Employee Benefits
In Focus
Pitta LLP
For Clients and Friends
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PENSION PLAN BAILOUT FINAL RULE EXAMINED

As previewed in our In Focus article dated July 13, 2022, entitled "PBGC Issues Final Rule to Rescue Distressed Multiemployer Pension Plans," the Pension Benefit Guaranty Corporation ("PBGC") issued an interim final rule outlining its Special Financial Assistance ("SFA") Program on July 8, 2022 to take effect on August 8, 2022. In short, the SFA Program provides eligible multiemployer defined benefit pension plans with sufficient funds to pay benefits due during the period from the date of receipt of SFA through the plan year ending in 2051.

The final rule amends the interim final rule by: (i) modifying the method used to calculate the amount of SFA a plan could receive, (ii) increasing the allowable investment vehicles for SFA funds and their potential earnings, (iii) modifying the requirements for plans that merge with a plan that receives SFA, and (iv) modifying the withdrawal liability conditions applicable to a plan that receives SFA. Though named the final rule, the PBGC continues to welcome comments on the rule albeit limited to the condition that requires a plan to recognize SFA in the plan's determination of withdrawal liability.

The final rule will not apply to plans that submitted applications prior to its effective date unless those plans refile applications pursuant to the final rule's regulations. Under the final rule, applications must be filed no later than December 31, 2025 while revisions to a previously filed application must be filed no later than December 31, 2026. The list of Priority Groups set forth in the interim final rule has not changed and thus, the original Priority Group schedule remains current. The new SFA application has five sections, which include requests for the following items: plan identifying information, certain plan documents including SFA-related plan amendments, an enrollment form for the transfer of funds, plan data including an SFA determination, plan financial statements, the SFA application checklist and other certifications.

Among other changes, the final rule modifies the definition of the SFA measurement date from "the last day of the calendar quarter immediately preceding the date the plan's application was filed" to "the last day of the third calendar month immediately preceding the date the plan's initial application for [SFA] was filed." For example, if a plan files an application on March 15, 2023, then its SFA measurement date would be December 31, 2022.

Consistent with the interim final rule, the final rule provides that plans terminated by mass withdrawal are not eligible to receive SFA. In fact, there are only four types of multiemployer plans eligible to apply for SFA. These include: (1) a plan in "critical and declining status" as defined by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), in any plan year beginning in 2020, 2021, or 2022, (2) a plan that

suspended benefits pursuant to ERISA as of March 11, 2021, the date the American Rescue Plan Act of 2021 became law, (3) a plan certified to be in critical status as defined in ERISA that is less than 40% funded and has a ratio of active to inactive participants of less than 2 to 3 in any plan year beginning in 2020, 2021, or 2022, and (4) a plan that became insolvent after December 16, 2014 (the date the Multiemployer Pension Reform Act of 2014 became law), has remained insolvent and has not terminated as of March 11, 2021. A multiemployer plan is insolvent "as of the first day of the plan year in which it is projected to have insufficient" funds to pay benefits due during that plan year.

In the final rule, the PBGC also adjusted the expected rate of return on SFA assets to be used in calculating the amount of SFA a plan would need to cover its liabilities through the end of 2051. In contrast, in the interim final rule, the PBGC provided that the same investment-return assumptions should be used to project both SFA assets and non-SFA assets. Commenters criticized PBGC's approach, suggesting that if the same interest rate was used to project the value of both SFA and non-SFA assets but SFA investments were restricted to investment grade bonds then the SFA amount would be insufficient to pay all benefits due through the end of 2051. In response, the PBGC adjusted the rules to provide that plans receiving SFA have "two separate pools of assets" to be invested separately with "different expected rates of return." PBGC also removed some of the restrictions on investments of SFA assets by expanding the permissible investments allowed for these assets. The final rule permits plans that receive SFA to invest up to 33% of SFA assets and earnings thereon in return-seeking assets and 67% in investment grade fixed income securities.

A plan that receives SFA must comply with certain terms, conditions, and reporting requirements such as the filing of an annual statement detailing compliance with the terms and conditions. The PBGC is permitted to conduct regular audits of plans that receive SFA. For more resources regarding the final rule, including application instructions and a fact sheet issued by the PBGC, please click here.

DC CIRCUIT JOINS SIXTH CIRCUIT LIMITING PERMISSIBLE METHODS FOR CALCULATING WITHDRAWAL LIABILITY

On July 8, 2022, the prestigious and powerful U.S. Court of Appeals for the District of Columbia joined its sister Sixth Circuit Court in holding that an actuary's calculation of withdrawal liability for a multiemployer pension plan must be based on the actuary's best estimate of the actual plan experience, typically known as the funding method, rather than on other widely accepted actuarial methods not "particular to the plan." While not mentioned by name, the D.C. Circuit's reasoning effectively disallows a widely used calculation formula known as the "Segal Blend." *United Mine Workers of Am. 1974 Pension Plan v. Energy West Mining, Co*., No. 20-7054, 2022 WL 2568025 (July 8, 2022). *Accord*, *Sofco Erectors, Inc. v. Trustees of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407 (6th Cir. 2021).

