Intersector Group Meeting With

the U.S. Department of Treasury and Internal Revenue Service—Notes

January 24, 2023 (Virtual Meeting)

Periodically the “Intersector Group” (“the Group”) meets with representatives of the Internal Revenue Service (IRS) and the Department of the Treasury (“Treasury”) to discuss regulatory and other issues affecting pension actuarial 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 American Society of Enrolled Actuaries (ASEA). Attending from the Intersector Group at this meeting were Bruce Cadenhead (Academy), Kelsey Mayo (ASEA), Eric Keener (SOA), Ellen Kleinstuber (CCA), Tonya Manning (CCA), David Pazamickas (Academy), Maria Sarli (SOA) and Virginia Wentz (ASEA). Linda K. Stone, Academy senior pension fellow, and Philip Maguire, Academy staff member supporting the Intersector Group, also attended.

These meeting notes are not official statements of the IRS or Treasury and have not been reviewed by its representatives who attended the meetings. The notes are a reflection of the Intersector Group’s understanding of the current views of IRS and Treasury representatives and do not represent the positions of the IRS, Treasury, or of any other governmental agency and cannot be relied upon by any person for any purpose. Moreover, the IRS and Treasury have not in any way approved these notes or reviewed them to determine whether the statements herein are accurate or complete.

Discussion topics were submitted by the Intersector Group to the IRS and Treasury in advance of the meeting and are shown in regular typeface below; a summary of the discussion is shown in italics.

Discussion Topics

Schedule SB and Schedule MB filings

The first issue is with the handwritten signature/initials requirement. We are aware of a plan sponsor that was assessed a $16,500 penalty for an unsigned Schedule SB, even though they had followed the filing instructions exactly, and had initialed the SB in the back (vs. p. 1). When discussing the situation with the IRS, the IRS agreed that the penalty probably should not have been assessed. Nonetheless, the plan sponsor still must go through the steps of requesting a reconsideration from the IRS. It would be helpful to have a change/clarification to these requirements on Schedule SB and MB filings in order to avoid these types of situations.

The second issue is one that plan sponsors often ask about—their need to retain a hard copy version with a "wet signature" in their files in these days of virtual work and digital storage. It would be helpful for the IRS to reconsider this requirement.

The third issue is clarification on the IRS' enforcement policy related to these sorts of filing issues and whether the IRS is no longer following along with the Department of Labor (DOL) timeline of 45 days.

Here is some additional detail on these issues.

There are two signature requirements

1. One on the version submitted to the Form 5500 vendor and then to the Department of Labor (DOL)
    - Issues are:
        - People do not always have equipment to print, sign, and scan
        - Inserting an image of a signature or initials does not seem to be in compliance
        - Even if you do insert an image of a signature or initials, they can get dropped when files are uploaded depending on how they are created
        - Inserting a signature or initials is no more demonstrative that the signer did that work than the typed name
2. One on the hard copy of the SB provided to the plan administrator sponsor
    - Issues are:
        - People do not always have equipment to print
        - With the pandemic and people not in offices, these copies are not always sent or they do not get to a file
        - Electronic records are an acceptable standard

Below are the current instructions from the 2021 5500.

Statement by Enrolled Actuary

An enrolled actuary must sign Schedule SB. The signature of the enrolled actuary may be qualified to state that it is subject to attached qualifications. See Treasury Regulations section 301.6059-1(d) for permitted qualifications. If the actuary has not fully reflected any final or temporary regulation, revenue ruling, or notice promulgated under the statute in completing the Schedule SB, check the box on the last line of page 1. If this box is checked, indicate on an attachment whether any unpaid required contribution or a contribution that is not wholly deductible would result if the actuary had fully reflected such regulation, revenue ruling, or notice, and label this attachment "Schedule SB – Statement by Enrolled Actuary." In addition, the actuary may offer any other comments related to the information contained in Schedule SB. *Except as otherwise provided in these instructions, a stamped or machine produced signature is not acceptable.*

> The actuary must provide the completed and signed Schedule SB to the plan administrator to be retained with the plan records and included (in accordance with these instructions) with the Form 5500 or Form 5500-SF that is submitted under EFAST2. *The plan's actuary is permitted to sign the Schedule SB on page one using the actuary's signature or by inserting the actuary's typed name in the signature line followed by the actuary's handwritten initials*. The actuary's most recent enrollment number must be entered on the Schedule SB that is prepared and signed by the plan's actuary.

The question about a Schedule SB/MB electronic signature has been asked before. It is being discussed among the three agencies (IRS, Pension Benefit Guaranty Corporation [PBGC], and DOL). A change must be agreed to by all three agencies. A change would also have to be proposed and subject to a comment period. The 2024 changes to the SB/MB are due very soon, so any change would likely be later. IRS will consider it.

There has been no change in the enforcement penalties that IRS is aware of. The IRS attendees questioned whether the penalty for violating the grace period was really assessed by IRS rather than DOL. The campus where materials are received is an assembly line—they look for what they are told to look for where they are told to look for it. You must put the initials on the signature line—they won't look for it somewhere else. An issue like this would have to be remediated later based on the specific facts of the situation.

Audit Program

It would be helpful if you were able to share additional information on the 90-day heads-up audit program such as when these will commence and the scope of the pilot program with regard to how many plans are expected to be included.

Back in May 2022, IRS took 100 cases and sent the plan sponsors a letter asking them to self-correct any failures, and in 90 days IRS would come out and begin a full examination if a response was not received. Plans were allowed to self-correct any errors identified during the 90-day period. IRS asked about Internal Revenue Code (IRC) section 415 violations specifically, but sponsors could correct anything they found. This initiative was done by four groups in the mid-Atlantic area.

IRS received responses from 72 sponsors. Of these, 60 provided the full information IRS asked for. The remaining 12 provided partial responses, and IRS went back and asked for more information. Twenty-eight plan sponsors didn't respond.

Fifty-four cases have now closed with no action based on the information provided—they were "no change exams." The remaining 18 provided partial information and IRS is still working on getting information, and if they get it, those cases will also be closed. The 28 who did not respond have now been sent audit letters. Some plan sponsors initially thought it was a phishing *scheme. IRS is strongly considering making the program permanent, but it may not work for all cases—for example, they do not expect that it would work for complex issues/cases. The plan is to expand the program to cover more qualification issues so that more plan sponsors may see this type of examination and will get the chance to self-correct and avoid a full examination. It is good for both the plan sponsors and IRS.*

The Intersector Group asked whether IRS is open to comments on the types of cases where this will work best—via a comment letter, for example. The answer was yes—practitioners can comment on the timeframe (currently 90 days), which plans should be offered this approach, etc. The group noted that some plan sponsors thought they needed to do a full compliance review of every plan operation in the 90-day period to respond fully to the pre-examination letter. IRS did not expect that plan sponsors could complete a full compliance review in 90 days. The group also inquired about the ability to get an extension of time to respond. IRS indicated that the deadline was not a hard 90 days—IRS would be reasonably flexible if the plan sponsor was being responsive and working with IRS.

Relief From In-Person Notarization Requirements
We have seen that remote notarization has been very beneficial for plan participants. We are interested in your thoughts on making this relief permanent/extending it beyond the upcoming expiration.

IRS issued a proposed amendment to 29 CFR Part 1, which would make remote notarization a permanent option for plans and participants. The guidance is welcome and ASEA intends to submit a comment letter.

Plan Funding in Advance of Plan Document Signature
We have seen some instances where the trust account is opened before the plan document is signed. The employer then funds the plan—and only later signs the document. It would be helpful to hear your view on this situation.

The group explained that these mistakes are made because the plan sponsor does not understand the order of operations, and financial institutions allow a trust to be opened without evidence of a signed plan document. IRS asked, is this a short time before the plan document is signed? The group responded that it is usually days or at most weeks, it is usually not months and months.

The government representatives have never heard of this situation, view it as a strange fact pattern, and don't have a reaction.

The group indicated that the questions are: Would those contributions not be deductible, not count toward minimum funding, etc.? In response to an IRS question, the group also indicated *that this is happening due to the SECURE Act because the funding deadline is so immediate to the creation of the plan. IRS asked whether this was a defined contribution plan issue as well. The group indicated that it had only seen the issue for defined benefit plans but that it could apply to either.*

Form W4-P and W4-R

The new W4 instructions and worksheets are required to be included as part of paper benefit election kits (rather than simply directing people where to find the instructions). This requirement results in a programming expense for administrators and often requires going to duplex printing to avoid having the package to be too large to fit in the usual delivery envelope. Plan sponsors find this requirement does not help compliance with their sustainability goals. Our experience in plan administration is that generally participants are not asking questions about Form W4-P and W4-R (optional lump sum withholding).

It would be helpful to hear the IRS' perspective on consequences for plan sponsors who decide not to comply (i.e., not printing the instructions and worksheets to Form W4 and including in a mailed paper election packet).

The group indicated that, for the logistical reasons described above, this can be a very expensive proposition to implement, for very little added benefit to participants, who can easily access this information through web addresses. This requirement is not in a regulation; it is only on the Additional Guidance for Substitute and Telephonic Submissions of Forms W-4P and W-4R page on the IRS website, which was updated in September 2022. The Intersector Group asked more generally what force of law such a piece of guidance has.

IRS representatives did not seem to believe adding these written pages was a burden (noting that it was only a few pages) and expressed concern about participants who do not have access to the internet. They noted that this requirement has been added to the 2023 Instructions for Publications 15-A and 15-T. They did not comment on the force of law question.

Substitute Mortality Tables (SMT)—Impact of COVID-19

During our last meeting, we discussed the potential impact of the COVID-19 pandemic on the years of experience used in SMTs. At that time, the IRS had not seen any experience study periods that included the years of the pandemic. The IRS had no specific recommendations, other than indicating it would require a discussion in the filing of the effect of the COVID years on both the mortality observed and the demographics more generally (e.g., termination of employment, retirement patterns).

It would be helpful if the IRS could share any updates to this recommendation on preferred approaches based on your recent experience as that would be useful to ensure that applications are being filed with the necessary information.

The group indicated that the question really is whether 2020 and 2021 must be included in the experience years. If those years don't show elevated mortality compared to other years, there would not seem to be an issue, but if they do, does IRS have any recommendations as to what could be done to get an SMT approved? Could those years be excluded despite the regulations?

IRS responded that plan sponsors and practitioners must follow the regulations. That may simply mean that a plan sponsor can't request an SMT now if the enrolled actuary doesn't believe the experience that must be included in accordance with the regulations is reasonably predictive. If the actuary thinks it is, submit it and IRS may approve for a shorter time period (e.g., five years rather than 10 years) if they have concerns. You cannot leave out any years or weight them differently. However, the IRS could exclude some of the years from the analysis before approving the SMT.

The government representatives also agreed that the failure to finalize the proposed mortality regulations—and therefore their inapplicability to 2023 plan years—means that the requirement to discontinue use of an SMT if there has been a 20% change in population is delayed (i.e., the requirement to discontinue would apply to 2025 plan years at the earliest).

Plan Termination Filings
Can IRS share any actions that filers can take to facilitate the determination letter review process? To best manage expectations, is there an expected timeframe for these filings to be processed once submitted?

The IRS target is 250 days, but it depends on what comes up in the review. A plan sponsor can ask for a review to be expedited if there is a particular reason that timing is critical. Common mistakes include incorrect user fees and missing plan amendments. IRS will consider coming up with a list of other common errors.

Funding Method Change Filings
It would be useful to hear about any items that submitters should approach differently with regard to these filings in order to facilitate IRS review or any approaches used that are not allowable to try to minimize the back and forth and speed up the process. For example, it is unclear whether or in what circumstances IRS wants to rule on the determination of quarterly contribution requirements.

The Intersector Group asked whether there are any common problems that IRS sees in submissions generally that they'd like cleaned up in the filings and want to get word out about through the Intersector notes.

There is an article on the IRS website on common problems they are seeing. See [Tips for Requesting a Private Letter Ruling on Actuarial Issues](). IRS will work with the plan sponsor when they get a request in and give them the opportunity to revise certain parts of it.

There are certain methods IRS expects to see in a filing—determination of plan assets and minimum required contributions. If they haven't seen a particular fact pattern they may not rule. For example, initially they would not rule on the methodology to determine quarterly contribution requirements. Now they may. They will not rule on the results of a calculation—for example, for benefit restrictions, they will not rule on the calculated value of the AFTAP or a proposal such as "there are no benefit restrictions." But they may rule on methodology, such as how you put a combined AFTAP together for a merger.

Filers also have the option of requesting a pre-submission conference, which may be helpful in identifying potential concerns earlier in the filing process. It would be helpful to understand the IRS view on the particular circumstances where a pre-submission conference would be helpful. Alternatively, if the IRS view is that there is no downside to having a pre-submission conference, then it may be helpful to have this issue be more widely publicized.

IRS does very few of these. They will do one when it is advantageous to both IRS and the plan sponsor. Rev. Proc. 2023-4 discusses these conferences in section 28.07. If a submission has an unusual fact pattern or is nuanced and the plan sponsor wants to make sure all things are considered in the submission, IRS will work with them to perfect the submission. IRS will generally not grant pre-submission conferences in routine cases, but a plan sponsor can always ask. IRS will only grant it if they think it is beneficial.

Benefit Increases for Plans Receiving Special Financial Assistance

Plans receiving special financial assistance (SFA) may adopt benefit increases in limited circumstances during the SFA coverage period. For example, prospective benefit increases may be adopted if paid for by employer contributions not included in the determination of SFA. In addition, 10 years following the receipt of SFA, a plan sponsor may apply to the PBGC for an exemption to the conditions on benefit increases if the plan sponsor can demonstrate—to the satisfaction of the PBGC—that the plan will avoid insolvency following the proposed benefit increase.

IRC section 432(f)(1)(B) has additional restrictions on benefit increases for plans operating during their adoption and rehabilitation periods. Such a plan is able to adopt a benefit increase if paid for by employer contributions not contemplated by the rehabilitation plan, and, after taking into account the benefit increase, the plan is still reasonably expected to emerge from critical status by the end of the rehabilitation period.

It is unclear whether the conditions on benefit increases placed on a plan receiving SFA supersede the restrictions under IRC section 432(f)(1)(B) or whether they must be considered in tandem.

The IRS/Treasury indicated that this was discussed with PBGC when PBGC drafted the final rule under 29 CFR §4262 and noted that the preamble to the final rule states that the "conditions on benefit increases provided under § 4262.16(b) are in addition to the limitations under section 305(f)(1)(B) of ERISA (and corresponding section 432(f)(1)(B) of the Code) applicable to plans in critical status."

If the restrictions on benefit increases under IRC section 432(f)(1)(B) apply to plans receiving SFA, then it is unclear whether they continue to apply when a plan is operating outside of their rehabilitation period. Further there is ambiguity over what it means for a plan receiving SFA to be "deemed" in critical status in this context if a plan's actuary would otherwise certify the plan in the yellow or green zone. Clarification on this topic would be helpful to plan sponsors and actuaries.

The IRS/Treasury declined to comment on these two issues at the meeting. The group noted that some plans receiving SFA will be placed on a path toward long-term solvency—well beyond the 2051 target of SFA. Modest increases to benefits for active participants may re-engage the contribution base and possibly improve the financial security of such plans. Therefore, it would be helpful to have clarification on these issues. The IRS/Treasury then asked the group about the prioritization of multiemployer funding regulations versus other potential future guidance.

Cybersecurity Issues
With the increasing focus on the importance of cybersecurity and developments to improve cybersecurity, the Intersector Group thought it would be helpful to hear IRS perspectives. As an example, the group is aware of an IRS request for participant data where the plan sponsor was not permitted to delete any identifying data. At the same time, the plan sponsor was not comfortable that the IRS had acceptable secure data protocols in place.

A general discussion on this topic would be useful including areas such as the power of the agency (as you see it) to ask for this type of information without a subpoena, who has the obligation to provide it, and protocols in place for transmitting it securely.

IRS indicated they are not aware of any requirement to ask for Social Security numbers and names. IRS generally doesn't want to resort to a subpoena. The plan sponsor could always have a face-to-face audit. IRS does have protocols about disclosing taxpayer information. They believe it should be secure coming in by email, or could exchange it by mail.

They suggested talking to the manager in the group; they should work with you as they take the security of personal information very seriously. They are beginning to roll out Taxpayer Digital

Communication Secure Messaging, which is a way to exchange secure data. But the first step is to push back on the agent as to why they need that information.

30-year Treasury Issues

The group asked whether there was a change in the methodology for determining the 30-year Treasury rate the IRS publishes. It used to match the Federal Reserve's H15 monthly rate (which is the average of the daily values). Is there some sort of methodology change to the monthly averages in the IRS interest rate notice?

Treasury responded that the source of what IRS publishes in the monthly notice is a daily report from the treasury office that issues bonds. The daily report indicates the rate on the most recently issued 30-year bond. For example, three months after the last issuance of a 30-year bond it is really a rate on a bond with 29 years and nine months until maturity. The Federal Reserve publishes Treasury Constant Maturities, which may have been extrapolated to derive a 30-year rate. For current liability, actuaries must use IRS published rates. The source IRS uses is not a source available to the general public; it goes from Treasury to IRS once a month. IRS uses a standard rounding regime; they haven't changed what they are doing in 30 years.

IRS doesn't bridge a non-business day with the next preceding business day; they only average the days on which treasuries are traded. They do the same for the corporate bond yield curve. They drop all days with no trading activity and calculate the average of the remaining days.