

Intersector Group Meeting with the U.S. Department of Treasury and Internal Revenue Service Notes

May 3, 2017

Twice a year the Intersector Group meets with representatives of the U.S. Department of Treasury (Treasury Department) and the Internal Revenue Service (IRS) to discuss regulatory and other issues affecting pension practice. The Intersector Group is composed of two delegates from each of the following actuarial organizations: American Academy of Actuaries (Academy), Conference of Consulting Actuaries (CCA), Society of Actuaries (SOA), and ASPPA College of Pension Actuaries (ACOPA). Attending from the Intersector Group at this meeting were Bruce Cadenhead (CCA), Tom Finnegan (ACOPA), Ted Goldman (Academy), Tonya Manning (CCA), John Markley (ACOPA), Maria Sarli (SOA), and Josh Shapiro (Academy). Monica Konaté, the Academy staff member supporting the Intersector Group, also attended.

These meeting notes are not official statements of the Treasury Department or the IRS and have not been reviewed by their representatives who attended the meeting. The notes merely reflect the Intersector Group's understanding of Treasury Department/IRS representatives' views expressed at the meeting, and are not to be construed in any way as establishing official positions of the Treasury Department, the IRS, or any other government agency. The notes cannot be relied upon by any person for any purpose. Moreover, the Treasury Department and the IRS have not in any way approved these notes or reviewed them to determine whether the statements herein are accurate or complete.

The discussion topics shown in regular typeface were submitted to the IRS in advance of the meeting. The discussion summary is in italics.

Part I: Input from the profession

- Questions from the profession
 - What should we know about how things will operate differently under the new administration that will allow us to better support pension plan sponsors?
Did not discuss.
 - How does the new administration affect the current priorities? What's dropped, what's been added? Can/will new regulations be issued?
Did not discuss.
 - What are the implications of the focus on repealing regulations, and specifically the resolution to remove two regulations for every one proposed? What counts as a "regulation"?
Did not discuss.

- How will repeal work—for example, must an entire regulation be repealed or can only sections or subsections be repealed, leaving the rest intact?

Did not discuss.

- Would it be helpful for us to provide a list of regulations to consider, along with discussion of the reasons for their inclusion?

IRS pointed us to Notice 2017-28—This notice comes out every year asking for input on IRS’ priority guidance plan, but the notice asked additional questions this year. Comments received are all considered, and IRS finds it helpful to hear from us on areas we think are high-priority.

In making suggestions about regulations, IRS asked for us to focus on things like whether the regulation:

- *resolves significant issues or lessens burdens;*
- *is outdated;*
- *is unnecessarily burdensome or not effective;*
- *promotes sound tax administration; and*
- *can be administered uniformly.*

IRS always tries to reduce burdens, but there is an added focus now. IRS appreciates our interest and comments.

- We’ve now been without the gray book Q&A’s for one year. We feel this has left a gap in our ability to help plan sponsors. Is there anything we can do as a profession to help fill this gap? Are there other ways to respond to these issues as they arise?

IRS has looked at doing Chief Counsel Advice (CCA) memoranda, which have higher reliability than the gray book, and help identify IRS’ current thinking. However, they still can’t be relied upon. CCAs are public and are often targeted at abuses. If IRS thinks an answer is clear but there is confusion about it among the public, IRS will put its view out as a CCA. The public can write a letter asking for that type of advice. Example: You think the person down the street is overly aggressive in an interpretation, and as a result is taking clients away from less-aggressive practitioners—that is perfect for a CCA if the IRS believes the issue in question is clear.

IRS mentioned “Ask the Experts” panels (not comprised of IRS representatives), with government employees in the audience (like at the 2017 Enrolled Actuaries Meeting Q&NA)—IRS believes these are useful forums to both IRS and practitioners as long as a range of viewpoints is represented from the panelists. These sessions help IRS to formulate issues for its priority guidance plan—members of the actuarial profession can also make suggestions directly.

When IRS representatives are on panels at meetings, a list of anticipated questions to the panel in advance is helpful, so they can prepare in advance and indicate, in advance, if there are questions they are unable to address.

IRS emphasized that the problems with the gray book were (i) overreliance without a clearance process and (2) questions were tough and took a long time, so they were very resource-intensive. IRS did find gray book questions helpful when working on guidance.

IRS did not like the idea of the profession putting out questions with suggested answers because people might think that if IRS did not publicly come out against the answer, that would mean IRS agrees. If questioners gave two different potential answers, that might be OK. The question is—what will people think when they read it? Will they think it has IRS imprimatur? Must be sure it is not presented as semiofficial or presented in such a way that people might misinterpret it to be semiofficial. The gray book was never an official answer to anything, but it was treated that way, with no clearance process. The time spent on the gray book was more than on some regulation projects.

