ERIC | THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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President

Submitted Electronically

December 13, 2022

Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
445 12th Street SW
Washington, DC 20024-2101

Re: Proposed Rule on Actuarial Assumptions for Determining an Employer's Withdrawal Liability

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to comment on the Proposed Rule entitled "Actuarial Assumptions for Determining an Employer's Withdrawal Liability" (Proposed Rule or Proposal).[1] ERIC has long enjoyed an excellent relationship with the Pension Benefit Guaranty Corporation (PBGC or Corporation) and appreciates the hard work that has gone into implementing the special financial assistance (SFA) program created by the *American Rescue Plan Act*. Unfortunately, this Proposed Rule, which applies to all plans and not merely those receiving SFA, as drafted, does not include a reasonableness requirement for a key assumption used for determining withdrawal liability.

By way of background, ERIC is a national advocacy organization that exclusively represents large employers that provide health, retirement, paid leave, and other benefits to their nationwide workforces. Our member companies are leaders in every sector of the economy, with stores, warehouses, factories, and operations in every state. ERIC member companies contribute to multiemployer plans in a variety of sectors; these plans range from financially healthy to plans that qualified for SFA.

We write because the Proposed Rule creates inconsistencies with provisions of Title IV of the *Employee Retirement Income Security Act of 1974*, as amended (ERISA) by not requiring the interest assumption used in determining withdrawal liability to be reasonable.[2] Additionally, the Proposal, if finalized, would authorize in all cases the use of assumptions that may not always be appropriate in calculating withdrawal liability. Finally, the Corporation's economic analysis raises unanswered questions and did not consider a more modest regulatory alternative.

[1] 87 Fed. Reg. 62316 (Oct. 14, 2022).
[2] 29 U.S.C. 1301 *et seq.*

ERIC Recommends Amending the Proposal

For the reasons discussed below, proposed §4213.11 should be amended as follows to reinstate a requirement that actuarial assumptions governing withdrawal liability calculations be reasonable:

§ 4213.11 Section 4213(a)(2) assumptions.

(a) In general. Withdrawal liability may be determined using actuarial assumptions and methods that satisfy the requirements of this section. ~~Such actuarial assumptions and methods need not satisfy any other requirement under title IV of ERISA.~~

(b) Interest assumption

(1) General rule. To satisfy the requirements of this section, the single effective interest rate for the interest assumption used to determine the present value of the plan's liabilities must be the rate in paragraph (b)(2) of this section, the rate in paragraph (b)(3) of this section, or a rate between those two rates.

(2) The rate in this paragraph (b)(2) is the single effective interest rate for the interest assumption prescribed in § 4044.52 of this chapter for the date as of which withdrawal liability is determined.

(3) The rate in this paragraph (b)(3) is the single effective interest rate for the interest assumption under section 304(b)(6) of ERISA for the plan year within which the date in paragraph (b)(2) of this section falls.

(c) Other assumptions. The assumptions and methods ~~(other than the interest assumption)~~ satisfy the requirements of this section if—

(1) Each is reasonable (taking into account the experience of the plan and reasonable expectations), and

(2) In combination, they offer the actuary's best estimate of anticipated experience under the plan.

The Proposed Regulation Creates Inconsistencies by Not Subjecting Withdrawal Liability Assumptions to a Reasonableness Standard

According to the Corporation, the Proposal is necessary because in several recent cases, withdrawing employers have argued (with varying degrees of success) that the interest rate used in assessing withdrawal liability for employers leaving multiemployer plans must reflect the actuarial best estimate of anticipated experience under the plan.[3]

[3] Proposal, *supra* note 1, at 62317 (citing recent cases, including *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 39 F. 4th 730, 735 (D.C. Cir. 2022) and *Sofco Erectors, Inc. v. Trs. of Ohio, Operating Eng'rs, Pension Fund*, 15 F. 4th 407 (6th Cir. 2021)).

