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<u>PROPOSED PBGC REGULATION ALLOWS USE OF MINIMUM FUNDING RATE, SECTION 4044 RATE, OR ANY RATE IN BETWEEN FOR WITHDRAWAL LIABILITY</u>

On October 14, 2022, the PBGC issued a proposed regulation regarding the interest rate assumption for withdrawal liability calculations by multi-employer ERISA plans. Court decisions had rejected widely-used methods of arriving at such assumptions. In response, the regulation allows a plan to use the interest rate set forth elsewhere in PBGC regulations, the rate of return the plan uses to determine its funding requirement, or any rate between the two. This welcome regulation restores certainty, gives plans flexibility, and reinforces plan solvency.

When it must calculate withdrawal liability, a multi-employer plan (or its actuary) uses certain assumptions. As relevant here, the plan must assume an interest rate (the "discount rate") to determine the present value of its future benefits. Discount rate calculations take a number of factors into account, including two other rates. The first is the rate that applies to other withdrawals, such as mass withdrawals. That rate is published by the PBGC under 29 C.F.R. § 4044 ("4044 rate"). The second rate—which is typically higher—is the plan's expected rate of return on investments. These and other factors are often blended to arrive at the discount rate.

Recent court decisions rejected this practice. For example, in the *Sofco* case, the Sixth Circuit held that a blended discount rate violated 29 U.S.C. § 1393(a)(1) because it did not take plan experience into account and was not the best estimate of anticipated experience, as that statute demands. *Sofco* held (and other decisions have held) that the plan was required to use the rate of return as the discount rate. This would increase discount rates, which lowers withdrawal liability. The PBGC noted the potential uncertainty and lower payments, and acted.

29 U.S.C. § 1393 allows the PBGC to issue regulations that prescribe withdrawal liability assumptions. 29 U.S.C. § 1393(a)(2) allows a plan to follow these regulations, and if it does so, that statute provides that the assumptions satisfy 29 U.S.C. § 1393. A court will not ask whether those assumptions are "reasonable" or a "best estimate," only if they follow the regulations.

Here, the regulation—the first the PBGC has ever issued pursuant to 29 U.S.C. § 1393—is direct, clear, and brief. It provides that the discount rate must equal the 4044 rate, the rate of return, or any rate on a spectrum between those two rates. The regulation does not address calculation methods; any rate on that spectrum, however arrived at, may be used

Plans should celebrate this regulation. Over decades, plans and actuaries had developed sophisticated discount rate calculation methods and assumptions that did not adhere to either the 4044 rates or the rate of return, but that were valued because they reflected the complexity of post-employer-withdrawal plan experience. The court decisions threatened to sweep away this knowledge and force the use of a high discount rate, generating low withdrawal liability. Further, those decisions only applied to certain states, so regional or national actuarial firms would have had to develop multiple sets of assumptions, based on plan (or employer) location. This frustrated a primary goal of ERISA—uniformity. This regulation reimposes uniformity, and it does so in a way that restores control to plans. The regulation allows them to continue to use formulas developed over time and informed by experience, as long as the result falls on a spectrum. It also simplifies calculations for regional and national firms. Finally—and in contrast to the court decisions—the regulation protects funds fiscally by not reducing withdrawal liability through an inflated discount rate. For all these reasons, plans should welcome this regulation.

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