Attendees from the Intersector Group indicated that without a way to get questions answered, people are really concerned that IRS examiners will take a different position on unclear rules and force costly, retroactive corrections and penalties. IRS indicated that with respect to audits, if plan sponsors don't make every decision "against the government," they will be in a better place.

The Employee Plans group has provided information to examiners (e.g., they did this on the topic of DC plans and the maximum of two loans in a lookback period).

Industry Issue Resolution—This program is intended to address facts and circumstances situations IRS sees on audit. It is often used to tell plan sponsors what sort of documentation is needed to have on audit to prove their case—not necessarily to solve legal issues. Industry issue resolutions involve more operational staff (Employee Plans) and chief counsel is not typically involved.

IRS has established a [video portal](#) that is similar to IRS Phone Forum, but available on demand. For example, there is a [presentation](#) on the Employee Plans Compliance Resolution System (EPCRS) and Revenue Procedure 2016-51 on the portal. Rollouts of new guidance are very good topics for phone forums or on-demand videos.

The Intersector Group expressed the view that what is missing in the regulation process is for IRS to ask the profession for feedback on what IRS is thinking before a proposed regulation is issued. IRS responded that at the public hearing on a proposed regulation, IRS has the opportunity to ask questions of people who made comments, and so doing improves IRS' understanding of practitioners' concerns. The Intersector Group indicated that it would be better if that dialogue could happen before the proposed regulation stage—that is, before IRS has staked out a proposed position. Dialogue would be more useful than just sending IRS comments.

IRS said it aims to be open, fair, and follow the Administrative Procedures Act (APA). White papers from the profession are particularly helpful. When groups

ask for something, often IRS will ask for a white paper, and often that gets something onto the priority guidance plan, or gets meetings scheduled. IRS can't share information in any such meeting; it needs to be in listening mode.

IRS indicated that for a number of projects (the Affordable Care Act especially) it went through a three-step process – (1) IRS is thinking of these things, and seeks comments from practitioners; then (2) IRS writes a proposed regulation and gets more comments; then (3) regulations are finalized. That approach is resource-intensive.

- Specific issues for discussion

- Finalizing mortality table regulations

The Intersector Group questioned whether these regulations are “economically significant” and affected by the “two-for-one” rule from the Office of Management and Budget. The Intersector Group also expressed concern about the timing of release of the §417(e) mortality table, and preparation of benefits packages for early 2018 commencements. IRS could not discuss.

- Finalizing the update to minimum present value requirements (§417(e)) regulations

The Intersector Group expressed two possible technical concerns.

The proposed regulations make clear that the minimum present value under §417(e) includes a pre-retirement mortality discount, regardless of the plan's death benefit. However some plans do not reflect this discount, providing more than the §417(e) absolute minimum. It would seem there may be a problem with the “QJSA most valuable” rule because then the lump sum will be more valuable than the QJSA to a degree not required by §417(e).

Secondly, the proposed regulations could be read to imply requirements about calculation of benefits for post-NRD retirements (i.e., use of a mortality increment whether or not a full death benefit is provided). IRS did not provide any feedback as to whether that was intended.

- Change in funding methods

The Intersector Group noted that many unanswered questions exist about mergers and spin-offs, including IRC §436 concerns. We indicated that a webinar on mergers and spinoffs and funding method approval would be useful, focusing on how to make it a less painful process and covering things similar to the tips IRS representatives on the 2017 Enrolled Actuaries Meeting panel on funding method changes covered (e.g., reminding people to follow up if they don't hear in six or eight weeks, make sure the most recent revenue procedure is used, use the correct address (not McPherson Station), pay the right fee, etc.). There is a

new Revenue Procedure every year (usually with the same number after the year) that people should follow.

The Intersector Group discussed the comment letter on mergers and spinoffs (focusing on IRC §430 and §436) that the Academy sent in 2011, and indicated that nothing seems outdated in there—the Intersector Group believes what was suggested still works and the suggestions would be the same if the letter were written today.

- Relief for closed DB plans' nondiscrimination testing

The Intersector Group suggested that the aspects of the regulations that cannot be relied upon until the regulations are finalized be permitted to be relied upon in the interim (e.g., the ability to skip the gateway if a plan sponsor can pass the General Test using a 6% normalization rate). IRS was unable to share any information about the status of the regulation project.

