Intersector Group report to the

Society of Actuaries'[1] Retirement Section Council

Meeting with the

Pension Benefit Guaranty Corporation (PBGC)

March 7, 2019

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Intersector Group Meeting with the Pension Benefit Guaranty Corporation Notes

March 7, 2019

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 ASPPA College of Pension Actuaries (ACOPA). Attending from the Intersector Group at this meeting were Bruce Cadenhead (CCA), Tom Finnegan (ACOPA), Eric Keener (SOA), Ellen Kleinstuber (Academy), Tonya Manning (CCA), Marty Pippins (ACOPA), Maria Sarli (SOA), and Eli Greenblum (Academy). Monica Konaté, 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 meetings. 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 or 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 or 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.

- **PBGC Changes—**Update on any PBGC organizational changes and priorities.

  Tom Reeder is staying on until a new Executive Director is approved. Dan Liebman is now Deputy General Counsel in the Program Law and Policy Department, Office of General Counsel. Ross Marcelin is now Deputy Chief of Negotiations and Restructuring, Office of Negotiations and Restructuring. Theresa Anderson is now Assistant General Counsel in the Program Law and Policy Department, Office of General Counsel. Ted Goldman is now Director of the Policy, Research and Analysis Department.

- **Pilot Mediation Program—**We understand that PBGC has now made this program permanent and that it now covers termination liability collection, Early Warning Program, and fiduciary breach cases. Can PBGC provide any information about the types of cases that have been resolved (and how they were resolved)?

  PBGC launched the pilot in October 2017 for termination liability and early warning situations. It was made permanent in January 2019 and expanded to include fiduciary issues. PBGC uses an experienced mediator from the Federal Mediation and Conciliation Service. The cost is $800/day and is split between PBGC and the plan sponsor. Of course, the plan sponsor pays its own attorney if they bring one. The program is promoted by PBGC negotiators, but there has not been as much interest as they had hoped. Not that many cases are contested. Negotiations are usually productive, so plan sponsors often don't want to involve a third party. There was only one case mediated so far—a small, not-for-profit hospital plan—contributions were missed, and liens were perfected. A distress termination was filed in 2015 and approved in 2017. PBGC and the hospital then started negotiating settlement of the unfunded benefit

liabilities and could not reach agreement. The sponsor agreed to mediation and, after one day of mediation, they came to terms. PBGC views mediation as just another tool in the toolbox. They think that settlement of unfunded benefit liabilities on plan termination will be the situation where mediation is most useful, because those situations are more factual.

- **ERISA §4044 assumptions—**Is there any update on your internal review of assumptions (mortality, interest rates) used in ERISA §4044 calculations and mass withdrawal liability determination in multiemployer plans? [We see the review of mortality and interest rates on the regulatory agenda but not other assumptions like expected retirement age (XRA).]

  The current regulatory agenda only includes projects PBGC believes will be completed in the next year. ERISA §4044 and mass withdrawal liability assumptions were at the top of the list, so their goal is to have an ERISA §4044 proposed regulation, focused on interest and mortality, out within the next year. They asked again whether all actuaries can use the full yield curve and generational mortality. (PBGC said decisions had not been made to go in that direction but they just wanted to know whether it would cause problems if they did). The Intersector Group members indicated they thought everyone could use generational mortality and the full yield curve; there are small actuarial firms that may not have used them in the past, and may not want to, but could if they had to. Small multiemployer practitioners may not have had any occasion to use a full yield curve, so it may be useful to have a simplified (segment rate) option for small plans.

  PBGC indicated that they welcome feedback on any of the assumptions. Interest and mortality will be addressed first; XRA and other assumptions are expected to follow—however no timeline is set for when that will happen.

- **De-risking activity—**Is PBGC now using the information you are collecting on de-risking to inform solvency projections? If so, how is it affecting them?

  PBGC is using the information, although they are not yet at the point of using it to inform solvency projections. They now have four years of data. An outside contractor that is analyzing the data is just finishing up their work. PBGC will review their conclusions and will try to do a deeper dive regarding how it affects PBGC financial projections (e.g., what is the credit rating profile of firms that are de-risking?) PBGC will compare the results to an earlier study. It will take some time before PBGC is ready to have the data inform their solvency projections, but they have done stress testing, and have concluded that, with de-risking, the outlook does not get better for PBGC.

  PBGC asked whether the Group expected de-risking to accelerate, decelerate or stay the same. The group responded that there is some bulk lump sum (BLS) exhaustion (i.e., those plan sponsors who were going to offer a BLS have already offered one or more such programs, so the opportunity to further de-risk due to a BLS is diminished, although the effect of IRS's guidance in Notice 2019-18 saying they will not treat retiree lump sum programs as violations of IRC §401(a)(9) remains to be seen). However, the group believes that annuity purchases will continue. Pricing can be very competitive in the market for annuity purchases—the cost is often close to the ASC 715 projected benefit obligation (PBO).

