TheBenefitPractice

December 13, 2022

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

Subject: 4213 Proposed Rule

The Benefit Practice (TBP) is submitting this letter in response to the request for comments on the Pension Benefit Guaranty Corporation (PBGC) changes suggested in its Proposed Rule under Part 4213 of 29 CFR chapter XL. TBP is a Third Party Administration and Actuarial Consulting firm providing consultative and administrative services for approximately 1,600 employer sponsored retirement plans, of which approximately 500 are defined benefit plans. On a number of occasions, TBP has been retained to evaluate withdrawal liability calculations and assumptions affecting both its clients and prospects who have participated under a variety of different multiemployer pension plans.

This letter dated December 13, 2022, includes in full all of the text of our letter dated November 14, 2022, but also includes a few additional points and clarifications that we believe further explain what rules should apply to the assumptions used for calculating withdrawal liability amounts and how those rules should be applied.

These comments are presented to voice TBP's support for PBGC's decision to issue regulations under Section 4213(a)(2) of ERISA. We concur with PBGC's assessment that absent such regulation, it is likely that the "recent trend in withdrawal liability dispute resolution" towards calculation of withdrawal liability using assumptions appropriate for plan funding purposes, or rates closely resembling such assumptions, would continue. Further, we believe that this would be the correct outcome absent such regulations, as we believe that cases such as *United Mine Workers of America v. Energy West Mining Co.*, No. 20-7054, 2022 WL 2568025 (D.C. Cir. July 8, 2022) and *Sofco Erectors, Inc. v. Trustees of Ohio Operating Engineers Pension Fund et al.*, 15 F. 4th 407 (6th Cir. September 28, 2021) were properly decided. Until PBGC issues regulations under Section 4213(a)(2), Section 4213(a)(1) clearly appears to mandate the use of funding assumptions to prepare the withdrawal liability calculation.

We have significant concerns and disagreement, however, with the specifics of the regulation that PBGC has proposed. In recent years, plan termination rates, comparable to those used under Section 4044 of ERISA, have been as low as the mid-2% range, while plan funding rates for multiemployer plans have frequently been in the range of 7 – 8%. We find it difficult to fathom that Congress intended PBGC to use its statutory authority to bless such a wide range of rates as acceptable for purposes of the withdrawal liability calculation. A standard so broad is worse than no standard at all. The amount of liability calculated using the endpoints of such a range will be radically different in all cases; it should be clear to any actuary as it was clear to the court in *United Mine Workers* that "The discount rate is the weightiest assumption in the overall withdrawal liability calculation."

We believe it is also inappropriate for PBGC to approve such dramatically different assumptions for purposes of performing the same calculation without any requirement whatsoever to take differences in plan operation and sponsor actions into account in determining the assumption. Otherwise, to allow a multiemployer plan sponsor to use very low, extremely conservative, rates in determining withdrawal liability while permitting that self-same plan sponsor to assume considerably higher rates of return in funding its plan is to countenance and encourage an unacceptable form of arbitrage at the expense of the withdrawing employer.

For example, consider a plan that is 85% funded using a 7.5% interest rate (the actuary's best estimate and chosen rate for funding the plan), but only 42% funded using a 2.5% rate (the presumed termination rate under Section 4044). Not only are the plan liabilities approximately double at the lower rate, but the unfunded liabilities are even more dramatically different – nearly four times as great. While the wide variety of complicating factors in the determination of withdrawal liability, such as the method used, make it impossible to say that the withdrawal liability paid by a withdrawing sponsor would actually be four times greater under the Section 4044 assumptions, it is reasonable to assume that the difference would be somewhere in that vicinity in this example.

This additional payment represents a windfall to the plan sponsor. Having received a payment from the withdrawing employer using very conservative assumptions, the sponsor remains free to continue using substantially higher ongoing plan assumptions to fund the plan and to value the liabilities it holds for the related participants at a significantly lower amount than what it received. In its regulatory overview, PBGC has noted that withdrawing employers shift their share of investment and other risks to the plan, and that the plan cannot seek additional funds in the event of worse than expected performance. It should be noted that the converse is true as well; the plan will not provide any additional benefits or refund in the event that performance is better than anticipated. It should not be up to a withdrawing employer to fund benefits for plan participants that never worked for that employer, other than those that withdrew in insolvent condition.

What is worse is that the related participants receive no additional protection or guaranty by virtue of their former employer having provided the plan sufficient funds to settle their liabilities on a termination basis. These individuals will be no better or worse off than any other plan participant, and subject to the same investment and other risks borne by every other participant. This is not necessarily the case for other types of plans. For example, single employer plans are required by IRS regulations under Section 414(l) to maintain a special schedule for five years to preserve their funded status in the event a Section 4044 allocation is required, and that is the case even without mandating the full funding on a plan termination basis (or something close to it) that is being discussed here.

