

Via Electronic Delivery

December 8, 2022

RIN 1212-AB54
Regulatory Affairs Division
Office of the General
Pension Benefit Guaranty Corporation
445 12th Street, SW
Washington, DC 20024-2101

Re: RIN 1212-AB54: Notice of Proposed Rulemaking: Actuarial Assumptions for Determining an Employer's Withdrawal Liability

To Whom It May Concern:

On behalf of Cheiron, Inc., I am submitting these comments on the proposed regulation under section 4213 of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, that was published in the Federal Register on October 14, 2022 (RIN-1212-AB54). Cheiron, Inc. is a full-service pension and health actuarial consulting firm that provides actuarial services to approximately 115 multiemployer defined benefit pension plans (hereinafter referred to as “multiemployer plans”) covering more than 1.5 million participants. As discussed below, the proposed regulations present issues that may need to be addressed in order to avoid unnecessary disputes regarding interpretation of the regulation.

Background

Under ERISA, an employer that withdraws from a multiemployer plan may be liable to the plan for withdrawal liability, which is generally an allocated share of any unfunded vested benefits. The unfunded vested benefits are the excess of the present value of nonforfeitable benefits over the value of the plan's assets. The plan's actuary determines the present value of nonforfeitable benefits using actuarial assumptions and methods, which include an assumed interest rate that is used to discount future benefit payments.

Section 4213(a) of ERISA provides that PBGC may prescribe by regulations actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability. Section 4213(a) further provides that withdrawal liability shall be determined by each plan on the basis of either:

- (1) Actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan; or
- (2) Actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining withdrawal liability.

Up to now, the PBGC has not issued any regulations under section 4213. In recent years there has been much litigation concerning the interest rate used to determine withdrawal liability.

To date, three circuit courts of appeal have ruled that the interest rate assumption used to determine the present value of nonforfeitable accrued benefits failed to satisfy section 4213(a) because it did not represent the actuary's best estimate of experience under the plan. In two of the cases, the actuary used assumptions specified by the PBGC under section 4044 of ERISA (4044 rates), and in one case the actuary used a blend of the 4044 rates and the interest rate used for funding purposes.¹ No circuit court of appeals has ruled that the use of the 4044 rates satisfies the requirements of section 4213(a).

Proposed Regulation

On October 14, 2022, the PBGC issued a proposed regulation under ERISA setting forth actuarial assumptions under section 4213(a)(2), which may be used as an alternative to the actuarial assumptions under section 4213(a)(1) for purposes of determining withdrawal liability. Under proposed section 4213.11(a), withdrawal liability may be determined using the actuarial assumptions that satisfy the requirements of that section. Proposed section 4213.11(b)(1) provided that, to satisfy the requirements of that section, the single effective interest rate (defined in proposed section 4213.2) must be the interest rate specified in section 4213.11(b)(2), the interest rate specified in section 4213.11(b)(3), or a rate between those two rates. Under proposed section 4213.11(c), the actuarial assumptions (other than the interest rate assumption) satisfy the regulation if (1) each is reasonable (taking into account the experience of the plan and reasonable expectations), and (2) in combination, they offer the actuary's best estimate of anticipated experience under the plan.

The interest rate specified by proposed section 4213.11(b)(2) is the single effective interest rate for the interest assumption prescribed in section 4044.52 for the date as of which withdrawal liability is determined. The interest rate specified by proposed section 4213.11(b)(3) is the single effective interest rate for the interest assumption under ERISA section 304(b)(6) for the plan year within which the date in paragraph (b)(2) falls.

ERISA section 304(b)(6) provides that the funding standard account (and items therein) shall be charged or credited (as determined under regulations prescribed by the Secretary of the Treasury) with interest at the appropriate rate consistent with the rate or rates of interest used under the plan to determine costs.

Comments

We believe that some clarifications in the regulation will be helpful and will avoid potential controversy. The suggested clarifications are discussed below along with a brief discussion of the reason for the comment.

¹ The cases are *United Mine Workers of Am. 1974 Pension Plan v. Energy West Mining Co.*, No. 20-7054, 2022 WL 2568025 (D.C. Cir. July 8, 2022) (4044 rates); *Sofco Erectors, Inc. v. Trs. of Ohio, Operating Engineers, Pension Fund*, 15 F. 4th 407 (6th Cir. 2021) (blend of 4044 rates and funding interest rate); *GCIU-Employer Retirement Fund v. MNG Enterprises*, No. 2:21-cv-00061, (9th Cir. October 28, 2022)(4044 rates)

Clarification #1: The final regulation should clarify that the choice of whether to use the actuaries best estimate pursuant to section 4213(a)(1) or the assumptions specified by the PBGC pursuant to section 4213(a)(2) is a choice made by the plan sponsor, not a choice made by the plan's actuary. While proposed section 4213.1 sets out the purpose of the regulation as to provide an alternative to the assumptions under section 4213(a)(1) of ERISA, section 4213.1 does not specify who determines which alternative is used. The uncertainty can lead to disputes about the decision process and the standard to be applied in making the decision.

Clarification #2: Similarly, the final regulation should clarify that the choice of which interest rate within the range specified by section 4213.11(b) is a choice made by the plan sponsor, and does not need to represent the actuary's best estimate of anticipated experience under the plan. Uncertainty as to who makes the choice of interest rates within the permitted range can lead to disputes about the process and the standard to be applied in making the decision.

Clarification #3: The final regulation should specify in section 4213.11(b)(3) that the rate is the single effective interest for the interest rate or rates used by the plan's actuary to determine the minimum funding requirements pursuant to section 304(c)(3) and used to credit interest on the funding standard account as shown on the Schedule MB filed for the plan year immediately preceding the plan year in which the withdrawal occurs. As proposed, arguments may be made that section 4213.11(b)(3) does not actually specify an interest rate. There are no Treasury regulations at this time and the statutory provisions do not define what constitutes an "appropriate rate" and further merely requires that it be "consistent with" the rate or rates used under the plan to determine costs. We can easily imagine that disputes will arise due to uncertainty with respect to the meaning of the terms.

Clarification #4: The final regulation should clarify that the rate specified in section 4213.11(b)(3) may be determined after the end of the plan year preceding the plan year in which the withdrawal occurs. The clarification would appropriately not follow the decision of the Court of Appeals for the Second Circuit in *The National Retirement Fund, et. al. v. Metz Culinary Management, Inc.* (Metz) 946 F.3d 146 (2d Cir. 2020), but would accord with the district court for the District of Columbia in *Trustees of the IAM National Pension Fund v. M&K Employee Solutions, LLC*, case 1:21-cv-02152-RCL, September 28, 2022. The clarification would resolve potential future disputes on this issue.

If you have any questions about these clarifications, or need more information, please contact me.

Sincerely,



James E. Holland, Jr.
Chief Research Actuary
Cheiron, Inc.