Office of Inspector General

September 8, 2022

Risk Advisory

TO: Gordon Hartogensis
Director

FROM: Nicholas J. Novak
Inspector General

NICHOLAS NOVAK Digitally signed by NICHOLAS NOVAK Date: 2022.09.08 16:14:38 -04'00'

SUBJECT: Pending GAO Opinion on PBGC's Final Rule that adopted a bifurcated interest rate for certain SFA applications

On August 10, 2022, I requested a legal opinion from the Government Accountability Office (GAO) on PBGC's authority to create a separate interest rate for projecting investment returns on the assets that plans use in their Special Financial Assistance (SFA) applications. I made this request pursuant to the GAO guidance, "Procedures and Practices for Legal Decisions and Opinions," GAO-06-1064SP (September 2006). On September 1, 2022, GAO indicated to me that they will issue an opinion on this matter.

The suggestions contained in this Risk Advisory do not constitute formal audit recommendations. Consequently, it does not require a PBGC management response.[1] However, if PBGC chooses to act on the issues that this Risk Advisory discusses, I respectfully request a written summary of those actions.

In compliance with OIG responsibilities under the Inspector General Act to keep the Board, Congress, and the public fully and currently informed about problems and deficiencies related to the Corporation's programs and operations, please be advised OIG will post this Risk Advisory on the OIG public website. Because PBGC actions will be dependent on its risk mitigation strategy it develops, the initial post to the OIG's website will be a limited synopsis of this Risk Advisory. Once GAO issues a final decision, OIG will post the entirety of the Risk Advisory, along with any management comments received.

[1] We are issuing this Risk Advisory under the authorities in the Quality Standards for Federal Offices of the Inspector General, August 2012.

Summary

Management is responsible for identifying internal and external risks that may prevent the Corporation from meeting its strategic goals and objectives, assessing risks to determine their potential impact, and applying the appropriate risk responses. One source of risk information is the OIG.

The American Rescue Plan Act (ARP) provides a 120-day requirement for approval of applications for SFA. In its Final Rule published in the Federal Register on July 8, 2022, PBGC adds that the 120-day approval window will also apply to supplemented applications that previously approved plans might file to take advantage of the changes in the Final Rule. If PBGC approves SFA applications using aspects of the Final Rule that are currently under review by GAO, PBGC faces both a risk of improper payments and a reputational risk. Given these two risks, PBGC should consider contingency plans and an assessment of its options in dealing with the plan applications that rely on the Final Rule's bifurcated interest rate that GAO is assessing.

Background

ARP authorizes PBGC to provide an estimated $82 billion in SFA to help save severely underfunded multiemployer pension plans that meet certain criteria. ARP's stated intention is to cover the gap between plan liabilities and current assets (if any), plus 30 years of projected income (which includes investment returns on current and SFA provided assets).

Generally, Congress provided in ARP that a plan should determine its SFA request using 30-year projections that relied on the plan's actuarial assumptions made before ARP was enacted. Where these pre-enactment actuarial assumptions did not align with the state of the plan at the time the plan is applying for SFA, Congress permitted a plan to change the actuarial assumptions that were no longer reasonable.

Built into the law is an exception regarding the interest rate that a plan may use. This exception requires that a plan requesting SFA must compute the amount requested using the same interest rate as the plan used to value liabilities before Congress enacted ARP. A requesting plan can change this rate – but only to a rate no lower than a particular published average of Federal rates. This interest rate limitation sets a barrier that a plan cannot cross if it chooses to lower its interest rate.[2] In July 2021, PBGC promulgated an Interim Final Rule (IFR) to guide multiemployer plans applying for SFA. In the preamble to the IFR, PBGC stated that a plan may not change the interest rate required for eligibility or SFA amount in a manner inconsistent with ARP's interest rate limitation. In addition, PBGC stated that it lacked regulatory authority to provide a different rate or to bifurcate the statutorily mandated interest rate.

After receiving public comments on the IFR, PBGC published its Final Rule on July 8, 2022. In this Final Rule, PBGC changed its position from the IFR and allowed plans to bifurcate the interest rate used in requesting SFA, as well as made other adjustments in how an interest rate limit might be determined for projecting investment returns on SFA provided assets. Its stated rationale was that it was harmonizing the ARP's statutory interest rate limitation with other ARP provisions. PBGC estimated the cost to the United States Treasury of this change at $4.64 billion.

