AMERICAN BENEFITS COUNCIL

November 22, 2019

Submitted via www.regulations.gov

Regulatory Affairs Division
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: PBGC Proposed Rule on Lump Sum Payment Assumptions (RIN 1212-AB41)

Dear Sir/Madam:

The American Benefits Council ("Council") appreciates the opportunity to comment on the Pension Benefit Guaranty Corporation's ("PBGC") proposal to discontinue the monthly publication of PBGC's lump sum interest rates that are used to determine de minimis lump sums in terminated underfunded single employer plans, and to instead adopt the interest and mortality assumptions from section 417(e)(3) of the Internal Revenue Code ("Code") for such purpose.[1]

Our comments are provided in response to PBGC's request for information regarding the impact that the proposed rule would have on private-sector plans that use PBGC's interest rates to determine lump sums under such plans. As discussed below, in the vast majority of cases, there would be no ambiguity as to how the proposed rule would affect plans that use PBGC's rates, and plan sponsors could choose to provide relief to participants and beneficiaries whose benefit calculation would be adversely affected if the proposed rule is finalized. As also discussed below, plan sponsors' ability to provide relief to participants and beneficiaries depends, however, on PBGC providing plan sponsors with enough time before the applicability of the final rule to carefully consider and implement any relief the plan sponsor may find appropriate.

[1] 84 Fed. Reg. 51,490 (Sept. 30, 2019) (referred to hereinafter as the "proposed rule").

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

Our comments below address (1) the use of PBGC's lump sum interest rates by private-sector plans, (2) how the proposed rule would impact private-sector plans, (3) the Council's recommendation for an alternative to PBGC's proposal with respect to Appendix C, and (4) the effective date of the rule, if finalized.

PRIVATE-SECTOR PLANS' USE OF AND REFERENCE TO PBGC RATES

Use of PBGC Rates. As noted in the preamble to the proposed rule, Code section 417(e)(3) used to require defined benefit pension plans to use PBGC's lump sum interest rates when calculating the minimum permissible lump sum equivalent of an annuity benefit. Code section 417(e)(3) was subsequently amended in 1994 to replace the use of PBGC's interest rates with the annual rate of interest on 30-year Treasuries, and again in 2006 to replace the use of 30-year Treasuries with the segment rates that apply today (and that PBGC is proposing to adopt).

Although Congress' move away from using PBGC's rates under section 417(e)(3) for purposes of determining minimum permissible lump sums under private-sector plans generally resulted in lower minimum payments for plans, some plans nevertheless chose to continue using PBGC's interest rates for this and other purposes. We do not believe that the number of plans that continue to use PBGC's rates is considerable. Yet because these plans tend to consist of older, large defined benefit plans, PBGC's proposed rule would potentially affect the significant number of participants and beneficiaries in the plans.

Incorporation by Reference. Each of the private-sector plans we are aware of that continue to use PBGC's lump sum interest rates does so by incorporating PBGC's rates by reference in the plan document. Historically, PBGC published one set of lump sum interest rates for PBGC's use that private-sector plans also used in their own calculations. As described above, until the mid-1990s, Code section 417(e)(3) required plans to use that set of rates, and after section 417(e)(3) was amended, some plans chose to continue their use of such rates. Accordingly, our members have indicated that private-sector plans were typically drafted to incorporate PBGC's set of rates into the plan by reference to "the interest rates used by PBGC" or "PBGC lump sum interest rates" (or other similar language).

In 2000, PBGC announced that it would begin publishing two sets of lump sum rates: one set for PBGC's use in calculating lump sums (i.e., Appendix B), and one set for use by the private sector (i.e., Appendix C).[2] PBGC explained that, although the rates in Appendix B and Appendix C would initially be the same, PBGC might in the future "change the way it sets the lump sum interest rates it uses for its own payments."[3]

[2] 65 Fed. Reg. 14,753 (Mar. 17, 2000).

[3] *Id*. at 14,754.