- Addressing open issues related to variable annuity and hybrid plan designs (pending letters from the Academy)

The Intersector Group discussed the issue of the prescribed discount rate and the assumed return on assets for funding purposes for variable annuity plans (VAPs), and distinguished the VAP situation from the use of other prescribed assumptions an actuary might disagree with. For other prescribed assumptions, if those prescribed assumptions are realized, the actuary will have the right funding target. But for VAPs, if it is assumed that the §430 discount rates apply, and an assumed "best estimate" expected return on assets must be used to project the benefit adjustments, and if the prescribed assumptions are realized, then the actuary will have the wrong funding target—it is guaranteed to be wrong.

In any event, it would be helpful to have certainty one way or the other as to the IRS view on the funding rules for VAPs.

IRS could not address the substance of the argument. But IRS asked, given its limited resources, what is the importance of this issue? The Intersector Group responded that while there are not a lot of VAPs, there are some longstanding, very big plans, and there are newer plans in the smaller plan market. The Intersector Group indicated that for some employers VAPs are a good alternative to simply going DC, but the uncertainty around the funding rules gets in the way. There is just a really big difference between the two viewpoints on the correct funding approach. In response to IRS's question, the Intersector Group also indicated that there is a significant law firm market for VAPs because they provide a better match of assets and liabilities, so partners don't think they put in \$1 million and get out \$750,000. In addition, there is rapidly growing interest among multiemployer plans; there the issues are different, because the discount rate is not prescribed, but uncertainty exists about how far you can deviate from the pure model in plan design by adding features designed to mitigate participant benefit volatility.

IRS suggested a white paper on these issues would be very useful.

The Intersector Group asked whether the §430 funding question raised above could be answered even if IRS did not have the resources to tackle all the issues. IRS responded that the ripples of the answer were too wide to be able to address narrowly.

The Intersector Group indicated that if there are follow-up questions to the letter the Academy intends to send, and the upcoming practice note, the Intersector Group would like the opportunity to respond.

IRS indicated that there is a distinction between accrual issues and funding issues for VAPs and there is a tendency to conflate the issues and suggested that, in any comments made, the Intersector Group clearly separate the issues of (i) accrual rules, (ii) employer discretion, (iii) §411(a)(9) (the normal retirement benefit cannot be less than any early retirement benefit), and (iv) funding.

- Market rate hybrid plans (e.g., projection rates for accrual rules, IRC §415, nondiscrimination testing)

IRS said sooner would be better than later (for sending the upcoming Academy letter).

- DC and DB QLACs

The Intersector Group brought up the topic of the feasibility of adding Qualifying Longevity Annuity Contracts (QLACs) to DB plans and indicated that it is happy to provide information if IRS would find that helpful. IRS indicated that it hasn't forgotten about this topic, but it is on the back-burner. The Intersector Group agreed that it is in the category of "nice to have but not must-have," so a lower priority is probably the right decision.

We discussed theories around why use of annuities in IRA/§401(k) plans is low. IRS believes take-up rates for QLACs/annuities will go up when interest rates go up.

Part II: Issues from IRS/Treasury

For each of the topics below, IRS would be interested in hearing about:

- Common practice(s)
- Feedback as to whether there are enough questions and variations in practice to warrant issuing guidance
- Whether some practitioners and/or plan sponsors are taking aggressive positions that should be addressed in future guidance

Topics:

- Adjusted Funding Target Attainment Percentage (AFTAP) certifications

- Timing—are there issues with plan sponsors trying to influence the timing to delay imposing/removing §436 benefit restrictions or any issues with range certifications?

The Intersector Group indicated that there are currently fewer plans subject to restrictions due to interest rate stabilization. Typically the actuary wants the plan sponsor to dictate when the AFTAP will be certified—the actuary does not want to be a fiduciary.

The group discussed whether plan sponsors drag their feet, and suggested it was more about wanting to make contributions first so they don't go into restrictions and come out when a contribution is made, and not wanting to accelerate contributions. There is not a lot of dragging feet to avoid imposing or lifting restrictions when contributions that will make a difference are not pending, but there is certainly an administrative concern if plan sponsors can't administer it immediately after the AFTAP is certified, because there is no time allowed for implementation. More issues with the timing of AFTAP certifications may arise if interest rates go down due to the widening of the interest rate stabilization corridor.

- Mergers/spinoffs
 - AFTAP certification/presumptions; actual rate of return used to update funding balances

The Intersector Group indicated that its views on how this should work remain consistent with the 2011 Academy letter.

- Change in the enrolled actuary (EA) for the plan—what do people consider to be the effective date of the change?