The core objective of the Proposed Regulation, therefore, is to authorize a plan assessing withdrawal liability to use (a) settlement interest rate assumptions prescribed under ERISA section 4044 (mass withdrawal rates or 4044 rates), (b) the interest assumption used for plan funding purposes (the funding interest rate), or (c) any rate in between, regardless of the reasonableness of the rate.[4]

The relevant text of the statute, Section 4213(a) of ERISA, states:

> *(a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer –The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of—*
>
> > *(1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or*
> > *(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.*

In paragraph (a)(2), Congress authorized, but did not require, PBGC to prescribe "assumptions and methods" for determining withdrawal liability. Because the regulation is authorized but not required, Congress set forth principles in (a)(1) as to how, in the absence of regulation, a plan shall determine withdrawal liability. The Proposal depends on an interpretation that (a)(2) authorizes the Corporation to issue regulations that are not subject to the limitations in (a)(1). An alternative reading is that (a)(2) may permit a narrowing of the assumptions and methods that would be otherwise permitted absent a regulation. In other words, the Corporation might clarify what is a "reasonable" assumption or method for purposes of determining withdrawal liability, but it may not read the direction that assumptions and methods be reasonable out of the statute.

This alternative interpretation is more consistent with other key withdrawal liability-related statutory provisions because it requires withdrawal liability to be computed in the context of the reality of the plan. First, Section 4213(b) requires that the computation of withdrawal liability is to be determined with reference to the plan's actual characteristics. For example, the plan actuary may "rely on the most recent complete actuarial valuation used [for purposes of plan funding] and reasonable estimates for the interim years of the unfunded vested benefits."[5]

[4] The Proposal is unclear whether the trustees of the plan have the ultimate authority under the Proposed Regulation to set the interest assumption for withdrawal liability, or if the plan actuary is to set the assumption. We understand that under current practice, the actuary sets this assumption.
[5] ERISA Sec. 4213(b)(1).

And if the plan's data is not complete, the actuary may reply on the data available, or on sampling expected to representative of the status of the entire plan.[6]

Second, the PBGC does not explain how the Proposal could be reconciled with the dispute resolution mechanism established in section 4221. Congress created a system for a withdrawing employer to challenge a withdrawal liability assessment in arbitration. In such a proceeding, Congress provided that the employer could prevail if able to show that a determination made by the plan was "reasonable or clearly erroneous."[7] And when challenging the determination of the plan's unfunded vested benefits, the withdrawing employer can prevail if it shows that "the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)" or the actuary made a significant error in applying the assumptions or methods.[8] In other words, if the regulation is finalized without a reasonableness requirement, it appears that a withdrawal liability assumption authorized by the regulation could nevertheless be challenged (the basis of reasonableness) in arbitration.

Mass Withdrawal Rates Are Not Always Appropriate for Withdrawal Liability Calculations

The Proposed Rule includes an authorization to use 4044 rates in all circumstances. PBGC anchors its justification in permitting mass withdrawal rates to be used even in non-mass withdrawal situations in the understanding that the withdrawing employer is "settling its liabilities once and for all and bears no risk of future losses."[9] To quote the Proposal's preamble:

> *This approach considers that a withdrawing employer ceases to participate in the plan's investment experience because the employer is settling its liabilities once and for all and bears no risk of future losses. This approach therefore considers the use of settlement interest rate assumptions prescribed by PBGC under section 4044 of ERISA (4044 rates) to be appropriate to determine the amount sufficient to release a withdrawing employer from any future financial obligations to the plan. Those interest rate assumptions can be used to approximate the market price of purchasing annuities to cover the withdrawing employer's share of the plan's benefit liabilities, which are generally paid in the form of life annuities. From this perspective, the plan trustees' investment risk appetite, asset allocation choices, or the actuary's best estimate of the plan's future investment returns following the withdrawal are not relevant to the withdrawal liability assessment.*[10]

[6] ERISA Sec. 4213(b)(2).
[7] ERISA Sec. 4221(a)(3)(A)
[8] ERISA Sec. 4221(a)(3)(B). See also *Energy W. Mining Co.*, *supra* note 3, at 741
[9] Proposal, *supra* note 1, at 62317.
[10] *Id.* at 62317 (emphasis added).

