



EBEC EXPO2024

Proskauer's Perspective
on Employee Benefits,
Executive Compensation
and ERISA Litigation

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Emerging Multiemployer Plan Issues

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Meet Your Presenters



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Today's Agenda

- Rethinking defined benefit plan investment approaches – no law required
- Withdrawal liability assumptions and the people who challenge them
- The obligatory SFA update





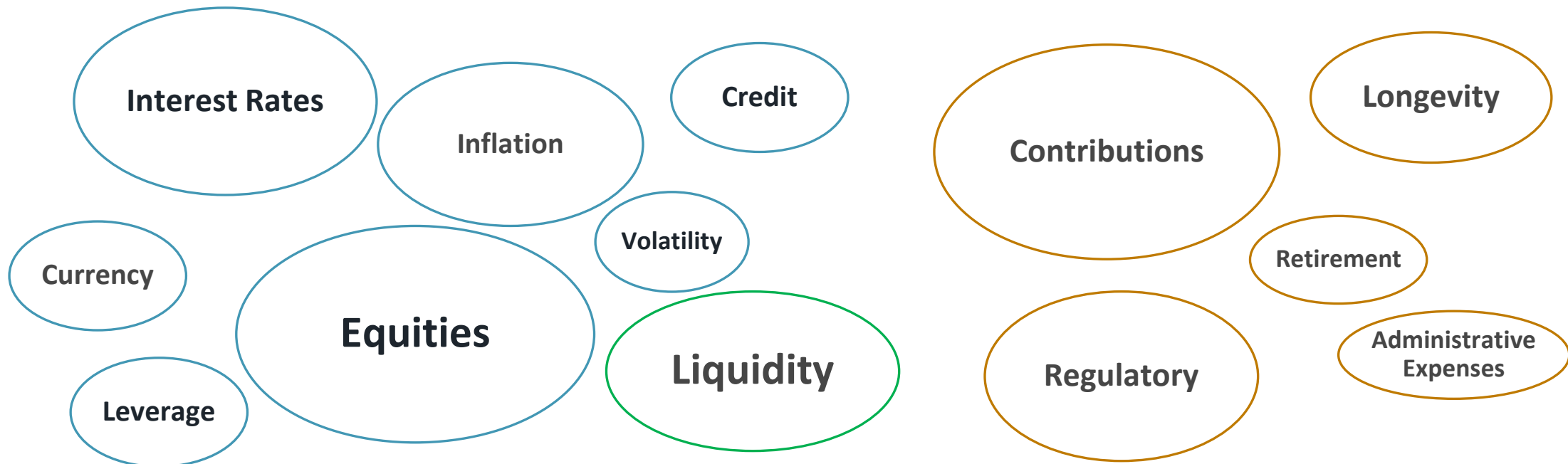
Rethinking Defined Benefit Plan Investment Approaches

Level Setting on DB Investment Approach

- Does your Board spend more time talking about asset allocation or manager selection and performance?
 - ☐ Asset allocation
 - ☐ Manager performance
- Which best describes how your Board sets asset allocation?
 - ☐ Finding an investment mix that efficiently meets the actuary's investment return assumption
 - ☐ Determine what investment mix is mostly likely to satisfy the plan's liabilities but not expose it to too much risk based on the plan's unique features
- Are your actuaries an integral part of the asset allocation discussion?
 - ☐ Yes
 - ☐ No

New(ish) to Actuarial Reports

“The deterministic actuarial models used in this valuation are based on a single set of assumptions and do not take into consideration the risk associated with deviations from those assumptions. The assumptions selected for this valuation – including the valuation interest rate – generally reflect average expectations over the long term. If overall future economic or demographic experience is different than assumed, the level of plan costs determined in this valuation could increase or decrease dramatically in future valuations. In order to better understand the Plan’s risk exposure, a summary of the significant risk factors for this pension plan is provided below. . . .”



More Actuarial Report Language

“More mature pension plans generally have more risk exposure than less mature plans because they have fewer options to correct funding shortfalls that may develop as a result of adverse experience. For example, the contribution rate increase required to offset a year with a poor investment return would be larger for a plan with a decreasing active population than it would be for an otherwise similar plan with an increasing active population.”

Plan 1	Plan 2
Assets: \$200 million Actives: 2,000 Inactives: 2,000 Investment loss: 20%	Assets: \$200 million Actives: 1,000 Inactives: 3,000 Investment loss: 20%
Contribution fix: \$20,000 per active (\$40 million/2000)	Contribution fix: \$40,000 per active (\$40 million/1000)

Can take a case study of two fully funded plans with the same return assumption, one with flat cash flow and one with negative. Both can do fine if the return assumption is achieved, but the one with negative cash flow is less likely to bounce back from volatility.

One More Data Point on Maturity

- Not a big difference in historic investment returns for green zone plans vs. plans in a zone or even critical and declining
- Plans in a zone have higher maturity ratios (non-active to active participants) than green zone plans
- Look at critical and declining plans and green zone plans in 2021

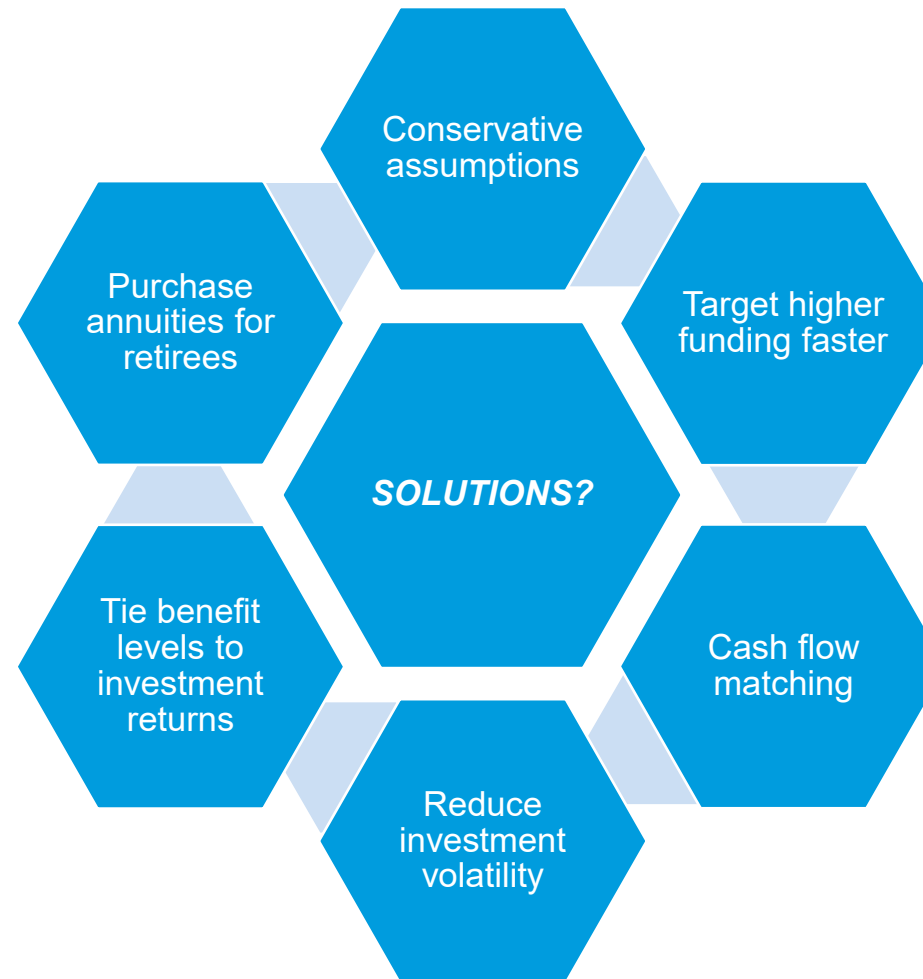
	Green in 2021	C&D in 2021
2001 maturity ratio	0.8	1.7
2021 maturity ratio	1.4	7.2



What I Take from This

- Matching the investment return assumption shouldn't be the sole focus of asset allocation discussions
- Consider investment risk (volatility) but also other risks associated with the unique nature of the plan
 - Funded percentage, demographic maturity, net cash flow, contributions percent of assets, cost of accruals relative to contributions
- Implication of that is that asset allocation should be a discussion with the investment consultant and the actuary
 - Investment risk modeling: current and annual returns to meet objectives, sensitivity testing
 - Contribution risk modeling: changes in active population, baby boomer retirements, industry change, employer withdrawals

Exploring Solutions to the Risks



Back to Our Level Setting

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Withdrawal Liability Assumptions

Update on Discount Rate Challenges

Calculating Withdrawal Liability

- Withdrawal liability is an employer's share of the plan's unfunded vested benefits, which are the plan's:

$$\textit{Vested Benefits} - \textit{Assets}$$

- **Assets** are either marked to market or a multi-year average
- **Vested benefits** are the actuary's projection of non-forfeitable benefits the plan must pay into the future. Because it is a projection, the actuary must make a number of assumptions, the most consequential of which are:
 1. Mortality: how and when benefits will be paid
 2. Discount rate: how to convert the stream of future payments into a current present value
- Mortality assumptions are rarely litigated. The discount rate is commonly challenged when it is lower than the rate used for minimum funding purposes.

Types of Discount Rates

1. Funding rate

2. Risk free rate

- Most common is the PBGC rate for Section 4044 annuities
- PBGC rate must be used to calculate withdrawal liability for mass withdrawals and plans that have accepted SFA

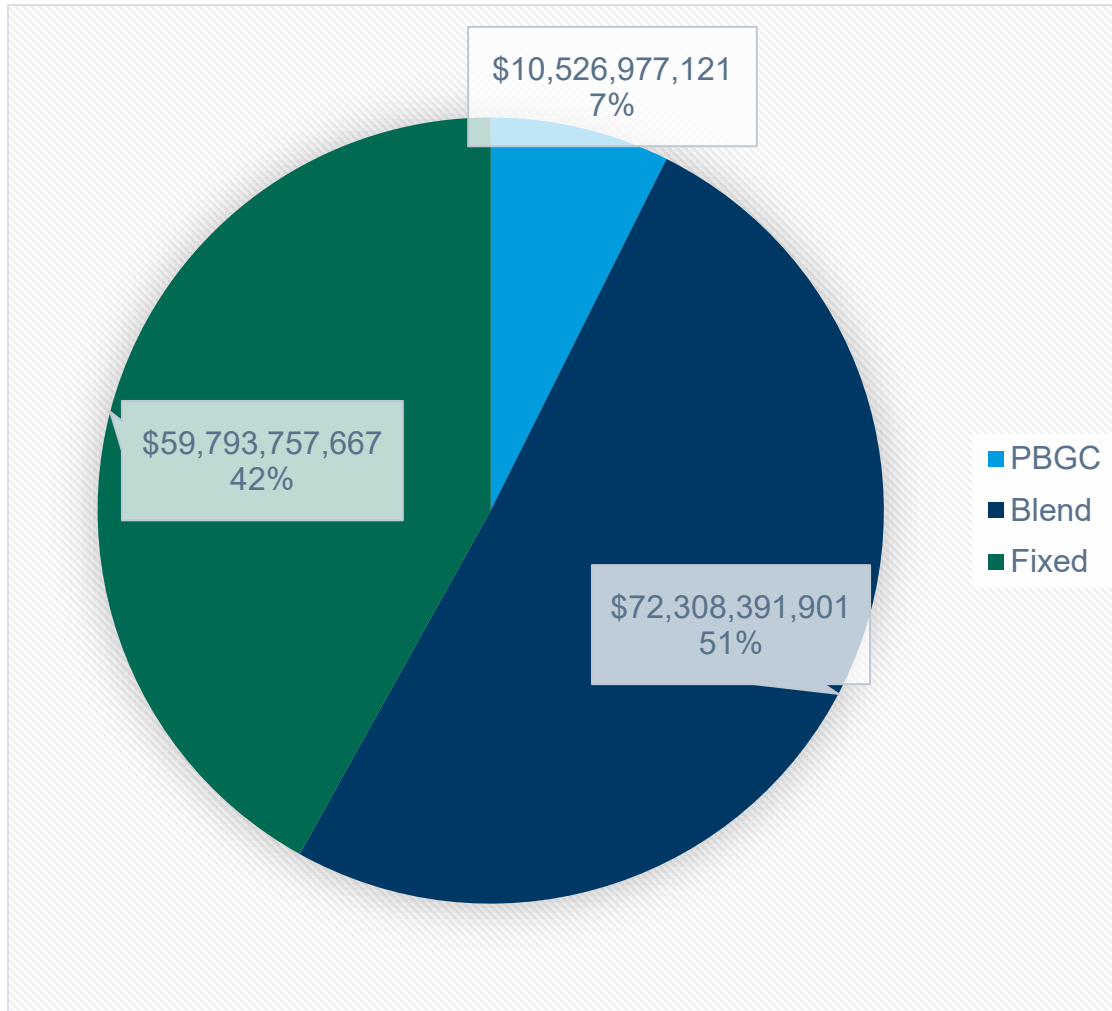
3. Blended rate

- Most common is the Segal Blend, which blends the funding rate and the PBGC rate

4. Other fixed rate, e.g.:

- Funding rate, less anticipated future administrative expenses
- Plan's anticipated return using different assumptions, such as shorter timeframe or more conservative outlook than for funding purposes

Prevalence of Discount Rate Methodologies



- In 2022, there were 526 multiemployer pension plans that were less than 100% funded, of which 242 plans used different discount rates for funding and withdrawal liability purposes.
- These 242 plans have a total of 2.9 million participants and \$143 billion in assets.

PBGC's Proposed Rule

- By statute, PBGC can prescribe a discount rate
- PBGC has prescribed the PBGC rate for mass withdrawals and withdrawals from plans receiving SFA
- In 2022, PBGC proposed a rule permitting any discount rate between the PBGC and minimum funding rates
 - 28 comments received
 - If adopted, would apply prospectively as a safe harbor
 - May be cited as persuasive authority
- Since 2022, PBGC rate has increased from 2->5.5%, narrowing the range of rates that would be permissible under the proposed rule

Types of Discount Rate Challenges

Where actuaries use a lower discount rate for withdrawal liability purposes than for funding, employers have asserted that the lower rate is improper for the following reasons:

1. Its adoption was untimely
2. It was the result of undue influence by the plan's trustees
3. Rates must be the same as a matter of law
4. Rate does not reflect the plan's actual or anticipated experience

Timeliness Challenge

- There is currently a split of authority on the deadline by which an actuary must adopt the methods and assumptions used to calculate withdrawal liability.
 - *National Retirement Fund v. Metz Culinary Management, Inc.*, 946 F.3d 146 (2d Cir. 2020): Actuary must adopt withdrawal liability assumptions by end of the prior plan year (*i.e.*, the “measurement date”), otherwise, previous rate must be used.
 - *Trs. of the IAM National Pension Fund v. M & K Employee Solutions, LLC*, 92 F.4th 316 (D.C. Cir. 2024): There is no deadline, and the appropriate inquiry is whether the actuary selected its assumptions based on information as of the measurement date.

Procedural Challenge

- Selecting the discount rate is entrusted to the professional judgment of the actuary. If the actuary's decision to select a lower discount rate is unduly influenced by the plan's trustees, the discount rate is not the actuary's "best estimate," and is therefore unreasonable as a matter of law.
- Commonly alleged, but few decisions and rarely successful
- Usually used as an argument as to why a particular issue should be interpreted in a particular way – that is, to avoid the risk of undue influence

Statutory Challenge

- Actuaries calculate the current present value of the plan's projected liabilities for two purposes
- Minimum funding under 26 U.S.C. § 431:

For purposes of this section, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods, **each of which is 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.
- Withdrawal liability under 29 U.S.C. § 1391:

Withdrawal liability shall be determined by each plan on the basis of 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.
- Employers argue that once an actuary selects a discount rate for minimum funding purposes, selecting any other number for withdrawal liability purposes cannot possibly reflect the actuary's "best estimate"
 - No court has adopted this argument
 - Rejected by D.C. and Ninth Circuits and several district courts
 - Employers continue to press argument in requests for review, arbitration, and jurisdictions in which the Circuit Court has not resolved the question

Substantive Challenge

- Actuarial justification for lower rate is **risk transfer**
 - Withdrawal liability is a one-time settlement of liabilities, and by withdrawing, the employer transfers to the remaining employers all risk associated with the plan's future underperformances
 - If the plan's assets underperform, the withdrawing employer will have paid less than its proportionate share, and the remaining employers will have to make up the shortfall
 - Because risk has a price, the difference in rates compensates the remaining employers for the added risks with which they are saddled
- Several district courts and the PBGC have recognized risk transfer as an appropriate reason to use a lower rate

The Discount Rate Trilogy

- The justification for a lower discount rate **AND** the rate itself must be reasonable
- The Sixth, D.C., and Ninth Circuits have held that the rate must reflect the plan’s actual or anticipated experience
 - *United Mine Workers of Am. 1974 Pension Plan v. Energy West Mining Co.*, 39 F.4th 730 (D.C. Cir. 2022)
 - *Sofco Erectors, Inc. v. Trustees of Ohio Operating Eng’rs Pension Fund*, 15 F.4th 407 (6th Cir. 2021)
 - *GCIU-Emp. Ret. Fund v. MNG Enterprises, Inc.*, 51 F.4th 1092 (9th Cir. 2022)

	<i>Energy West</i>	<i>MNG</i>	<i>Sofco Erectors</i>
Minimum Funding Rate	7.5%	8%	7.25%
Withdrawal Liability Rate	PBGC rates of 2.71% and 2.78%	PBGC rate of ~4%	Segal Blend using PBGC rates of 2-3%
Holding	PBGC rate is a risk-free rate and has no relation to plan’s investments or their anticipated return		PBGC rate “dilutes” the plan’s anticipated return

The Rate is Unreasonable – Now What?

- Upon finding that the discount rate is unreasonable, the remedy is for an arbitrator to select a different rate or give the actuary a re-do
- In reported decisions, arbitrators that have selected a different rate have selected the funding rate because the actuary testified:
 1. it was the actuary's best estimate of the plan's anticipated experience, and
 2. there was no evidence in the record of an alternative rate reflecting the plan's anticipated experience
- If the actuary gets a re-do, it will have the benefit of being guided by an arbitrator's order and an opportunity to document its decision to adopt the same or different rate

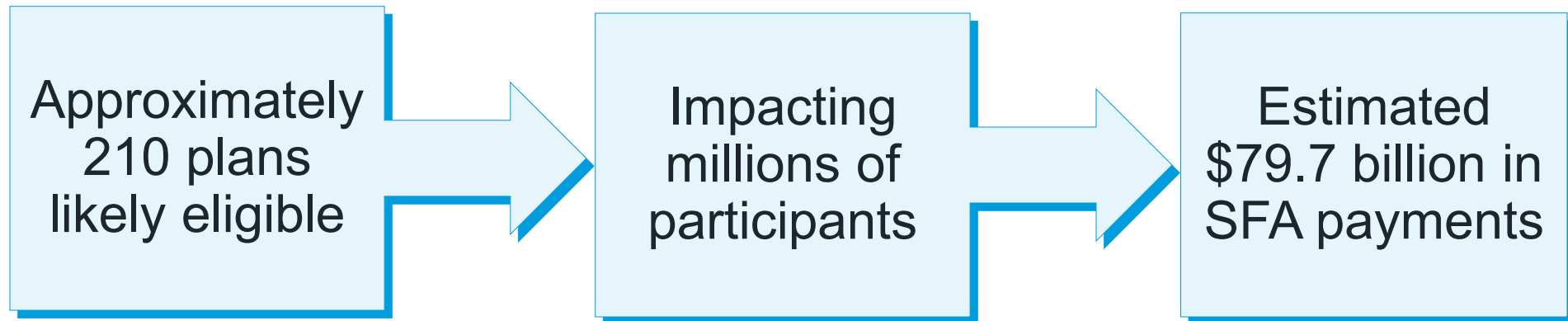


Special Financial Assistance

Summary Update

Special Financial Assistance

The American Rescue Plan Act provides for “special financial assistance” to enhance the prospects that financially distressed defined benefit pension plans will remain solvent until 2051 or beyond.



SFA Applications – Current Status

(as of April 26, 2024)

	<i>Applications Approved</i>	<i>Applications Denied</i>	<i>Applications in Review**</i>
Number of Applications	107*	1	20
Aggregate SFA Monies (approved or requested)	\$53.9 billion	\$132.2 million	\$14.3 billion
Aggregate Participant Count	978,151	1,122	417,457

* Includes 72 full applications and 35 supplemented applications.

** 28 out of the 115 funds on the PBGC's waitlist have been invited to submit their SFA application.

Issues Relating to SFA

- Independent Death Audit impacts application process
- Timing of awards of SFA and the “Waiting List”
- Fiduciary aspects of the investment of SFA
- Audits of plans following plans’ receipt of SFA

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