



Billing Code 7709-02-P

## **PENSION BENEFIT GUARANTY CORPORATION**

**29 CFR Part 4213**

**RIN 1212-AB54**

### **Actuarial Assumptions for Determining an Employer's Withdrawal Liability**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

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**SUMMARY:** The Pension Benefit Guaranty Corporation is proposing to provide interest rate assumptions that may be used by a plan actuary in determining a withdrawing employer's liability under a multiemployer plan.

**DATES:** Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*] to be assured of consideration.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the online instructions for submitting comments.
- *E-mail:* [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov) with subject line "4213 proposed rule."
- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024-2101.

Commenters are strongly encouraged to submit comments electronically. PBGC expects to have limited personnel available to process comments submitted on paper by mail or hand delivery. Until further notice, any comments submitted on paper will be considered to the extent practicable.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to the 4213 proposed rule. All comments received will be

posted without change to PBGC's website, *www.pbgc.gov*, including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024-2101, or calling 202-326-4040 during normal business hours. If you are deaf or hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

**FOR FURTHER INFORMATION CONTACT:** John Ginsberg (*ginsberg.john@pbgc.gov*), Assistant General Counsel, Multiemployer Law Division, Office of the General Counsel, at 202-229-3714, or Gregory Katz (*katz.gregory@pbgc.gov*), Attorney, Regulatory Affairs Division, Office of the General Counsel, at 202-227-8918. If you are deaf or hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

**SUPPLEMENTARY INFORMATION:**

**Executive Summary**

The Pension Benefit Guaranty Corporation (PBGC) is proposing to provide interest rate assumptions that may be used by a plan actuary in determining a withdrawing employer's liability under a multiemployer plan.

PBGC's legal authority for this rulemaking comes from section 4213 of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to prescribe actuarial assumptions and methods for purposes of determining an employer's withdrawal liability, and from section 4002(b)(3) of ERISA, which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA.

## **Background**

### *Withdrawal liability*

PBGC administers two independent insurance programs for private-sector defined benefit pension plans under title IV of ERISA — one for single-employer defined benefit pension plans and one for multiemployer defined benefit pension plans (multiemployer plans). In general, a multiemployer plan is a collectively bargained plan involving two or more unrelated employers. The multiemployer program protects benefits of approximately 10.9 million workers and retirees in approximately 1,360 plans.<sup>1</sup> This proposed rule applies only to multiemployer plans.

Under ERISA, an employer that withdraws from a multiemployer plan may be liable to the plan for withdrawal liability, which generally represents the employer's share of any unfunded vested benefits (UVBs) that the plan may have at the end of the plan year immediately preceding the plan year in which the employer withdraws. UVBs are the amount by which the present value of nonforfeitable benefits under the plan as of the valuation date exceeds the value of plan assets as of that date. The plan actuary determines the present value of all of the plan's nonforfeitable benefits using actuarial assumptions and methods. The assumptions include the interest rate — sometimes called the “discount rate” — that is used to discount future benefit payments to their present value and the mortality tables used to determine the probability that each benefit payment will be made. Assuming a higher interest rate results in lower UVBs, whereas a lower rate leads to higher UVBs. Disputes between plans and employers about the value of UVBs are resolved through mandatory arbitration, and then, if necessary, litigation.

For plans terminated by mass withdrawal, PBGC's regulation on Duties of Plan Sponsor Following Mass Withdrawal (29 CFR part 4281) specifies actuarial assumptions for valuing benefits, including interest rates described in Appendix B to PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044).<sup>2</sup> These interest rates are based on the

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<sup>1</sup> See PBGC FY 2021 Annual Report, page 3 at <https://www.pbgc.gov/sites/default/files/documents/pbgc-annual-report-2021.pdf>.

<sup>2</sup> See 29 CFR § 4281.13.

average market price of a life annuity, which PBGC determines from a quarterly survey of insurance companies and can be used to approximate the cost of purchasing annuities to cover benefits. Annuity prices are derived in part from yields on high-quality corporate bonds.

For ongoing plans, section 4213(a) of ERISA provides —

The corporation may prescribe by regulation 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 under this part. Withdrawal liability under this part shall be determined by each plan on the basis of —

(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 an employer's withdrawal liability.

Because PBGC has not issued regulations under section 4213(a)(2), withdrawal liability determinations governed by section 4213(a) have heretofore been made under section 4213(a)(1).