Risk

If GAO's decision were to contradict PBGC's position in its Final Rule, SFA payments, made while the decision was pending, risk being deemed improper payments, and additionally raise a reputational risk for PBGC.

Details

Risk of Improper Payments

An improper payment is any payment that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements.[3]

On August 10, 2022, I requested a legal opinion from GAO on whether PBGC may set an interest rate for plans projecting returns on SFA-provided assets lower than the rate

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[2] "[I]n determining the amount of special financial assistance in its application, an eligible multiemployer plan . . . shall use the interest rate used by the plan in its most recently completed certification of plan status before January 1, 2021, provided that such interest rate may not exceed the interest rate limit." 29 U.S. Code § 1432(e)(2).

[3] *See* 31 U.S.C. § 3351(4).

Congress established in ARP. GAO has notified me that they will issue an opinion. Should GAO conclude PBGC lacked the authority to set a lower interest rate of return, there is a risk that any SFA funds distributed to plans by PBGC based on that rate may be deemed improper payments.

PBGC is allowing plans that have already received SFA payments under the IFR to submit a supplemented application for additional SFA funds. As of September 1, 2022, PBGC has received 17 applications for supplemental payments totaling $916 million related to the interest rate change for projecting returns on SFA provided assets. Additionally, two applications utilizing the bifurcated interest rate have been submitted requesting $35.0 billion. It is my understanding that PBGC has yet to approve any application for supplemental or initial SFA payments with the regulatory-created bifurcated interest rate changes.

Risk to PBGC's Reputation

Improper payments represent a risk to PBGC's reputation for fiscal responsibility, technical competency, and integrity. Under ARP, PBGC receives appropriated funds to disburse SFA to multiemployer plans that meet certain criteria. After ARP's enactment, the Corporation moved quickly to promulgate the IFR so that PBGC's SFA program was in effect within a statutory deadline of 120 days. Following promulgation, the Corporation received comments to the IFR and worked with its Board agencies to develop the Final Rule, which was published on July 8, 2022.

Conclusion

PBGC should always be diligent in protecting against the fact or appearance of an improper payment. It is unknown when GAO will provide their opinion and whether they will concur with the bifurcated interest rate changes contained in the Final Rule. With the statutory requirements under ARP and the possibility of improper payments, PBGC should evaluate the consequences and implement operating processes that minimize PBGC's adverse exposures and undesired outcomes.

Suggestions

To mitigate the above risk of improper payments and reputational risk, we offer the following suggestions:

- Develop a contingency plan taking into considerations potential outcomes from GAO's decision.
- Evaluate risks during the interim period (while waiting for GAO's decision) and implement operational changes to minimize adverse consequences and to reduce likelihood of improper payments.

PBGC
Protecting America's Pensions
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Office of the Director

Date: December 8, 2022

To: Nick Novak
Inspector General

From: Gordon Hartogensis
Director

Gordon Hartogensis

Digitally signed by Gordon Hartogensis
Date: 2022.12.08 15:50:40 -05'00'

Subject: Response to OIG's Risk Advisory regarding Pending GAO Opinion on PBGC's Final Rule that adopted a bifurcated interest rate for certain SFA applications

This memorandum responds to OIG's Special Report titled *Risk Advisory: Pending GAO Opinion on PBGC's Final Rule that Adopted a Bifurcated Interest Rate for Certain SFA Applications (SR-2022-12).*

The Special Financial Assistance (SFA) Program, established under the American Rescue Plan Act of 2021, provides funds to severely underfunded multiemployer pension plans and ensures that millions of workers, retirees, and their families receive the pension benefits they earned through many years of hard work.

PBGC has worked diligently to implement the SFA Program by issuing regulations and guidance, developing internal controls to mitigate risks, processing applications for special financial assistance, and by keeping stakeholders, the public and Congress informed.

Working with our Board agencies, PBGC promulgated the SFA Final Rule, which PBGC and its Board strongly feel was appropriately constructed to achieve the core statutory directive to provide severely underfunded multiemployer pension plans with sufficient assets to pay benefits through 2051.

We will of course continue to cooperate and answer any questions on any issues raised by our oversight community.

PBGC will continue to comply with our statutory obligations to receive, review and approve or deny SFA applications within the 120-day review period. SFA applicants remain able to submit applications by following the instructions available at American Rescue Plan Act of 2021 More Resources | Pension Benefit Guaranty Corporation (pbgc.gov).

PBGC remains committed to ensuring the successful implementation of the SFA Program.