

2009 Enrolled Actuaries Meeting

Questions to the PBGC and Summary of Their Responses

March 2009

Summary of Discussions between the Enrolled Actuaries Program Committee
and Staff of the Pension Benefit Guaranty Corporation
on February 4, 2009

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on February 4, 2009, with representatives of the Enrolled Actuaries Program Committee. Included also are summaries of the responses to those questions. The summary responses to the questions are intended to reflect as accurately as possible the statements made by the government representatives. However, those responses are merely the current views of the individuals and do not represent the positions of the Pension Benefit Guaranty Corporation or of any other governmental agency and cannot be relied upon by any person for any purpose. Moreover, PBGC has not in any way approved this booklet or reviewed it to determine whether the statements herein are accurate or complete.

The following representatives of the Enrolled Actuaries Program Committee took part in the discussions:

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The Program Committee would like to thank the practitioners who submitted questions for this booklet.

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QUESTION 1

Premiums: Pre-retirement Death Benefits

PBGC's regulation on premium rates (part 4006) and page 16 of PBGC's Comprehensive Premium Payment Instructions for 2009 explain that a qualified pre-retirement survivor annuity (QPSA) does not fail to be vested solely because the participant is still living.

- (a) Is a death benefit in excess of a QPSA vested for premium purposes?
- (b) If a plan has a 100% QPSA for everyone, would it be reasonable to consider the plan as having a 50% QPSA and "other" extra pre-retirement death benefits, so that only the 50% QPSA would be vested for PBGC premium purposes?
- (c) Under § 4006(d)(3) of PBGC's premium rates regulation, a pre-retirement lump-sum death benefit (other than a benefit that returns accumulated mandatory employee contributions) is not vested for premium purposes if the participant is living.

Consider a cash balance plan under which, in lieu of the 50% QPSA, a survivor may elect to receive a pre-retirement death benefit in the form of a lump sum equal to 100% of the present value of the vested accrued benefit. If the assumed form of payment upon death (for valuation purposes) is the lump sum option described above, is the entire pre-retirement death benefit a "pre-retirement lump-sum death benefit" and therefore not vested for premium purposes?

RESPONSE

- (a) The regulation does not address the treatment of death benefits in excess of the QPSA. Pending the issuance of additional guidance, PBGC would not treat a pre-retirement death benefit in excess of the QPSA as vested for premium purposes.
- (b) No. The terms of the plan control. If the plan provides for a 100% QPSA, the value of the QPSA does not fail to be vested for premium purposes solely because the participant is still alive.
- (c) No. The language in part 4006 and the premium instructions on pre-retirement lump-sum death benefits are intended to refer to an incidental death benefit such as a \$5,000 payout to cover funeral expenses. An optional form of payment tied to the accrued benefit is not a pre-retirement lump-sum death benefit.

QUESTION 2

Premiums: Termination Premium Collection Experience

Please describe the PBGC's collection experience regarding the \$1,250 termination premium, whether through ordinary-course PBGC Form T filings or through settlements or litigation both in the bankruptcy context and the non-bankruptcy context (e.g., where a distress termination is approved under Distress Test 3 ("inability to continue in business")). Please include information as to the number of PBGC Form T filings that have been made to date and the total amount of termination premiums paid with such PBGC Form T filings.

RESPONSE

Because PBGC has collected termination premiums through agreements that typically resolve all of PBGC's claims against plan sponsors and controlled group members, the total amount of termination premiums paid is not readily ascertainable. As to litigation, PBGC has appealed the district court's decision in Oneida (Southern District of New York) that the termination premium is a pre-petition bankruptcy claim. The appeal has been fully briefed and argued in the Court of Appeals.

QUESTION 3

Premiums: Termination Premium Applicability

Assume that each member of the controlled group maintaining a plan qualifies for distress under Distress Test 1 (Liquidation), and that, therefore, if the termination is processed as a distress termination, there is no \$1,250 termination premium owed. Assume further, however, that the termination is instead processed as a consensual involuntary termination under ERISA Section 4042. Would a termination premium be owed in such circumstances and, if so, who would pay it and when?

RESPONSE

Under section 4006(b)(7) of ERISA, a termination premium is owed in the event of an involuntary termination under section 4042 of ERISA; therefore the premium would apply in the circumstances described in the question. PBGC will attempt to collect a termination premium whenever it arises. However, the plan sponsor and administrator should contact PBGC to discuss payment options.