  Some companies are borrowing to fund, terminating the plan and eliminating the risk. While they have to pay off the loan, that amount is fixed, and it doesn't include the costs of running the plan. Closed plans that can't satisfy nondiscrimination testing will continue to freeze, and then may or may not terminate.

  PBGC indicated that they have definitely lost premium income on terminated vested participants. The Group pointed out that unhealthy plans may be at the PBGC variable rate premium (VRP) cap so PBGC

will lose significant premiums when those plans reduce headcount. Two-thirds of PBGC premium income is VRP.

- **Missing participants—**Update on any joint efforts among DOL, IRS, and PBGC on this topic. Are there efforts to standardize what constitutes a diligent search for various purposes**?**

  For terminated plans, the expanded missing participant (MP) program has been up and running for a year. The Department of Labor (DOL) is intending to review and revise the DC safe harbors for MPs. That is still expected, but PBGC has no update about timing. For ongoing plans there have been letters from organizations like the American Benefits Council (ABC) and the ERISA Industry Committee (ERIC) about DOL enforcement activities and the need for guidance. PBGC is not currently actively working with DOL and IRS on this.

  PBGC regulations under ERISA §4050 provide that a diligent search must occur before a missing participant's benefit goes to PBGC. For DC plans, PBGC and DOL coordinated on the meaning of a diligent search. For DB plans, PBGC tried to get closer to the DOL search steps provided in Field Assistance Bulletin (FAB) 2014-01—in the §4050 regulation, they are now much closer to the DOL FAB.

  PBGC is not seeing a lot of DC plans turning over missing participants to PBGC. PBGC asked the Group if they knew whether it was because DC plans aren't terminating or because plans are not using the ability to turn over missing participants to PBGC because there is no clear safe harbor. The Group indicated that all DC plans have missing participants, but DC plans don't terminate very often. PBGC believes that there are DC terminations, but missing participants are not coming to PBGC. The Group indicated that some terminating plans in the past sent a check to the participant's last known address. When the participant doesn't cash the check, it goes into an uncashed check fund at the mutual fund—it doesn't go back to the plan. This happened mostly before the latest change in regulations, but preexisting uncashed checks remain.

  Participants may make an election, never cash the check, and the money never makes it back to the plan. The person gets a Form 1099 (mailed to the last address, so they might not receive it), and it may come up on an income tax audit, at which point they must deal with the mutual fund company to find their funds.

- **Discussion of PBGC Guidance Plan—**What areas are you focusing on (besides the ERISA §4044 assumptions) and what are we likely to see sooner rather than later? We see the following in the guidance plan; which are being actively worked?
  - Update the methodology for setting interest assumptions under the benefit payments regulation.
  - Clarify and codify policies in PBGC's benefit payments and valuation regulations. (Note that this is important for plan sponsors when performing spinoff calculations.)
  - "Housekeeping" to make miscellaneous corrections, clarifications, and improvements to PBGC's regulations (e.g., CFR part 4043 (particularly addressing duplicative reporting of active participant reductions) and 29 CFR part 4010 (annual financial and actuarial information reporting)).
  - Clarify and codify policies on the determination of guaranteed benefits for participants in multiemployer plans.
  - Clarify rules on arbitration procedures for multiemployer plans.

The regulatory agenda on their website now is the Fall 2018 agenda; the benefits payments regulations and housekeeping regulations should be first; however things can change during the clearance process that change either the timing or the order of release. Any dates are just estimates.

The Group asked whether there is a regulation project on how to determine whether an investment advisor is considered a "professional" for PBGC coverage purposes? There is no current regulation project on this issue.

- **Forms and instructions update**

PBGC's December 2018 What's New discussed PBGC coverage determinations.

There is a new page—Pending Proposed Rules—which has PBGC-related federal regulations open for comment. They are trying to get more participation from the public providing comments.

They are going through comments and revising forms and instructions (Paperwork Reduction Act inspired). They will repost 2019 forms and instructions. See the Paperwork Notices page.

They are working on the packages for §4062(e) filings—they are getting "handfuls" of §4062(e) filings a year; some are filed as a precautionary measure and there was not actually a filing obligation.

Terminated and insolvent plan issues are on the regulatory agenda. Form/instruction changes were discussed in the preamble. There may be changes in notice requirements, forms, and instructions based on comments. See INSTRUCTIONS FOR NOTICES AND FILING REQUIREMENTS FOR TERMINATED, INSOLVENT MULTIEMPLOYER PLANS.

Sometimes they are able to propose forms and instructions along with proposed regulations, which allows commenters to address issues with regulations in the context of the accompanying forms.

- **ERISA §4010 filings**

PBGC is seeing a substantial lack of accuracy in the financial information provided with §4010 filings. For example, controlled group information is often wrong, with non-U.S. controlled group members not included, even the parent entity. Something new has been added to PBGC's website: the offer of a pre-filing consultation. If you are doing a filing, you can call PBGC and they'll walk you through it. Go to the PBGC website's §4010 filing page for more information.

Filers will be contacted if they are not filing things correctly or providing complete information.

