December 13, 2022

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

Submitted electronically: https://www.regulations.gov

Re: Comments regarding Actuarial Assumptions for Determining an Employer's Withdrawal Liability (4213 proposed rule): RIN 1212-AB54

Dear Sir or Madam:

On behalf of Segal, we respectfully submit this comment letter regarding the Pension Benefit Guaranty Corporation's (PBGC) notice of proposed rulemaking entitled Actuarial Assumptions for Determining an Employer's Withdrawal Liability, published at 87 Fed. Reg. 62316 (October 14, 2022) (proposed rule). The proposed rule was published with a 30-day public comment period. PBGC extended the comment period for the proposed rule to a total of 60 days from the date of publication. PBGC is explicitly authorized to issue the proposed rule as provided under §4213 of the Employee Retirement Income Security Act of 1974 (ERISA), as amended.

Segal is a provider of actuarial, employee benefits and human capital consulting services to employers and employee benefit plans throughout the United States and provides actuarial services to more multiemployer pension plans than any other consulting firm.

PBGC is proposing to provide interest rate assumptions that may be used in determining an employer's withdrawal liability. We agree with PBGC's view expressed in the preamble of the proposed rule that employer withdrawal constitutes a settlement of all obligations to the plan. Given increasing litigation and the delay, expense and uncertainty over withdrawal liability, including challenges to the validity of the actuary's best estimate, we support PBGC's effort in the proposed rule to provide a permissible range of interest rates that may be used in determining withdrawal liability amounts.

On one end of the permissible range are funding rates, currently used by some actuaries to determine withdrawal liability, and on the other end are so-called "termination rates" that reflect the actual marketplace for the transfer of pension liability. Blended approaches balance these concepts and are also supported by Actuarial Standards of Practice. Notably, the use of any approach that incorporates market rates recognizes that there is a cost to eliminating risk with respect to the withdrawing employer, which is no longer a party to the enterprise that is obligated to continue to manage risk in furtherance of the mission to provide meaningful retirement benefits. The rates promulgated by PBGC for purposes of ERISA §4044 (4044 rates)

appropriately reflect the current marketplace offered by annuity insurance companies for the elimination of pension liability risk.

We believe that plan sponsors will be able to work with their legal and actuarial advisors to determine how best to proceed under the proposed rule in a reasonable and responsible manner.

Our comments that follow address the specific questions raised by PBGC in the proposed rule. Our comments also include our observations regarding technical actuarial points of practice.

Responses to questions posed and observations

Interest rate range

PBGC requested comments on whether the final rule should restrict allowable options to a narrower range of interest rates or to only specific methodologies for determining interest rates. We believe that the range of permitted interest rates as defined in the proposed rule is appropriate and should not be further restricted.

Within the multiemployer community, there are differing opinions regarding the impact of withdrawal liability on multiemployer plans. For many plans, withdrawal liability protects the remaining employers from the burden of funding withdrawn employers' unfunded liabilities and serves as a deterrent for employer withdrawals. For some plans, minimizing withdrawal liability helps lessen a barrier to entry into the plan and may encourage new employers to participate.

As discussed in the preamble, the "best estimate" assumptions as described under ERISA §4213(a)(1) that are currently used in practice fall within the full range of options in the proposed rule. Recent litigation has cast doubt over the ability of actuaries to continue to use their best estimate for withdrawal liability to the extent it deviates from the funding rate. The proposed rule, if adopted in its current form as a final rule, would provide the clarity needed to reduce costly withdrawal liability challenges.[1]

The final rule should neither restrict the allowable options to a narrower range of interest rates nor specify only certain methodologies for determining interest rates. Furthermore, the final rule should not set the "top" of the range of permitted interest rates under §4213(a)(2) to be lower than the funding interest rate assumption used by individual plans.

[1] However, we note that the plan's funding interest rate described in §4213.11(b)(3) is the rate for the plan year preceding the year in which the employer withdrew. The funding interest rate for a plan year is effective as of the beginning of the plan year and typically set well after the plan year begins, based on facts and circumstances as of the beginning of the plan year. This assumption may not reflect the actuary's best estimate for funding purposes based on the facts and circumstances at the end of the plan year. The analysis of the facts and circumstances at the end of the plan year is typically performed in the following plan year. PBGC should instead consider adopting or allowing a rate that reflects typical actuarial practice. Specifically, PBGC may consider whether it is appropriate to set the interest rate in §4213.11(b)(3) to the plan's funding interest rate as of the first day of the plan year in which the employer withdrew, as that date is coincident with the withdrawal liability determination date (the last day of the plan year preceding the year during with the employer withdrew). This would more accurately reflect the actuary's expected return on plan assets as of the determination date, as compared to the funding assumption as of a year prior to the determination date.

Plan insolvency, expected investment mix and funded ratio

PBGC requested comments on the appropriate relationship, if any, between (a) the estimated date of plan insolvency, expected investment mix and/or funded ratio, and (b) permitted withdrawal liability assumptions. We submit that the final rule need not address these relationships. The "settlement of liability" concept applies regardless of investment mix or funded ratio.

Moreover, as a plan approaches insolvency, the plan sponsor typically shifts plan assets to a lower-risk investment portfolio that will have a lower expected return and, as a result, actuaries would adjust the funding interest rate assumption accordingly.

The preamble to the proposed rule states that the use of settlement interest rates prescribed by PBGC under the 4044 rates, either as a standalone or in combination with funding assumptions, represents a valid approach to selecting an interest rate for determining withdrawal liability. As a technical point, we note that the preamble implies that the "top" end of the permitted range of interest rates will be equal to the funding assumption. We encourage PBGC to acknowledge the possibility that a plan's funding interest rate assumption may be lower than the 4044 rates.

For example, if a plan's assets are invested entirely in cash, the expected return on plan assets would likely be lower than the 4044 rates. Also consider a scenario in which the 4044 rates continue to rise. Even for a plan with assets that are invested in a typical allocation of equities, fixed income, and alternative investments, it is conceivable that the 4044 rates may, at some point, exceed its funding assumption—as was the case for several years following the enactment of the Multiemployer Pension Plan Amendments Act in 1980.

We do not believe it is necessary, however, for the final rule to prescribe a "lower" end of the permitted range of interest rates that is less than both the 4044 rates and the funding assumption. In either of the scenarios described above, the plan could use the withdrawal liability payments to purchase annuities, or otherwise immunize the withdrawn employer's share of vested benefit liabilities, thus eliminating the risk transfer to the plan that typically occurs with an employer's withdrawal.

Demographic assumptions

Under §4213.11(c) of the proposed rule, each assumption and method used, other than the interest rate assumption, must be reasonable (taking into account the experience of the plan and reasonable expectations) and must, in combination offer the actuary's best estimate of anticipated experience under the plan. PBGC requests comments on whether the final rule should specify assumptions or methods other than interest assumptions, specifically mortality.

We urge PBGC not to restrict the actuary's best estimate with respect to demographic assumptions, as each population of workers and retirees will have their own characteristics and experience, as monitored by the actuary.

If the final rule does specify a mortality assumption for determining withdrawal liability, the specified assumption should be optional. For example, PBGC guidance on assumptions for determining the amount of special financial assistance under ERISA §4262 establishes an "acceptable" change in the mortality assumption, but it does not mandate the use of the assumption. A similar option may be helpful for withdrawal liability assumptions, keeping in mind that any prescribed mortality assumption would need to be updated periodically to reflect the current tables and projection scales. Furthermore, the use of any optional mortality assumption for withdrawal liability purposes should be separate and independent from the use of an interest assumption within the range permitted under the final rule.

Administrative expense assumption

When an employer withdraws from a multiemployer plan, the plan bears the ongoing cost of administering the benefits accrued with (or liabilities allocated to) the withdrawn employer, including paying annual PBGC premiums. It is therefore appropriate for the determination of withdrawal liability to include an assumption for future administrative expenses.

For minimum funding calculations, assumed administrative expenses for the upcoming plan year are typically included as an add-on to the normal cost (an annual "term cost"). For withdrawal liability purposes, the concept of normal cost does not apply. Therefore, any assumption for future administrative expenses must be added to the amount of vested benefits.

Under the proposed rule, any assumption for administrative expenses, in combination with all other assumptions (except for the interest rate), must offer the actuary's best estimate of anticipated experience under the plan. However, there may be a risk of dispute if the actuary includes an assumption for future administrative expenses for withdrawal liability purposes that differs from the assumption used for minimum funding purposes. For that reason, we encourage PBGC to provide guidance on this topic, or consider including a provision in the final rule for an administrative expense assumption.

We note that rules for determining the vested benefit liability in the event of a mass withdrawal include a load for administrative expenses, determined in accordance with Appendix C of ERISA §4044. The final rule could permit the same or a similar assumption for purposes of determining withdrawal liability, even if the interest rate is not linked to the 4044 rates. Other reasonable assumptions for administrative expenses should be permitted as well.

As an alternative to an explicit assumption for administrative expenses, it would be reasonable to adjust the interest rate assumption to be net of administrative expenses. The "low" end of the permitted range, however, may need to be expanded to permit an interest rate assumption that is net of the allowance for administrative expenses.

Single effective interest rate

We respectfully request clarification regarding two issues involving the single effective interest rate. Section 4213.11(b) appears to provide that a single effective interest rate must be

determined that would produce the present value of the plan's vested liabilities. In the case of a method that blends liabilities determined at two or more distinct rates within the permissible range (such as both funding and 4044 rates), there should be no need to solve for a single effective rate. The same is true in the case of the 4044 rates, which generally provide an applicable rate for the first 20 or 25 years and a different rate thereafter. Accordingly, we request that PBGC clarify §4213.11(b) to specifically address whether a single effective interest rate must be calculated in all circumstances, or whether a simple disclosure of the methodology is sufficient when all component rates are within the range of the rates specified in paragraphs (b)(2) and (b)(3).

Additionally, §4219(c)(1)(A)(ii) provides that the determination of the amortization period described in §4219(c)(1)(A)(i) "shall be based on the assumptions used for the most recent actuarial valuation for the plan." This provision has often been the subject of arbitration and litigation. Specifically, it is unclear whether the reference to "most recent actuarial valuation" is with respect to the valuation for minimum funding purposes or the valuation of vested benefits for determining withdrawal liability. If the latter is to be used, PBGC should provide guidance as to whether the amortization period must be determined based on a single effective rate, as described in §4213.11(b) and as discussed above.

Effective date

The preamble to the proposed rule provides that changes in the proposed rule would apply to the determination of withdrawal liability for employer withdrawals that occur on or after the final rule's effective date. When implementing the effective date provisions of the final rule, we request that PBGC provide a practical, balanced approach that is mindful of variables that impact stakeholders.

For example, plans in the Second Circuit must abide by the decision in *The National Retirement Fund, et al. v. Metz Culinary Management, Inc.*[2] As required under *Metz*, the interest rate assumption used to calculate withdrawal liability must be the rate in effect as of the measurement date (the last day of the plan year preceding the year during which the employer withdrew). Even if the final rule is effective for employer withdrawals that occur in 2023, it appears that plans in the Second Circuit would be precluded from applying any change in interest rate assumption until the following year. Reliance on the regulation as protection from challenges to the selection of the rate should be available immediately upon release, so long as no employers withdrawing in a given plan year had been previously assessed using a different basis.

Closing

As an employee benefits consulting firm that has provided actuarial services to multiemployer plans for many decades, Segal appreciates the opportunity to express its views regarding the

[2] 946 F.3d 146 (2d Cir 2020).

proposed rule. Given the current uncertainty and cost of continuing and new litigation in this area, we urge PBGC to expeditiously consider comments and proceed to release a final regulation. We would welcome further discussions with PBGC on any of the points we have raised in this comment letter.

Sincerely,

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