QUESTION 4

Premiums: Exemptions from Electronic Filing Requirement

PBGC's regulations mandate e-filing of premium information, subject to PBGC's authority to grant exemptions from the e-filing requirement "for good cause in appropriate circumstances" (29 CFR § 4007.3). Please describe the PBGC's experience to date with any such exemption requests.

RESPONSE

To date, PBGC has received fewer than 10 requests for exemptions from e-filing premium information for 2008 premium payment years. PBGC denied some requests and granted others. For example, PBGC granted a request for an exemption in a case involving the unexpected death of a filing coordinator. In that case, the Plan Administrator contacted PBGC to report that she would be able to submit a paper premium filing by the due date, but that if she had to file electronically, she would file late because she needed time to become familiar with MyPAA. (Alternatively, the Plan Administrator could have filed late and requested a waiver of any resulting penalty.)

PBGC may get a few more requests for e-filing exemptions for 2008 premium payment years, particularly since the earliest due date for small plans to file 2008 premiums is April 30, 2009.

QUESTION 5

Premiums: PBGC Audit and Enforcement Program

Please describe the PBGC's program relating to PBGC premiums, including recent activity, flat-rate and variable-rate premium audit findings and results (along with a brief summary of the most common problems found), and plans for future audits.

RESPONSE

PBGC continues its active Premium Compliance Evaluation Program, which is designed to enforce compliance with PBGC premium requirements and promote voluntary compliance. PBGC uses computer matching and electronic data analysis to identify plans for audit, including potential on-site evaluations. By comparing data contained in Form 5500 databases and Premium databases, PBGC is able to identify non-filers, differences in reported asset figures, and plan type differences. PBGC is also able to identify large participant count changes and other anomalies in the premium database that suggest the need for additional scrutiny. Participant count errors have been associated with improper employee coding, lack of integration between payroll and benefit systems, multiple participant databases, and failure to keep records of participants for whom premiums were paid, and other issues. Maintaining a static copy of electronic databases as of the premium snapshot date and highlighting those participants for whom premiums were paid can serve to streamline evaluations of reported participant counts.

The Pension Protection Act of 2006 (PPA 2006) eliminated the full funding limit exemption from the variable rate premium starting with 2008 plan years. For plan years before 2008, PBGC continues to electronically identify plans that appear to have incorrectly reported that they qualified for the full funding limit exemption.

PBGC is developing a new audit plan for premium filings under the post-PPA 2006 rules (i.e., for 2008 and later plan years). PBGC may investigate such matters as —

- If election to use the alternative premium funding target was in effect, whether a plan reported discount rates consistent with the discount rates used for funding purposes (as reported on Schedule SB);
- If an election to use the alternative premium funding target was not in effect, whether the reported segment rates used to determine the standard premium funding target were the spot segment rates for the month prior to the month in which the plan year begins;
- Whether a plan filed in accordance with an election to use the alternative premium funding target for at least five years;
- Whether a plan reported the same asset value when it reconciled an estimated premium funding target as it reported when it filed the estimated premium funding target; and
- Whether a plan that filed an estimated premium funding target is a large or mid-size plan.

QUESTION 6

Premiums: Effect of Merger on UVB Determination

Assume that Plans A and B, both calendar-year plans, have 1/1 and 12/31 valuation dates, respectively, and that both plans have UVBs for variable-rate premium purposes as of their respective valuation dates. If Plan A were to merge into Plan B effective 7/1/09, would Plan B base its variable-rate premium payment for the 2009 plan year on the combined UVBs of Plans A and B as of 12/31/09, even though Plan A's variable-rate premium payment for the 2009 plan year would have already taken into account Plan A's UVBs as of 1/1/09?

RESPONSE

Plan B's variable-rate premium is based on UVBs on its "UVB valuation date", which in this case is 12/31/2009. Because the assets and liabilities of Plan A were merged into Plan B before this date, they would be included in the UVB calculation. The fact that Plan A's also owes a VRP based on these assets and liabilities (but measured on 1/1/2009) has no impact on the amount owed by Plan B.

QUESTION 7

Premiums: Effect of mid-year benefit increase on value of vested benefits

A calendar year plan with a flat dollar benefit multiplier has a benefit increase adopted before January 1, 2009 (the valuation date) that is scheduled to take effect July 1, 2009 and that will apply retroactively. The increase does not apply to participants who terminate employment before July 1, 2009.

