

- Additional discussion of the distinction drawn in Technical Update 2021-1 and confirmed during CCA meeting (described below) would be helpful as well as if any consideration would be given to waiving the late 4010 filing and if so, in what circumstances.

  - If a plan originally covered the 2019 pre-American Rescue Plan Act (ARPA) minimum required contribution (MRC) with cash, and then ARPA reduced the 2019 MRC and the sponsor created additional prefunding balance (PFB) with the excess cash contribution, that additional PFB as of 1/1/2020 won't trigger a late 4010 filing, but

  - If the plan originally covered the 2019 pre-ARPA MRC with funding balance usage, and then ARPA reduced the 2019 MRC and you revoke some of that funding balance usage, the additional remaining funding balance as of 1/1/2020 could trigger a late 4010 filing.

  PBGC noted that the thinking behind Technical Update 2021-1 was to keep the rule simple and address the main case.

  The Group asked PBGC whether plan sponsors have requested a waiver of late 4010 filings. PBGC indicated that it had not heard from any plan sponsor on this issue besides one theoretical question. Technically it is too late for a plan sponsor to request a waiver for a filing due in April, but the PBGC suggests calling them directly on these issues.

Other PBGC Topics

PBGC provided comments or requested input on the following additional topics:

- New Standard Termination Audit Participant Count Threshold

  PBGC revealed that the participant count threshold for an automatic audit after a standard termination was increased from 300 participants to 1,050 participants. PBGC noted that their website reflects this update.

  The following is an excerpt from the "Standard Terminations: Q&A" from the PBGC website.

  "How does PBGC decide which standard terminations to audit?

  Plans are selected from all standard terminations completed during the target period to meet our statutory requirement of a statistically significant sample. Currently, PBGC selects all plans with a participant count of more than 1,050 for audit. For plans with a participant count of 1,050 or fewer, PBGC randomly selects plans to audit. PBGC also may audit a plan when we have reason to believe there may be a problem (for example, when we receive a complaint by plan participants or a plan practitioner). In addition, PBGC audits all plans that distribute plan assets in satisfaction of plan liabilities before or without filing a Standard Termination Notice (Form 500) in accordance with the standard termination regulations. (PBGC reserves the right to take any other appropriate action in such circumstances.)"

Link: https://www.pbgc.gov/prac/terminations/standard-terminations

Accessed: February 12, 2022

- Any plan sponsors considering any new plan design changes?

  The Group commented that there has been an increased number of plans permitting in-service distributions or lowering their in-service distribution age to age 59½. This has not necessarily been combined with plan sponsors adopting a formal phased retirement program.