#### *Actuarial variety in selection of assumptions*

Plans have used a variety of approaches to determine withdrawal liability; three common approaches are described in the following paragraphs.

One approach uses the same interest rate assumption that is used to determine minimum funding requirements, based on the expected average return on plan assets over the long term. This approach applies the interest rate assumption used under section 431(b)(6) of the Internal Revenue Code (Code) and section 304(b)(6) of ERISA (funding interest rate assumption) to satisfy both standards under section 4213(a)(1) — that the actuarial assumptions and methods used to determine withdrawal liability are in the aggregate reasonable (taking into account the experience of the plan and reasonable expectations) and in combination offer the actuary's best estimate of anticipated experience.

Another approach focuses on the contrast between contributing employers and withdrawing employers. This approach identifies contributing employers as continuing to participate in the plan's investment portfolio and share in future gains and losses, including the

risk of increased contributions if plan investments do not earn as much as the assumed funding interest rate. This approach considers that a withdrawing employer ceases to participate in the plan's investment experience because the employer is settling its liabilities once and for all and bears no risk of future losses. This approach therefore considers the use of settlement interest rate assumptions prescribed by PBGC under section 4044 of ERISA (4044 rates) to be appropriate to determine the amount sufficient to release a withdrawing employer from any future financial obligations to the plan. Those interest rate assumptions can be used to approximate the market price of purchasing annuities to cover the withdrawing employer's share of the plan's benefit liabilities, which are generally paid in the form of life annuities. From this perspective, the plan trustees' investment risk appetite, asset allocation choices, or the actuary's best estimate of the plan's future investment returns following the withdrawal are not relevant to the withdrawal liability assessment.

A third approach uses an interest rate assumption that employs both funding and settlement interest rate assumptions. For example, the actuary might value unfunded benefits using the funding interest rate assumption, and value funded benefits using a settlement interest rate assumption like PBGC's 4044 rates.

### *Recent disputes*

There has been increasing litigation over withdrawal liability determinations, centered on the interest rate assumption used to discount liabilities of ongoing plans. In five cases since 2018 (and an unknown number of arbitrations), a withdrawing employer has challenged its withdrawal liability assessment by arguing that the interest assumption that the plan actuary used to value nonforfeitable benefits failed to satisfy section 4213(a)(1) of ERISA because it was lower than the actuary's best estimate of anticipated average returns on plan investments. Court decisions

have varied<sup>3</sup> and some have noted PBGC's unused authority to issue a regulation prescribing assumptions that may be used under section 4213(a)(2).<sup>4</sup>

### *Special financial assistance interim final rule*

On July 12, 2021 (at 86 FR 36598), PBGC published an interim final rule on special financial assistance (SFA) under new section 4262 of ERISA.<sup>5</sup> In footnote 18 of that rule's preamble, PBGC indicated that it intends to propose a separate rule of general applicability under section 4213(a) of ERISA to prescribe actuarial assumptions that may be used by a plan actuary in determining an employer's withdrawal liability. This proposed rule carries out PBGC's stated intention.

### **Overview of Regulation**

Section 4213(a)(2) of ERISA authorizes PBGC to set forth in its regulations actuarial assumptions and methods that may be used by a plan actuary for the purpose of determining an employer's withdrawal liability as an alternative to the assumptions and methods used under section 4213(a)(1). This rule is being proposed under section 4213(a)(2) to make clear that use of 4044 rates, either as a standalone assumption or combined with funding interest assumptions represents a valid approach to selecting an interest rate assumption to determine withdrawal liability in all circumstances. Withdrawing employers will not be making future plan contributions, and ERISA accounts for this by requiring an employer to settle its share of the plan's unfunded liabilities. In the event of worse than expected investment performance or other

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<sup>3</sup> See *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, No. 20-7054, 2022 WL 2568025 (D.C. Cir. July 8, 2022) (re 4044 rates); *Sofco Erectors, Inc. v. Trs. of Ohio, Operating Eng'rs, Pension Fund*, 15 F. 4th 407 (6th Cir. 2021) (re blend of 4044 rates and funding interest rate assumption); *GCIU Employer Retirement Fund v. MNG Enterprises, Inc.*, No. 2:21-cv-00061, 2021 WL 3260079 (C.D. Cal., July 8, 2021) (re 4044 rates), *appeals filed*, Nos. 21-55864, 21-55923; *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, 331 F. Supp. 3d 365 (D.N.J. 2018) (re blended rates), *appeal voluntarily dismissed*; *New York Times Co. v. Newspaper and Mail Deliverers'-Publishers' Pension Fund*, 303 F. Supp. 3d 236 (S.D.N.Y. 2018) (re blended rates), *appeals voluntarily dismissed*. In the cross-appeals of the *New York Times* decision, PBGC participated as *amicus curiae*.