- **Actuarial equivalence lawsuits**

PBGC asked about the reaction among our clients to these lawsuits. The Group responded that these are viewed by mid-market plans as a large plan issue. It is too early to know the effect. Only four lawsuits had been filed at the time of the meeting, and the defendants in all four cases have filed motions to dismiss. Many clients are reviewing the issue; few are acting.

PBGC is beginning to talk about this internally. The Group indicated that one concern is uncertainty about what happens when a plan terminates. If there is liability for outdated factors, who takes the liability on? The plan sponsor? The insurer? The PBGC? No one knows. This may spur some plan sponsors to terminate their plans sooner than they otherwise might, thinking the risk may be reduced (at the very least it would seem that terminating a plan would not increase the risk). On the other hand, if corrections have to be made, it is easier to make corrections under an ongoing plan than a terminated plan.

- **Contribution strategies**—Trends in contribution policies, common strategies to making decisions, future expectations for those who made greater contributions last year to take advantage of tax reform, differences in frozen versus ongoing plans.

  For the Projections Report, PBGC needs to make estimates of future contributions into the system. PBGC is projecting significant reductions in premiums over the next five years.

  PBGC asked what the Intersector Group is seeing among our clients in terms of contribution strategies or patterns (e.g., contributions in excess of the minimum required). For example, are companies going to contribute less in future years because they accelerated contributions to get the larger tax deduction last year? The Group indicated that it did not see a particular trend. Poor rates of investment return for many plans during 2018 will naturally increase required contributions for 2019. Companies generally contribute more to avoid ERISA §4010 filings, prevent benefit restrictions, and reduce VRPs. Many do not just automatically contribute the minimum required contribution. They generally make these decisions year-to-year rather than following an absolutely strict policy. Some are on glide paths toward termination and that drives their contribution decisions.

- **End game strategies for frozen plans**—Hibernation versus termination

  The Group indicated that if a plan has mostly retiree liabilities, the plan sponsor is probably going to look at termination. If there are a lot of actives, they will more likely consider turning retirees over to an insurer and keeping actives in the plan, because the cost of administration is priced high by insurers but the plan's administrative systems are already set up.

  PBGC indicated that they believe that there are issues with capacity within the system—insurers can't find enough bonds to invest in to take on all plan liabilities plan sponsors may want to transfer to them.

- **Withdrawal liability**
  - Discuss the proposed guidance on simplified withdrawal liability.
  - Update from PBGC— Has anything changed in the last year with respect to withdrawal liability settlements and how they relate to the "two-pool" method.

  Julie Cameron, Connie Markakis, and Chris Bone all worked on detail to the Joint Select Committee on the Solvency of Multiemployer Pension Plans and Darren French worked on the withdrawal liability proposed rule. The withdrawal liability rule is in the comment period. There are five areas where PBGC is unsure what the best approach is and specifically requested comments (at the end of the preamble).

Comments are due by April 8. PBGC of course welcomes comments on anything in the proposed regulations.

The proposed regulations deal with simplified withdrawal liability methods under MPRA. As such, all would be optional—a plan can do something else if it complies with MPRA. There is one exception: benefit-bearing contributions required by Rehabilitation Plans. Are they included for withdrawal liability allocation purposes? PBGC appears to take the position that this should be an actuarial determination. Some plans don't do it that way, and they may want to be able to include the entire benefit-bearing amount in the allocation of withdrawal liability even if only a small portion is buying benefits.

The Group indicated that it was good to see two options for ignoring the effect of benefit suspension.

As to "two-pool" withdrawal liability allocations, PBGC has concern that plans would settle for a fraction of withdrawal liability if it is paid in a lump sum to enable an employer to settle and "jump" into the new employer pools (rather than actually withdraw), and so PBGC is requiring that permission be granted. It is a difficult decision for trustees to make, since it is hard to conclude that it is in the best interest of participants and doesn't increase risk of loss to PBGC. The plans may not know how to structure it to satisfy PBGC, so few apply, and PBGC has not had much experience.

Some green zone plans are asking for a two-pool method with no ability to jump. New employers don't want to join unless they can be shielded from legacy withdrawal liability. PBGC is not seeing significant reasons to disapprove plans that apply without "jumping" provisions—it seems like they will be more likely to attract new employers—they have had a few.

Placing new employers in a new pool with withdrawal liability on the direct attribution method generally doesn't seem like a problem to PBGC unless there are valuable subsidies that are earned in the new pool and not properly paid for by those employers. New employers need to feel secure that they will not have liability for the old pool, and PBGC wants to make sure they are properly paying for their benefits in the new pool.

For plans approaching insolvency with employers who can't pay withdrawal liability, PBGC gave some relief in order to keep the employers in the plan and paying contributions. Questions were asked about the terms and conditions scrutinized for payment of withdrawal liability for employers who are "jumping". They included: What is the interest rate? Is it the funding rate? Are participants keeping subsidies? The withdrawal liability payment may not be adequate to cover risks, and these employers are somewhat insulated from liabilities in the old pool.

- **PBGC Databook**—PBGC asked whether we use it and whether it is useful.

  The Group indicated that they use it and it is useful.