With the introduction of two sets of rates, PBGC advised the private sector to "exercise care" when drafting or amending plan documents so that the PBGC rate intended to be used would be clear.[4] In this regard, PBGC suggested that a plan should refer to the "PBGC lump sum interest rates *for private-sector payments*" (emphasis added) if the plan wanted to avoid being affected by any future change the PBGC might make to the method it uses to determine the rates for its own lump sum payments.[5] PBGC also indicated that a private-sector plan's reference to PBGC's lump sum interest rates for PBGC payments (i.e., the rates that PBGC uses) would refer to the rates PBGC uses "for its own lump sum payments and therefore could result in unexpected changes in plan lump sum amounts if the PBGC changes the way it sets rates for its own payments."[6] PBGC thus acknowledged that, absent a plan amendment, a plan's incorporation of PBGC's rates by a general reference to PBGC's lump sum rates or the rates PBGC uses would refer to, under a plain reading of the plan's language, the rates in Appendix B.

Our members are aware of very few, if any, private-sector plans that were amended in or after 2000 to specify that the plan's use of PBGC's rates means those rates set forth in Appendix C for private-sector plans.[7] Instead, plans generally continue to refer to "the interest rates used by PBGC" (or similar language), which, as noted above, would refer to the rates PBGC uses (i.e., Appendix B). As a result, in the vast majority of cases, we believe it is very clear which set of PBGC rates a private-sector plan is referring to because the plan either (1) refers to "PBGC's lump sum interest rates" or "the rates PBGC uses" (or similar language), i.e., Appendix B, or (2) refers specifically to PBGC's rates for private-sector plans, i.e., Appendix C.[8] (All plans may be in the former category, as noted.)

Although we appreciate PBGC's consideration of whether the proposed rule could cause ambiguity for private-sector plans, it is unclear why the PBGC suggests in the preamble that there may be ambiguity in the instances described above, especially when PBGC itself noted in 2000 that a general reference to PBGC's rates would effectively mean those in Appendix B. Regardless, for purposes of the anti-cutback rules, the interpretation of a plan's provisions is within the IRS's purview, and as such we respectfully ask that PBGC expressly state that it does not intend to suggest that any such ambiguity exists.

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[4] *Id*. at 14,755.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 14,753. One reason we believe that very few plans were amended to specifically reference the Appendix C rates and/or the PBGC rates for private-sector plans is that PBGC stated in the preamble to its final rule on lump sum payment assumptions in 2000 that the Internal Revenue Service ("IRS") had informed PBGC that a plan that is amended to clarify that the plan's reference to PBGC lump sum interest rates means the lump sum interest rates for private-sector payments would not cause the plan to fail to satisfy the "anti-cutback" rules of Code section 411(d)(6) if it is amended before the PBGC amends its regulations to provide lump sum interest rates for PBGC payments that differ from those specified in Appendix C. *Id.* at 14,755. As such, there has been little reason for private-sector plans to consider making the contemplated amendment until the PBGC considered such an amendment to its rules, as it has now done in the proposed rule.

[8] We imagine it may be possible for the proposed rule to create ambiguity for a plan in certain situations that we expect to be very rare or even nonexistent, such as a plan that requires use of "the rate that PBGC uses for private-sector plans." In that case, because PBGC does not "use" the rates in Appendix C to calculate its lump sum payments, it may be ambiguous under the plan as to which set of rates must be used.

Fail-Safe Language. Some private-sector plans, in addition to referencing the PBGC's rates in one of the manners described above, include language providing for a change in how actuarial equivalence is calculated if PBGC takes certain actions, such as ceasing to publish or update its lump-sum interest rates, or changing the methodology used to develop such rates.

PROPOSED RULE'S IMPACT ON PRIVATE-SECTOR PLANS

Very generally, PBGC is proposing to (1) begin using the "applicable interest rate" specified in Code section 417(e)(3) to calculate lump sums instead of publishing its own lump sum interest rates in Appendix B, and (2) publish a final set of interest rates in Appendix C, which would no longer be updated. Set forth below is the resulting impact that we expect the proposed rule would have on private-sector plans that use the PBGC's lump sum rates. But because the proposed rule also raises tax qualification questions and considerations for private-sector plans, we first describe some applicable IRS rulings in this regard.