The Intersector Group suggested that the reason for the funding balance election process is for the plan sponsor to know what is going on, so the group suggested that maybe there should be some sort of common-sense easy to follow rules for transitions in EA because the plan sponsor typically understands what is going on with the EA change and was not intending to change elections as a result.

IRS indicated that the question was not about standing elections specifically—it is asking more broadly: “When does the EA change?” IRS wants to figure out the right way to do this. The Intersector Group indicated that it believes the change doesn't occur when a new actuary signs a contract or is awarded the business, but after he or she reproduced the prior actuary's numbers so that the new actuary can sign off on things. For changes in EA within the same firm, the group believes the change occurs when the new actuary does something (e.g., signs an AFTAP, receives a funding balance election) that “the plan's enrolled actuary” is supposed to do.

IRS indicated that it is strange when the prior actuary signs the 2016 Schedule SB and the 2017 Schedule SB, and the new plan actuary signs the 2018 AFTAP in the middle. (IRS seems to be looking at things chronologically, but because in practice it is more

about who is doing the valuation for the plan year, the scenario just described is what will typically happen if a new actuary is appointed for the 2018 plan year). IRS asked: Who is the EA for the plan in that interim period? Is the lack of any other AFTAP that is signed evidence that the new EA who signed the AFTAP is the EA for the plan year?

The Intersector Group made the point that there is never any confusion among the client and the EAs involved about who the EA is, which the group believes is what is important.

We discussed that in practice we have suggested refreshing standing elections to the new EA, or doing new elections to both EAs, just to be safe with elections and standing elections.

- DB plans that adjust the benefit accrued for a given year based on the asset return for the prior year

Some plans amend accruals based on past investment experience, rather than having a potentially more complicated VAP. This is not widespread among multiemployer plans, but the Intersector Group indicated that for both multiemployer and single-employer plans, there is some desire to help mitigate investment losses for plan sponsors without going to a full VAP. The group pointed out, however, that if experience is bad and a plan sponsor reduces accruals to \$0, current employees are being penalized to preserve benefits for prior employees, and perhaps the effect of investment losses should better align with the people the experience relates to.

- Hybrid plans with interest credit choice based on age

While the hybrid regulations technically allow this, there is a lot of technical uncertainty (e.g., are there age discrimination issues?), so plan sponsors are not yet adopting hybrid plans with interest credit choices based on age.

- Cash balance plans with market-based interest crediting rates (including “participant choice” plans and plans that base the interest crediting rates on the return on plan assets)

See answer above; due to uncertainty, significant numbers of new plans or plans adding these features do not now exist, but those that already existed have many technical uncertainties to grapple with.

Part III: IRS/Treasury Selected Insights

Discussion on interaction with the IRS, including:

- Constraints on IRS’s ability to participate in conferences and other outside meetings—travel expenses, meeting size, etc.

Not discussed.

- Use of formal versus informal channels for comment / discussion

Discussed above.

Part IV: Top retirement issues

- Top retirement policy issues practitioners are hearing from plan sponsors—reason for discussing is that it could determine future IRS, Treasury, PBGC, or DOL priorities and activities.
 - Managing frozen DB plans and potential uptick in terminations if economy and markets create a conducive environment

Not discussed.
 - Issues associated with aging plan populations (e.g., closed DB plans, post-NRD issues, missing participants)

Not discussed.
 - Risk transfers—continued focus on lump-sum cash-outs and annuity purchases

Not discussed.
 - Multiemployer plan long-term sustainability (in light of the Multiemployer Pension Reform Act)

Not discussed.
 - Security of PBGC multiemployer program and run-off consequences for the single-employer program

Not discussed.
 - Public defined benefit pension plan long-term sustainability

Not discussed.
 - Emergence of DB risk-sharing types of programs

The Intersector Group said that an example of this type of program is composite plans; other countries are exploring this option (e.g., Netherlands, Canada). IRS asked for more information about what these programs look like. The group said that DC plans are getting smarter—automatic enrollment and escalation is the first step. The next step is more personalized: using different rates of auto-enrollment (i.e., individual default rates) based on what is known about the participant, and refreshing those auto-enrollment rates throughout the employee’s working lifetime. In other words, using behavioral science to keep employees on a path to a secure retirement. This is an emerging concept. The draw-down component in these programs also adjusts for gains and losses automatically. Participants would be able to opt out.
 - Lifetime income in defined contribution plans—need for more workable options

Not discussed.

- Evolution of behaviorally driven defined contribution solutions—personalized default and active choice programs

Not discussed.

- Expanded access to retirement plan savings vehicles

Not discussed.

- Tax reform—effect on retirement programs

Not discussed.

- Social Security long-term solvency

Not discussed.