<sup>4</sup> See *United Mine Workers*, 2022 WL 2568025, at \*2; *Sofco Erectors*, 15 F. 4th at 420; *Manhattan Ford Lincoln*, 331 F. Supp. 3d at 393.

<sup>5</sup> The final rule on SFA was published July 8, 2022, at 87 FR 40968.

actuarial experience following an employer's withdrawal, the plan cannot seek additional funds from that employer. Thus, a withdrawing employer shifts its share of investment risk and other risks to the plan and its remaining employers. If a party promising a pension, as an employer participating in a multiemployer plan indirectly does, were to shift all investment risk, mortality risk, and other asset and liability risks to an annuity provider, that party must pay the premium amount necessary to fund the promised pension liability. Accordingly, it is reasonable to base the amount needed to settle the employer's share of the liability on the market price of settling pension liabilities by purchasing annuities from private insurers.

The use of actuarial assumptions and methods prescribed by PBGC under section 4213(a)(2) would not be subject to the requirements of section 4213(a)(1), and accordingly, the plan's actuary would be permitted to determine withdrawal liability under the proposed rule without regard to section 4213(a)(1).

The proposed rule would specifically permit the use of an interest rate anywhere in the spectrum from 4044 rates alone to funding rates alone.<sup>6</sup> In the case of an interest assumption that involves two or more rates to value a plan's liabilities, such as a yield curve or the use of separate interest rates for benefits expected to be covered by current assets and for other benefits, this proposed rule would apply to the single interest rate that would result in the same liability measure as the multiple rates. PBGC requests comments on whether the final rule should restrict the allowable options to a narrower range of interest rates or to only specific methodologies for determining interest rates. In particular, should the top of the range of permitted interest rates under section 4213(a)(2) be lower than the typical funding interest rate assumption (which represents the expected return on a portfolio with a significant allocation to return-seeking assets)? PBGC also requests comments on what should be the relationship, if any, between (a)

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<sup>6</sup> The proposed rule would not override other statutory or regulatory provisions requiring the use of specific rates such as PBGC's regulation on Duties of Plan Sponsor Following Mass Withdrawal (29 CFR part 4281) which specifies actuarial assumptions for valuing benefits.

the estimated date of plan insolvency, expected investment mix, and/or funded ratio, and (b) permitted withdrawal liability assumptions.

Under § 4213.11(c) of the proposed rule, each assumption and method used, other than the interest assumption, would have to be reasonable (taking into account the experience of the plan and reasonable expectations). Additionally, the assumptions and methods other than the interest assumption would, in combination, have to offer the actuary's best estimate of anticipated experience under the plan. Note that the standards under proposed § 4213.11(c) echo the current standard for selecting actuarial assumptions for multiemployer funding under section 431(c)(3) of the Code and section 304(c)(3) of ERISA, which has been updated since the enactment of ERISA.<sup>7</sup> As with assumptions adopted under those sections, assumptions used under § 4213.11(c) would reflect the actuary's judgment as an independent professional generally bound by actuarial standards of practice. The standards in proposed § 4213.11(c) would apply to assumptions and methods other than interest assumptions. As discussed earlier in this preamble, consideration of the anticipated experience of the plan in selecting withdrawal liability interest assumptions is not necessarily appropriate in light of a withdrawing employer's lack of continued shared investment experience.

PBGC requests comments on whether the final rule should specify assumptions or methods other than interest assumptions. Also, if PBGC were to specify assumptions under section 4213(a) of ERISA that included demographic assumptions, such as mortality assumptions, that differed from plans' demographic assumptions, would plans be unlikely to use the PBGC assumptions because of those differences? If so, why? Although PBGC is specifically requesting comments on the issues discussed earlier in this preamble, PBGC also invites comment on any other issue relating to section 4213 withdrawal liability assumptions.

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<sup>7</sup> See section 9307(b) of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87) (Pub. L. 100-203).