<u>Suggestion #1:</u> The regulation allow the use of Section 4044 assumptions <u>only if 1)</u> the plan then buys annuities from a private insurer to fully cover the benefits provided by the plan for the participants of the withdrawing employer and these participants are then withdrawn from the plan (to the extent of the benefits from that employer), <u>or 2)</u> the plan adopts investment and funding policies that are consistent with a Section 4044 basis for all participants on a go-forward basis. Only by adopting provisions of this sort can the PBGC ensure equity between the variety of participating employers and participants covered by these plans. This proposal would ensure that benefits are adequately funded for the participants of the withdrawing employer, without mandating that employer to fund benefits for any other financially capable employer, and without subjecting its participants to the ongoing risks of participating in a multiemployer pension plan.

Given that the vast majority of withdrawal liability payments are paid over a period of years (up to twenty), rather than paid in a single sum at the time of withdrawal, PBGC regulations should include rules specifying how these periodic payments should be applied to the purchase of annuities if the plan chooses that option above (for example, by providing which participant benefits should be annuitized first).

We also believe that many of the same issues exist with relation to "the popular practice of using 4044 rates for benefits expected to be covered by existing assets and funding rates for other benefits." The fact that a method is "popular" does not mean that it is appropriate. Restricting or eliminating the use of this method would not be the first time that a popular practice has been discontinued or restricted in pension plan operation and administration. For example, the IRS chose not to offer a safe harbor for Social Security PIA offset plans in regulations under Code Section 401(l) when that section was modified by the Tax Reform Act of 1986, despite the fact that PIA offset plans were then the most common form of integrated pension plan. The question that must be decided here is whether there is any logical basis for continuing the use of what is often referred to as the "blended" method.

<u>Suggestion #2:</u> The regulation only allow the use of the blended method if the plan actually operates in a way that is consistent with the assumptions underlying it, that is, that it periodically (annually) purchase annuities to cover those benefits that can be funded on a termination basis. Any additional benefits provided by the plan could continue to be funded on an ongoing basis, until the time of the next periodic annuity purchase. Otherwise, we believe that it is unclear that this method would comply with Actuarial Standard of Practice No. 27 unless it is statutorily or regulatorily approved. We see no reason for PBGC to throw this method such a regulatory lifeline unless the plan's operation merits it.

Once again, we note that PBGC regulations should include rules specifying how periodic withdrawal liability payments should be applied to the purchase of any annuities that would comply with these requirements, which we believe are essential if the blended method is to be used.

The benefit of each of these suggestions is that not only would they both place multiemployer plan funding on much more stable ground, they would each be consistent with actual plan sponsor behavior and consistent with each other. The assumptions used would no longer be primarily subject to the discretion of the plan actuary, or potential pressure brought by the plan board. Plan sponsors would be responsible for funding only those liabilities attributable to their employees, plus a reasonable share of liabilities attributable to insolvent sponsors who withdrew in the past. It would not be the responsibility of a withdrawing employer to contribute to remaining sponsors for whom they have no responsibility, under a plan in which they no longer have any say.

Suggestion #3: If the plan does not meet the requirements suggested above, it be mandated to comply with Section 4213(a)(1) and apply withdrawal liability rules using assumptions that are consistent with those used for funding the plan. There should be no mandated windfalls, only funding of the unfunded amounts attributable to the withdrawing employer (and a share of the amount for the insolvent). The remaining employers should not benefit from the moral hazard of having another employer's money to use, with the knowledge that if the plan ultimately fails, it becomes the responsibility of the PBGC.

We would argue that the only time rates other than those described above would be acceptable is if some aspect of plan operation and sponsor behavior justified it. For example, if the plan sponsor purchased annuities for retiring employees, but not other funded benefits, a rate between the rates above could be acceptable. Otherwise, sponsors should not be allowed to use a rate other than the three rates above. The wording of the proposed regulation appears to allow any random rate as long as it falls between the two extremes.

Finally, there is one other option that was not considered in the proposed regulation that we believe should be considered. We believe that PBGC could and should issue related regulations under Section 4232 of ERISA, allowing a withdrawing plan sponsor to accept responsibility for the benefits for its participants by transferring those benefits to a single employer defined benefit plan, in lieu of payment of withdrawal liabilities for such employer.

Suggestion #4: A withdrawing plan sponsor be provided the option to forego payment of withdrawal liability in return for accepting a plan-to-plan transfer from the multiemployer plan to a single employer plan sponsored by the withdrawing plan sponsor, in accordance with the provisions of ERISA Section 4232. The multiemployer plan would be required to provide an asset transfer equal to the percentage funded, determined using the interest rates provided under either Section 430(h)(2)(D) or Section 417(e) of the Internal Revenue Code. Additional funding would be the responsibility of the single employer plan sponsor in accordance with single employer plan funding rules.

We believe these suggestions would greatly simplify the withdrawal liability assumption setting process and go a long way toward meeting the goals expressed by PBGC of improving multiemployer plan funding, ensuring administrative savings by reducing arbitration and litigation, and maintaining equity between the different multiemployer plan stakeholders.

TBP appreciates the opportunity to provide these comments and suggestions in support of the regulatory process in this area with the goal of improving the ultimate outcome.

Very truly yours,

Lloyd A. Katz   Peter M. Coleman

Lloyd A. Katz, FSA, EA
Managing Partner

Peter M. Coleman, ASA, EA
Managing Partner