When Energy West Mining Company ("Energy West") withdrew from the United Mine Workers of America 1974 Pension Plan (the "Plan"), the Plan actuary calculated withdrawal liability of $115 million using a "risk-free" rate mirroring fixed annuities, at about

2.7%, rather than using the Plan's historic investment performance or minimum funding rate of 7.5%, which yielded only $40M in withdrawal liability. The lower the rate of the assumed asset growth, the fewer assets the Plan would have over time and, therefore, the more withdrawal liability money needed. The Plan justified the calculation based on longstanding actuarial guidance and the concept that when an employer withdraws, its liability is settled and fixed "risk-free" like an annuity. Both an arbitrator and district court agreed with the Plan. The D.C. Circuit, however, did not, and, as a result, reversed the district court and vacated the arbitration award.

Judge Rao, joined by Judges Walker and Sentelle, citing the Multiemployer Pension Plan Amendments Act ("MPPAA"), held that withdrawal liability must be calculated using "the actuary's best estimate of anticipated experience under the plan." From this language, the Court held that "the actuary was required to base his assumptions on the Plan's actual characteristics" or anticipated investment experience based on actual Plan experience. Since the Plan actuary ignored actual Plan experience in favor of a risk-free fixed income method, the assessment could not be the actuary's "best estimate of anticipated experience under the plan," reasoned the Court, and, therefore, was improper under the MPPAA. The decision does not discuss the widely used Segal Blend calculation method but it would also appear inappropriate for the DC Circuit's purposes since the Segal Blend melds the annuity and funding methods together for something less than the actual Plan experience. While *Energy West* is not binding outside of the D.C. Circuit, its reasoning and holding will surely influence arbitrators, district courts and courts of appeals such as the Second and Third Circuits in upcoming cases.

Energy West contains some significant wrinkles. First, the Court did not require the actuary to use the exact funding method but instead allowed for some minor variances. Second, the Court did not discount the possibility of using a fixed income formula if indeed that was the Plan's actual or projected experience for all, most or even some investments, even if designated for withdrawal liability. Third, and most significantly, perhaps, the Court noted that its holding comes in the absence of the Pension Benefit Guarantee Corporation's ("PBGC's") regulations that, if and when issued, would replace judicial guidance, such as *Energy West*, under the MPPAA. However, even here, the ground is unfirm. Given recent Supreme Court decisions undercutting administrative agency powers, it is unclear whether even PBGC rules approving the Segal Blend or other methods beyond "minimum funding" would resolve the issue or merely result in the rules themselves being challenged procedurally or substantively as irrational in light of *Energy West* and *Sofco*.

HOUSE WAYS AND MEANS CHAIRMAN PENS LETTER TO GAO SEEKING ANSWERS TO RISKS ASSOCIATED WITH CRYPTOCURRENCIES

We reported on the Department of Labor's ("DOL's") Compliance Assistance Release No. 2022-01 (the "Release") in our April and May Employee Benefits In Focus issues entitled "Are Retirement Plans Ready to Invest in Cryptocurrencies?" and "Is the Department of Labor's Anti-Crypto Guidance Foreshadowing of a Regulatory Change?" Most recently, in June 2022, we reported on the legal challenges faced by the DOL in an article entitled "DOL's Anti-Crypto Guidance Faces Legal Challenges." This time we report on a letter dated June 15, 2022, where House Ways and Means Chairman Richard Neal asked the U.S. Government Accountability Office ("GAO") to conduct research to assess the risks associated with cryptocurrencies.

In his letter, Chairman Neal states that defined contribution plan ("DC") providers have indicated that employers who sponsor DC plans will have the choice to permit their employees to invest their savings in cryptocurrencies. As a result, concerns have arisen regarding Americans' retirement security should they invest in cryptocurrencies due to the "volatility and limited oversight" on this type of investment. Chairman Neal, citing data from the Federal Reserve to show the predominance of DC plans in the United States stated that millions of older Americans rely on DC plans. In fact, at the end of 2021, for federal, state, and local workers and retirees, DC plans held more than $1.3 trillion in assets while in the private sector, DC plans held over $9.4 trillion in assets.