## **Applicability**

The changes in this proposed rule would apply to the determination of withdrawal liability for employer withdrawals from multiemployer plans that occur on or after the effective date of the final rule. The proposed rule does not preclude the use of an interest rate assumption described in proposed § 4213.11(b) to determine unfunded vested benefits before the effective date of the final rule.

## **Regulatory Impact Analysis**

### *(1) Relevant Executive Orders for Regulatory Impact Analysis*

Under Executive Order (E.O.) 12866, Office of Management and Budget (OMB) reviews any regulation determined to be a “significant regulatory action.” Section 3(f) of E.O. 12866 defines a “significant regulatory action” as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the E.O.

OMB has determined that this proposed rule is economically significant under section 3(f)(1) and has therefore reviewed this rule under E.O. 12866.

E.O. 13563 supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in E.O. 12866, emphasizing the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. It directs agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net

benefits (including potential economic, environmental, and public health and safety effects, distributive impacts, and equity).

PBGC has provided an assessment of the potential benefits, costs, and distributive impacts associated with this proposed rule.

## *(2) Introduction and Need for Regulation*

Benefit levels in a multiemployer plan are typically set by trustees representing contributing employers and unions. As discussed earlier in this preamble, withdrawal liability generally represents an employer's share of the plan's unfunded vested benefits (UVBs) that the plan may have at the end of the plan year immediately preceding the plan year in which the employer withdraws. Withdrawal liability is the portion of the UVBs allocable to the withdrawing employer and represents a plan's only opportunity to require a withdrawing employer to pay its allocated share of the unfunded liabilities. When a plan does not collect an adequate amount of withdrawal liability from a withdrawing employer or collects an amount that is less than a withdrawing employer's allocated share of the plan's UVBs, that burden is shifted to the remaining contributing employers in the plan. There is a higher likelihood that the plan will not be able to pay full accrued benefits, and ultimately, there is an increased likelihood that it would not have resources to pay basic (PBGC-guaranteed) benefits. In that case, a plan may have to cut benefits to the PBGC guarantee level and apply to PBGC for financial assistance, which shifts costs to plan participants and to others in the multiemployer insurance system who fund PBGC via annual premiums.

This proposed rule is needed to clarify that a plan actuary's use of 4044 rates represents a valid approach to selecting an interest rate assumption to determine withdrawal liability in all circumstances. The proposed rule would thereby reduce or eliminate the cost-shifting effects of impediments to actuaries' use of 4044 rates:

- As noted earlier in the preamble discussion, several recent court decisions (and an unknown number of arbitration decisions) have required plans to re-assess withdrawal liability using

interest assumptions based on anticipated investment returns rather than 4044 rates (or a blend using such rates), resulting in lower withdrawal liability assessments.

- The delay, expense, and risk of adverse judgment involved with arbitration and litigation may provide an incentive for plans to settle withdrawal liability claims for less than the amount of withdrawal liability determined by the plan actuary, even in cases where the withdrawal liability dispute is not arbitrated or litigated.
- Recent court decisions may deter actuaries from using 4044 rates (or a blend incorporating such rates) instead of interest rate assumptions based solely on anticipated plan investment returns.

### *(3) Regulatory Action*

Under this proposed rule, actuaries would be able to determine an employer's withdrawal liability on the basis of interest rate assumptions ranging from plan funding rates to 4044 rates, provided that the other assumptions and methods selected meet certain specified requirements.

Because PBGC expects the proposed rule will reduce the litigation risk for plans associated with selection of the interest assumption, PBGC believes that more plans will use 4044 rates, which would tend to increase withdrawal liability and a plan's collection of withdrawal liability assessments. PBGC also believes that increasing plans' withdrawal liability income would have an overall positive effect on the multiemployer system and PBGC's multiemployer program. It is also consistent with PBGC's mission to enhance the retirement security of workers and retirees.

### *(4) Estimated Impact of Regulatory Action*

For the reasons discussed earlier, this proposed rule would tend to increase the amount of withdrawal liability that multiemployer plans assess and collect.