Tax Qualification Considerations. As a requirement of tax qualification, defined benefit plans must provide definitely determinable benefits. This requirement may be satisfied by providing for an express formula in the plan, as long as the formula is not subject to the employer's discretion.[9] When actuarial assumptions must be used by a plan, the definitely determinable requirement may be satisfied by specifying a variable standard that provides for "self-adjusting changes" that are "independent of employer discretion."[10] The IRS has clarified that, when a plan specifies a variable standard for purposes of performing actuarial calculations, *only an amendment* to the basis for that variable standard as set forth in the plan is subject to the Code's anti-cutback requirements in section 411(d)(6) because "only such an amendment constitutes a potential change in accrued benefit."[11] As a result, any variation in the computation that occurs simply as a result of using a variable standard in the plan (e.g., a change in an interest rate that is incorporated by reference) is not subject to section 411(d)(6).[12]

Impact of Proposed Changes. If PBGC finalizes the rule as it is proposed, the changes would affect private-sector plans as follows:

- Plans that incorporate by reference the PBGC's rates using language such as "the lump sum rates used by PBGC" would continue to use the rates used by PBGC, which, under the proposed rule, would become the section 417(e)(3) rates. Because this change would occur automatically and without employer discretion, the anti-cutback rules would not be implicated.

- Plans that incorporate by reference the rates in Appendix C (to the extent any such plans exist) would begin using the final set of rates when published by PBGC. Similar to

[9] Rev. Rul. 74-385.

[10] Rev. Rul. 79-90.

[11] Rev. Rul. 81-12.

[12] *Id.*

above, no anti-cutback rules would be violated because this change would be automatic and would not involve employer discretion.

- Plans that include fail-safe language in the event that PBGC takes an action described in the proposed rule (e.g., changing the methodology used to determine its rates) would make any changes to their calculation methodology as required by the fail-safe language. Because this change would occur automatically and without employer discretion, the anti-cutback rules would not be implicated.

- Plans with participants whose lump sum payment would be adversely affected due to PBGC's action would generally have the option (assuming the plan does not prohibit it) to amend the plan to provide for a different rate and/or transitional phase-in period to lessen the impact of the change on participants. Although such amendments would be subject to the anti-cutback rules, as long as the amendment would produce a higher benefit than the benefit calculated using the rates under section 417(e)(3) (or the rates in Appendix C, if applicable), they would generally not trigger anti-cutback concerns. We imagine that some plans that would be required to begin using the section 417(e)(3) rates if PBGC's proposal is finalized might even consider amending the plan to use the Appendix C rates instead (either permanently or in connection with a phase-in period).

ALTERNATIVE TO PUBLISHING ONE FINAL SET OF FIXED RATES FOR PRIVATE-SECTOR PAYMENTS

As discussed above, the Council is not aware of any plans that were amended to specify their use of the rates PBGC publishes in Appendix C. Nevertheless, such plans could exist and – as described above – some plans might choose to reduce the impact of an automatic change to the section 417(e)(3) interest rates by amending the plan to use the Appendix C rates (subject, of course, to the plan's review of PBGC's final rule). Under either scenario, our members have indicated that it would be much more workable and appropriate for PBGC to establish rates for Appendix C that reflect ongoing changes to the interest rate environment. To this end, instead of setting one final set of rates based on a 10-year average, we recommend adopting the rate for 30-year Treasury securities as the rate for Appendix C. Doing so will ensure that Appendix C remains reflective of present economic realities and that lump sum payments based upon those rates are appropriate for that economic environment while also relieving PBGC from the responsibility of continually updating Appendix C.

EFFECTIVE DATE

As discussed above, when the proposal becomes effective, it will trigger a reduction in the lump sum values in most or all of the plans affected. For calendar year plans that base lump sums on the interest rates as of the first day of the plan year that will mean a reduction effective for 2021 if the proposal is finalized in, for example, early 2020. But there are plans with non-calendar year plan years and/or plans that adjust lump sum interest rates more frequently than annually. In those cases, finalization will trigger almost immediate reductions in lump sum values. That is a significant concern for many reasons, including (1) the effect on unwary participants, and (2) a rush to retire among participants aware of the change.

If plan sponsors have time between finalization of the proposal and its applicability, they can determine how best to avoid or reduce adverse effects on participants. For example, as noted, plan sponsors might want to consider phasing in or delaying the change in interest rates. But to do so, plan sponsors need time. We strongly urge PBGC not to make any changes effective for at least six months after publication of the final rule.

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Thank you for your consideration of our comments. Should you have any questions or wish to discuss our comments further, please contact me at (202) 289-6700 or by email at ldudley@abcstaff.org.

Sincerely,

Lynn D. Dudley

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy