PUBLIC SUBMISSION

As of: 12/13/22, 4:23 PM
Received: December 13, 2022
Status: Pending_Post
Tracking No. lbm-oytb-5yqf
Comments Due: December 13, 2022
Submission Type: Web

Docket: PBGC-2022-0005
Actuarial Assumptions for Determining an Employer's Withdrawal Liability

Comment On: PBGC-2022-0005-0008
Actuarial Assumptions for Determining an Employer's Withdrawal Liability

Document: PBGC-2022-0005-DRAFT-0024
Comment on FR Doc # 2022-24588

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General Comment

As the owner of a small business, I write to oppose the 4213 proposed rule as punitive towards withdrawing employers and any prospective purchasers of those businesses. The proposed rule is likely to chill business transactions and deter new businesses from becoming contributing employers. Why would an employer sign onto a plan that creates the risk of such significant future liability? Contrary to the stated reason for the proposed rule, if the PBGC condones the use of blended interest rates that increase withdrawal liability, it will not reduce litigation. If anything, that approach will have the reverse effect. The possibility of higher withdrawal liability assessments will give withdrawing employers more incentive to attempt to avoid or challenge the withdrawal liability altogether.

The PBGC should not allow funds to use the legally discredited "blended" interest rates for purposes of assessing withdrawal liability. Blending the interest rate that the plan's actuary has used to predict the plan's expected rate of return on its investments with the much lower PBGC mass withdrawal interest rate creates an artificial, much lower interest rate, which results in significantly higher withdrawal liability. For example, a fund using a blended rate methodology could have assets with a market value of over 100% of its vested benefits and still assess millions of dollars in withdrawal liability. This inconsistent result has led to several successful court challenges against these blended rates. Three federal Courts of Appeal (District of Columbia Circuit, Sixth Circuit, and Ninth Circuit) have invalidated the use of this kind of blend methodology based on the plain language of ERISA, which mandates that plans use the actuary's "best estimate of anticipated experience under the plan" for purposes of calculating withdrawal liability (absent situations of mass withdrawal). The PBGC should not override these well-reasoned court decisions by declaring the blend methodology acceptable via rulemaking.

The PBGC's motive appears to be that it believes that withdrawing employers benefit by withdrawing from the funds without having to face future uncertain investment returns, but that reasoning is flawed. This is because an actuary's projected interest rate for a plan is already supposed to predict and account for a plan's uncertain investment returns. Thus, there is no need to "blend" the actuary's interest rate with a lower interest rate in order to account for future market uncertainties. Doing so essentially double-counts future risks to artificially inflate withdrawal liability. Companies that have paid into the funds and need to withdraw should not be held inordinately accountable for the funds' investment decisions.

The proposed rule unduly saddles withdrawing employers with more than their fair share of the risk of uncertain investment returns. The purpose of withdrawal liability is to make sure employers that withdraw from a plan pay their fair share of the plan's unfunded vested benefits, not to prevent employers from withdrawing, which would be

the effect of the proposed rule. There are many legitimate reasons for employers to withdraw from pension plans, including the sale, closing, or relocation of a business, other changes in business operations/strategy, employees simply not wanting to be part of the local union, or the union not being able to provide trained labor to the employer in the area. Withdrawal liability should not be used to punish employers for withdrawing from plans in order to deter withdrawals and/or create windfalls for the funds. Unfortunately, the proposed rule does exactly those things by allowing funds to so harshly penalize withdrawing employers through artificially inflated withdrawal liability assessments.

For all these reasons, on behalf of small business owners, I respectfully request that the proposed rule be modified to reflect the language of ERISA and, in the absence of a mass withdrawal, mandate funds to use use the actuary's "best estimate of anticipated experience under the plan" for purposes of calculating withdrawal liability, rather than prejudicial blended interest rates.