The aggregate economic impact of this proposed rule is best measured by the amount of additional withdrawal liability that multiemployer plans are expected to receive from withdrawing employers. PBGC estimates that, in the 20 years following the final rule's effective

date, there will be a nominal increase in cumulative withdrawal liability payments ranging between \$804 million and \$2.98 billion. A 20-year time horizon was chosen to show the impact on withdrawal liability payments which, depending on the circumstances of the withdrawal, can last as long as 20 years, and to capture the impact on plans receiving SFA (which must calculate withdrawal liability using 4044 rates for at least 10 years). However, because the assumptions underlying this analysis become more speculative as projections reach further into the future, PBGC cannot reasonably estimate the impact after 20 years. While PBGC expects that the proposed rule will deter employer withdrawals, it will do so only at the margin, and this impact is difficult to estimate. Accordingly, this analysis does not model any change to the rate of employer withdrawals or decrease in contributions due to improved plan funding attributable to these changes because doing so would be too speculative.

Currently, the aggregate amount of withdrawal liability paid into the multiemployer plan system each year (taking into account the result of any dispute resolution process) is approximately \$1.3 billion, based on a PBGC analysis of attachments to 2018 and 2019 Form 5500 Schedules MB.<sup>8</sup> As discussed later in this Regulatory Impact Analysis, because the increase in withdrawal liability paid to a plan (and the mechanics of how such increase would come about) would depend on how it currently calculates withdrawal liability, PBGC makes assumptions in this analysis about how plans currently calculate withdrawal liability. For the purpose of this analysis, in the absence of reliable data, current withdrawal liability calculations are assumed as follows: (a) plans for which the Schedule MB was signed by an actuary from the firm associated with the largest number of plans use a blend of funding interest rates and 4044 rates and (b) for remaining plans, 80 percent use funding interest rates and 20 percent use 4044

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<sup>8</sup> The 2019 Form 5500 instructions provide that all employer and employee contributions for the plan year must be shown on line 3 of the Schedule MB. If any of the contributions reported include amounts owed for withdrawal liability, a list of withdrawal liability payments and the dates such amounts were contributed must be attached.

rates. Further, to simplify the analysis, 4044 rates are assumed to be 3 percent, an approximation of current 4044 rates.

PBGC's measurement of the increase in annual withdrawal liability paid attributable to this proposed rule depends on two primary assumptions: (1) the number and size of plans that change withdrawal liability assumptions because of this rulemaking (switching assumption), and (2) the value of reductions in withdrawal liability either directly resulting from the order of an arbitrator or judge interpreting section 4213(a)(1) of ERISA or agreed to by plans in recognition of the risk of similar arbitration and litigation outcomes that would occur if this proposed rule is not finalized (dispute resolution assumption). Due to a lack of reliable data upon which to base these assumptions and because the effect of the proposed rule could vary widely because it allows for a range of approaches, this analysis shows impacts when these assumptions are set at three different levels.

Because the impact is expected to be substantially lower in the first 10 years after the effective date of the final rule than in the period thereafter, PBGC is separating the impact into two separate time periods: the first 10 years after the effective date of the final rule and the time period thereafter. The reasons for this are as follows: (1) after the final rule's effective date, the number of withdrawal liability payments that would be affected would start at zero and increase over time (before leveling off when substantially all withdrawal liability payments are for withdrawals occurring after the final rule's effective date) and (2) plans receiving SFA under section 4262 of ERISA are required to use 4044 rates for withdrawal liability calculations for at least the first 10 years after receiving SFA, and as a result, this rule would have no impact on withdrawal liability received by such plans in connection with approximately 10 years of withdrawals.

Within each time period, three sets of assumptions are shown in three tables under the "Estimated Impact of Increase in Withdrawal Liability Received" heading with respect to the switching assumption and the dispute resolution assumption. Row (a), the switching assumption,

represents the assumed percentage of plans for which the plan is assumed to change from using funding interest rate assumptions to 4044 rates as a result of this proposed rule. The percentages represent what PBGC believes to be a reasonable range of the percentage of plans assumed to be using funding interest rates for withdrawal liability purposes that would switch to 4044 rates.

Row (b), the dispute resolution assumption, represents, for plans currently using 4044 rates or a blend using such rates, in the absence of this rule, the assumed reduction in withdrawal liability payments received by plans due to litigation outcomes, or similar reductions done voluntarily as a result of the threat of litigation. This reduction is measured as the percent reduction in the difference between the expected value of withdrawal liability payments calculated using 4044 rates and the expected value of withdrawal liability payments calculated using funding rates. In calculating the estimated annual increase in withdrawal liability payments, it is assumed that after the rule is effective, plans using 4044 rates or a blend using such rates will receive the expected value of withdrawal liability payments for a given assessment without a reduction due to settlements. The dispute resolution assumption assumes that no plans currently using 4044 rates would, in the absence of this proposed rule, switch from using 4044 rates to funding rates. Assuming that some plans would switch would increase the annual economic impact to some extent.