Specifically, Chairman Neal requested that the GAO prepare the following:

- A compilation of the types of firms, by size, that offer investment options for cryptocurrencies and a description of the "extent to which" these firms are offering said investment options.
- An explanation regarding the way in which DC plans "administer cryptocurrency investment options" and an assessment of "their valuation, the types and levels of fees associated with them, and safeguards, if any, that plan fiduciaries report using to maintain their fiduciary obligations to participants and beneficiaries."
- An evaluation of: 1) the "oversight of cryptocurrency investment options in 401(k) plans by the relevant agencies," 2) any "guidance federal agencies provide to plan sponsors, participants, and beneficiaries about investing in cryptocurrencies" and 3) the "current restrictions, if any, on investments in cryptocurrencies in 401(k) plans."

As noted above and as recent events have confirmed, Chairman Neal's concerns with the volatility and limited oversight of cryptocurrencies were prescient as prices of cryptocurrencies have plummeted in the past several weeks. We will continue to report on developments in this rapidly changing area as they occur.

A FEW REMINDERS

(Based on calendar-year plans)

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines that may be applicable to your plan.

JULY

ALL PLANS

- **Summary of Material Modifications ("SMM")**
  - July 29, 2022 is the deadline by which plan administrators must furnish an SMM to participants and beneficiaries receiving benefits explaining a material plan change that was adopted in Calendar Year 2021 unless a revised Summary Plan Description containing the modification was already distributed.

HEALTH AND WELFARE PLANS

- **Transparency Rule – Disclosure to Public**
  - July 1, 2022 is the deadline by which plan administrators must post machine-readable files related to in-network negotiated rates and out-of-network allowed amounts on a public-facing website.
    - This requirement is applicable to: group health plans and health insurers.
    - This requirement is not applicable to: excepted benefits plans, account-based plans or grandfathered health plans.

DEFINED BENEFIT PLANS

- **Quarterly Installments of Required Contributions**
  - July 15, 2022 is the deadline by which second quarter 2022 contributions are due.

DEFINED CONTRIBUTION PLANS

- **Cycle 3 Plan Document Restatements**
  - July 31, 2022 is the deadline by which all pre-approved defined contribution plans must restate plan documents.

AUGUST

ALL PLANS

- **Form 5500 Series (Annual Return/Report of Employee Benefit Plan) and Schedules**
  - August 1, 2022 is the deadline by which a plan administrator must file the Form 5500 unless an extension is granted after filing the Form 5558 before the due date (while the due date is July 31, 2022, because it falls on a Sunday, it may be filed on the next day that is not a Saturday, Sunday or legal holiday).

HEALTH AND WELFARE PLANS

- **Form 720, Quarterly Federal Excise Tax Return**
  - August 1, 2022 is the deadline by which self-insured group health plans must pay fees to the Patient-Centered Outcomes Research Institute ("PCORI") through the Form 720 (while the due date is July 31, 2022, because it falls on a Sunday, it may be filed on the next day that is not a Saturday, Sunday or legal holiday).

DEFINED BENEFIT PLANS

- **Form 5330**
  - August 1, 2022 is the deadline by which the Form 5330 must be filed to report and pay certain excise taxes related to employee benefit plans (while the due date is July 31, 2022, because it falls on a Sunday, it may be filed on the next day that is not a Saturday, Sunday or legal holiday).
- **Form 8955-SSA**
  - August 1, 2022 is the deadline by which the Form 8955-SSA must be filed with the Internal Revenue Service (while the due date is July 31, 2022, because it falls on a Sunday, it may be filed on the next day that is not a Saturday, Sunday or legal holiday).

DEFINED CONTRIBUTION PLANS

- **Form 5330**
  - August 1, 2022 is the deadline by which the Form 5330 must be filed to report and pay certain excise taxes related to employee benefit plans (while the due date is July 31, 2022, because it falls on a Sunday, it may be filed on the next day that is not a Saturday, Sunday or legal holiday).
- **Form 8955-SSA**
  - August 1, 2022 is the deadline by which the Form 8955-SSA must be filed with the Internal Revenue Service (while the due date is July 31, 2022, because it falls on a Sunday, it may be filed on the next day that is not a Saturday, Sunday or legal holiday).
- **Second Quarter Pension Benefit Statements**
  - August 14, 2022 is the deadline by which benefit statements for the quarter ending June 30, 2022 must be sent to participants and beneficiaries.
- **Lifetime Income Illustrations**
  - August 14, 2022 is the deadline by which the initial lifetime income illustrations must be included with quarterly statements for the quarter ending June 30, 2022.

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information is accurate, complete, useful or current. Accordingly, Pitta LLP is not responsible for any claimed damages resulting from any alleged error, inaccuracy, or omission. This communication may be considered an advertisement or solicitation.

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