In this regard, the Corporation asked for comment on what the relationship should be between the "expected investment mix" and permitted withdrawal liability assumptions.[11] In our view, a reasonable plan actuary should take into account the plan's investment policy, asset allocation, and funding status when setting the withdrawal liability assumption. When calculating the amount "sufficient to release" the withdrawing employer, the rate at which that amount will grow to cover the stated liabilities is clearly relevant. If the plan has no intention of actually purchasing annuities in order to cover the obligations, but rather investing pursuant to a policy with a higher expected rate of return (accounting for risk), then the plan could actually achieve more than required to settle liabilities using 4044 rates.[12]

Again, the proposal's flaw is that it divorces actuarial assumptions from reasonableness, which will vary plan-by-plan on a variety of factors. To bless the use of pure 4044 rates by a healthy, ongoing plan that is invested to achieve a significantly more robust return does not serve the policy rationale for withdrawal liability.

The Proposed Rule's Economic Analysis Did Not Analyze Important Costs to Employers

The Corporation emphasized that the purpose of the proposed regulation is to remove impediments to more plans using 4044 rates.[13] PBGC notes that because recent court decisions have required plans to re-assess withdrawal liability based on anticipated investment returns, plans have an incentive to avoid litigation and the risk of this outcome by reaching settlements with employers that could result in lower withdrawal liability collections. Additionally, plans may be deterred from using 4044 rates altogether, either alone or as part of a blend.[14]

PBGC states that it believes that the Proposal will encourage more plans to use the lower rates, increasing the collection of withdrawal liability (to the tune of between $804 million and $2.98 billion over 20 years), and thereby have an "overall positive effect on the multiemployer system and PBGC's multiemployer program."[15] These estimates are driven by two key assumptions: (1) the uptake of plans for these new rates and (2) the reductions in collections that would occur as a result of employers successfully litigating the reasonableness of the interest rate, absent the regulation (ignoring the possibility of settlements).[16]

[11] *Id.* at 62318.
[12] In other words, while the withdrawing employer may be at "no risk of future losses," the employer also receives no benefit from future gains that exceed the interest rate.
[13] Proposal, *supra* note 1, at 62319 ("This proposed rule is needed to clarify that a plan actuary's use of 4044 rates represents a valid approach to selecting an interest rate assumption to determine withdrawal liability in all circumstances. The proposed rule would thereby reduce or eliminate the cost-shifting effects of impediments to actuaries' use of 4044 rates[.]").
[14] *Id.* at 62319.
[15] *Id.*
[16] *Id.* at 62319-20.

However, these assumptions and the analysis PBGC provided raise a number of questions that the Proposed Rule does not answer, such as:

- Why does PBGC assume that most plans will not move toward using 4044 rates exclusively?
- Why does PBGC assume that a changed withdrawal liability assumption will only deter withdrawals at the margin? Why does PBGC's model assume no changes in the rate of employer withdrawals or contributions?

- PBGC says it cannot "reasonably estimate the impact [of the Proposed Rule] after 20 years"; could the proposed regulation have a deterrent effect on new employers agreeing to contribute to multiemployer plans? Did PBGC analyze this potential cost to plans, which could reduce the future financial status of plans and place an increasing financial burden on those employers that remain?

- The economic analysis is based on an aggregate amount of annual withdrawal liability is approximately $1.3 billion, based on analysis of 2018 and 2019 Form 5500 Schedules MB. Since 2019, the pandemic, market turbulence, and inflation/interest rate changes have significantly changed the decision calculus for plans and the collective bargaining parties. Why not wait until more data is available before choosing to exercise rulemaking authority?

Additionally, Executive Order 13563 directs federal agencies to perform cost-benefit analysis of available regulatory alternatives and maximize the net benefits of regulations. According to the Proposal, PBGC considered two alternatives to the Proposed Rule: (1) no regulation; and (2) only permit plans to use 4044 rates.[17] PBGC could have considered or analyzed other alternatives, such as requiring plans to use a rate between the mass withdrawal rate and the funding rate but retaining a "reasonableness" standard.

Conclusion

Again, thank you for the opportunity to submits comments on this Proposed Regulation. For the above reasons, the Proposal should be revised to include a requirement that actuarial assumptions be reasonable. ERIC stands ready to serve as a resource if you have any questions.

Sincerely,

James P Delfand

[17] *Id.* at 62321.