The following tables summarize the estimated annual increases to withdrawal liability payments received by multiemployer pension plans and the present value of those increases at 3 percent and 7 percent discount rates:

**Estimated Impact of Increase in Withdrawal Liability Received:**

<b>Estimated Impact Years 1-10 (\$ Millions)</b>			
(a) % of Plans Switching to 4044 Rates	5%	10%	20%
(b) % of Dispute Resolutions for Plans Using 4044 Rates	2%	5%	10%
<b>Year</b>	<b>Impact</b>	<b>Impact</b>	<b>Impact</b>
1	\$22	\$44	\$89
2	\$23	\$46	\$92
3	\$25	\$48	\$96
4	\$26	\$50	\$99
5	\$27	\$52	\$103
6	\$28	\$54	\$106
7	\$29	\$55	\$109
8	\$30	\$57	\$113
9	\$31	\$59	\$117
10	\$32	\$61	\$120
PV of Impact in First 10 Years (3% Interest)	\$233	\$451	\$898
PV of Impact in First 10 Years (7% Interest)	\$193	\$374	\$746

<b>Estimated Impact Years 11-20 (\$ Millions)</b>			
(a) % of Plans Switching to 4044 Rates	5%	10%	20%
(b) % of Dispute Resolutions for Plans Using 4044 Rates	2%	5%	10%
<b>Year</b>	<b>Impact</b>	<b>Impact</b>	<b>Impact</b>
11	\$47	\$89	\$174
12	\$48	\$91	\$178
13	\$49	\$93	\$183
14	\$51	\$96	\$187
15	\$52	\$99	\$191
16	\$54	\$101	\$195
17	\$56	\$104	\$200
18	\$57	\$107	\$205
19	\$59	\$109	\$209
20	\$60	\$112	\$214
PV of Impact in Years 11-20 (3% Interest)	\$340	\$640	\$1,240
PV of Impact in Years 11-20 (7% Interest)	\$193	\$364	\$706

<b>Estimated Present Value Impact Years 1-20 (\$ Millions)</b>			
(a) % of Plans Switching to 4044 Rates	5%	10%	20%
(b) % of Dispute Resolutions for Plans Using 4044 Rates	2%	5%	10%
Nominal Value of Impact in Years 1-20	\$804	\$1,526	\$2,981
PV of Impact in Years 1-20 (3% Interest)	\$573	\$1,091	\$2,138
PV of Impact in Years 1-20 (7% Interest)	\$386	\$738	\$1,452

Separate from the distributive impacts, because this rule would provide increased certainty in withdrawal liability determinations, plans and withdrawing employers would see substantial cost savings in the form of reduced arbitration and litigation costs.

The major expenses associated with a withdrawal liability dispute are attorney fees, arbitration fees (including fees to initiate arbitration and fees charged by an arbitrator), and fees charged by expert witnesses. Though costs will vary greatly from plan to plan based on the

plan's benefit formula, size of the plan, attorney and expert witness rates, and other factors, PBGC estimates that a withdrawal liability arbitration, measuring from a request for plan sponsor review of a withdrawal liability determination through the end of arbitration would range from \$82,500 to \$222,000. For lengthy litigation, costs can be over \$1 million. Assuming some arbitrations and litigation would be avoided entirely, and others would be less complex because they would not include disputes over interest assumptions, PBGC estimates that this proposed rule would result in an annual savings of \$500,000 to \$1 million, split evenly between plans and employers.

#### *(5) Regulatory Alternatives Considered*

PBGC considered a number of alternatives before deciding to issue this proposed rule. None of the alternatives were as cost-effective as the proposed rule.

One alternative PBGC considered is to not regulate under section 4213 of ERISA. Without a regulation, PBGC would expect a continuation of the recent trend in withdrawal liability dispute resolution toward requiring that withdrawal liability be based on funding rates (or rates closer to funding rates than to 4044 rates). PBGC believes that the adverse effect of employer withdrawals generally contributes to financial stress for plans (and their remaining employers and participants) that the use of 4044 rates in determining withdrawal liability would help alleviate. Inaction would constitute choice of the status quo, which could contribute to plan underfunding, benefit losses for participants, cost-shifting to remaining employers, and higher claims on PBGC's insurance system.

PBGC also considered issuing a proposed rule that would only authorize use of 4044 rates, without addressing the popular practice of using 4044 rates for benefits expected to be covered by existing assets and funding rates for other benefits. This limited approach would address the issue of comparatively low withdrawal liability assessments for plans that choose to use 4044 rates but by not providing flexibility for other plans, it would limit the effectiveness of the regulation.

## Regulatory Flexibility Act

The Regulatory Flexibility Act<sup>9</sup> imposes certain requirements respecting rules that are subject to the notice-and-comment requirements of section 553(b) of the Administrative Procedure Act, or any other law,<sup>10</sup> and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities, section 603 of the Regulatory Flexibility Act requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the proposed rule describing the impact of the rule on small entities and seek public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.<sup>11</sup>

### *Small Entities*

This proposed rule would directly regulate plans by prescribing interest assumptions for their use in calculating withdrawal liability. For purposes of the Regulatory Flexibility Act requirements with respect to this proposed rule, PBGC considers a small entity to be a plan with fewer than 100 participants.<sup>12</sup> This is substantially the same criterion PBGC uses in other regulations<sup>13</sup> and is consistent with certain requirements in title I of ERISA<sup>14</sup> and the Code,<sup>15</sup> as well as the definition of a small entity that PBGC and DOL have used for purposes of the Regulatory Flexibility Act.<sup>16</sup>

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<sup>9</sup> 5 U.S.C. 601 et seq.

<sup>10</sup> The applicable definition of “rule” is found in section 601 of the Regulatory Flexibility Act. *See* 5 U.S.C. 601(2).

<sup>11</sup> The applicable definitions of “small business,” “small organization,” and “small governmental jurisdiction” are found in section 601 of the Regulatory Flexibility Act. *See* 5 U.S.C. 601.

<sup>12</sup> PBGC consulted with the Small Business Administration’s Office of Advocacy before making this determination. Memorandum received from the U.S. Small Business Administration, Office of Advocacy on March 9, 2021.

<sup>13</sup> *See, e.g.*, special rules for small plans under part 4007 (Payment of Premiums).

<sup>14</sup> *See, e.g.*, section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

<sup>15</sup> *See, e.g.*, section 430(g)(2)(B) of the Code, which permits plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

<sup>16</sup> *See, e.g.*, PBGC’s proposed rule on Reportable Events and Certain Other Notification Requirements, 78 FR 20039, 20057 (April 3, 2013) and DOL’s final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).

Thus, PBGC believes that assessing the impact of the proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration<sup>17</sup> under the Small Business Act. PBGC therefore requests comments on the appropriateness of the size standard used in evaluating the impact of its proposed rule on small entities.

Based on its definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that the amendments in this proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Based on data for recent premium filings, PBGC estimates that only 38 of the approximately 1,360 plans covered by PBGC's multiemployer program are small plans. Plans would be able, but not required, to set assumptions to determine withdrawal liability under this proposed rule. As discussed in the Regulatory Impact Analysis, because this proposed rule would authorize a wide range of commonly used interest assumptions, few plans would switch assumptions. In that analysis, PBGC estimated that, for plans currently using funding assumptions (which are assumed to be less than 80 percent of all plans), from 5 to 20 percent would switch to 4044 rates. Consequently, of the 38 small multiemployer plans, PBGC estimates that no more than 6 would switch assumptions.

For a plan that does move to 4044 rates as permitted under the proposed rule, this proposed rule would tend to have a positive economic impact because it would increase the amount of withdrawal liability collected, which could improve the plan's ability to remain solvent and to continue paying participants' benefits. For the few small plans expected to switch assumptions, PBGC estimates that, in the 20 years following the final rule's effective date, the nominal increase in cumulative withdrawal liability payments would not exceed \$1 million. It could also deter employer withdrawals, however, as discussed in the Regulatory Impact

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<sup>17</sup> See, 13 CFR 121.201.

Analysis, it will do so only at the margin, and this impact is difficult to estimate. There would be a higher likelihood that plans that do not use 4044 rates provided by this proposed rule would eventually be unable to pay full benefits at current accrual rates. Plans would also see administrative savings in the form of reduced arbitration and litigation costs because some arbitrations and litigation would be avoided entirely, and others would be less complex because they would not include disputes over interest assumptions. As discussed in the Regulatory Impact Analysis, these savings could be as much as \$82,500 to \$222,000 for reduced arbitration costs and \$1 million in reduced litigation costs for a plan when an arbitration or litigation is avoided. This proposed rule would not have negative impacts or costs on small plans because plans could choose whether to use interest assumptions prescribed by the regulation. PBGC expects the administrative costs, if any, associated with the proposed rule would be de minimis. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), sections 603 and 604 do not apply.

Though this proposed rule would directly regulate plans, as discussed in the Regulatory Impact Analysis, it would indirectly impact employers, including small employers. This is because, for plans that switch assumptions, it would tend to increase the amount of withdrawal liability assessed by plans and withdrawing employers would pay the increases if they were to withdraw. The statutory process for allocating unfunded vested benefits to a withdrawing employer takes into account the employer's contribution history; employers with a history of higher contributions are allocated a larger share of UVBs while employers with a history of lower contributions are allocated a smaller share. Because small employers have small contribution levels, they would see smaller dollar increases in withdrawal liability than employers with large contribution levels. In addition, as discussed, if plans adopt the prescribed assumptions, employers in those plans may be less likely to withdraw. This effect, in combination with the higher withdrawal liability payments for employers who do withdraw, could contribute to the long-term solvency of multiemployer plans. Extended plan solvency

would help ensure that participants and beneficiaries would receive promised benefits, which would enhance their income security and benefit the communities, including small businesses within those communities, in which they live.

PBGC considered declining to prescribe assumptions under section 4213, an alternative that would have less impact on small employers, but as discussed in the Regulatory Impact Analysis, doing so would contribute to plan underfunding. PBGC also considered issuing a proposed rule that would only authorize the use of 4044 rates, an alternative that would have resulted in higher withdrawal liability under section 4213(a)(2) of ERISA in comparison to the proposed rule, and thereby a larger impact on small employers who participate in plans that adopt that approach (but would likely have a smaller adoption rate than the section 4213(a)(2) assumptions in the proposed rule).

#### **List of Subjects in 29 CFR 4213**

Employee benefit plans, Pension insurance, Pensions.

For the reasons set forth in the preamble, PBGC proposes to amend 29 CFR chapter XL by adding part 4213 to read as follows:

#### **PART 4213—ACTUARIAL ASSUMPTIONS**

Sec.

4213.1 Purpose and organization.

4213.2 Definitions.

4213.11 Section 4213(a)(2) assumptions.

**Authority:** 29 U.S.C. 1302(b)(3), 1393.

##### **§ 4213.1 Purpose and organization.**

This part sets forth actuarial assumptions and methods under section 4213(a)(2) of ERISA as an alternative to the assumptions and methods under section 4213(a)(1) of ERISA for determining withdrawal liability.

##### **§ 4213.2 Definitions.**

For the purposes of this part:

*Single effective interest rate* means for a given interest assumption, the single rate of interest which, if used to determine the present value of the plan's liabilities, would result in an amount equal to the present value of the plan's liabilities determined using the given assumption, holding all other assumptions and methods constant.

**§ 4213.11 Section 4213(a)(2) assumptions.**

(a) In general. Withdrawal liability may be determined using actuarial assumptions and methods that satisfy the requirements of this section. Such actuarial assumptions and methods need not satisfy any other requirement under title IV of ERISA.

(b) Interest assumption (1) General rule. To satisfy the requirements of this section, the single effective interest rate for the interest assumption used to determine the present value of the plan's liabilities must be the rate in paragraph (b)(2) of this section, the rate in paragraph (b)(3) of this section, or a rate between those two rates.

(2) The rate in this paragraph (b)(2) is the single effective interest rate for the interest assumption prescribed in § 4044.52 of this chapter for the date as of which withdrawal liability is determined.

(3) The rate in this paragraph (b)(3) is the single effective interest rate for the interest assumption under section 304(b)(6) of ERISA for the plan year within which the date in paragraph (b)(2) of this section falls.

(c) Other assumptions. The assumptions and methods (other than the interest assumption) satisfy the requirements of this section 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.

Signed in Washington, DC.

**Gordon Hartogensis,**

Director,  
Pension Benefit Guaranty Corporation.

[FR Doc. 2022-22304 Filed: 10/13/2022 8:45 am; Publication Date: 10/14/2022]