Assuming that under Treasury/IRS rules, the increase is reflected in the funding target as of January 1, 2009¹, is the increase vested for premium purposes as of January 1, 2009, and therefore included in the premium funding target used to determine the PBGC variable rate premium for 2009?

RESPONSE

PBGC's regulation on premium rates (part 4006) provides limited guidance on the meaning of "vested" for premium purposes. Pending issuance of more comprehensive guidance on this matter, PBGC would not treat the benefit increase as vested for premium purposes as of January 1, 2009.

¹ See IRS proposed regulations on measurement of assets and liabilities, 72 FR 74215, Dec. 31, 2007, and 2008 Gray Book Q&A 7.

QUESTION 8

Standard Terminations: Irrevocable Commitment Purchases Before Standard Termination

In its response to Question 7 of the 2007 Blue Book, PBGC described its new audit initiative relating to plans that distribute plan assets in satisfaction of plan liabilities before or without filing a standard termination notice with the PBGC.

- (a) Please describe PBGC's experience in connection with this audit initiative, in particular with large plans purchasing annuity contracts shortly before termination (for example, to lock in favorable interest rates for the benefit of the plan and plan participants)?
- (b) What concerns, if any, would PBGC have in connection with this new audit initiative where a plan that is about to undergo a standard termination purchases irrevocable commitments for all participants in pay status before initiating the standard termination process? What sanction, if any, would be imposed on a plan administrator for purchasing such irrevocable commitments where PBGC concludes that the irrevocable commitments are proper in all respects other than the timing of their purchase?

RESPONSE

- (a) To date PBGC has selected for audit over 120 cases in which plans distributed plan assets in satisfaction of plan liabilities before or without filing a standard termination notice with PBGC. To date, virtually all of these cases involved small plans that did not file a standard termination notice with PBGC and that distributed plan assets through payment of lump sums. After PBGC identifies such a plan, generally when it fails to pay premiums, it requires the plan to file a standard termination notice and post-distribution certification. PBGC is developing procedures to better identify large plans that purchase annuity contracts shortly before termination. As with all standard termination audits, the focus of this audit initiative is to ensure that participants received the benefits to which they were entitled. PBGC reserves the right to take other appropriate action in connection with this audit initiative, including penalties under section 4071 for each missed notice or filing.
- (b) In connection with this audit initiative, PBGC would be concerned that a purchase of irrevocable commitments for all participants in pay status (or for any other participants) before initiating the standard termination process could circumvent the termination requirements, including statutory and regulatory notice and disclosure requirements. The key issue for PBGC would be whether the purchase was made in contemplation of the termination. The analysis of this issue would be done on a case-by-case basis. The PBGC does note, however, that the concern only arises if the purchase is of an irrevocable commitment. A purchase of an annuity contract that is not an irrevocable commitment as defined in section 4001.2 of PBGC's regulations and that is held as an investment asset of the plan (i.e., there is no distribution of plan assets), as is sometimes done by ongoing plans, does not raise these concerns.

If PBGC determines the purchase of irrevocable commitments was made in contemplation of the termination, PBGC would verify the accuracy of the benefits provided, determine whether the annuity contract mirrors the provisions of the plan document, and require the plan to take corrective action where appropriate. In addition, the scope of the audit would increase (e.g., much larger samples) and PBGC might take other appropriate action, including penalties under section 4071 for each missed notice or filing.

PBGC is developing guidance on purchases of irrevocable commitments before a standard termination. Plan sponsors may contact PBGC to discuss any situations in which such purchases are being contemplated (such as to lock in interest rates).

QUESTION 9

Standard Terminations: Lump Sum Amendments

Consider a plan that provides for lump sums to be calculated as the minimum statutorily required amount (i.e., the present value of the normal retirement benefit using 417(e)(3) assumptions) and that is undergoing a standard termination with a termination date in November 2009. Assume that this plan is amended, on or before its termination date, to provide that lump sums with annuity starting dates in or after the 2010 plan year will be calculated as the greater of the minimum statutorily required amount and an amount determined on an alternative basis that satisfies all qualification requirements.

If the distribution takes place in the 2010 plan year and the alternative basis produces higher lump sums, may or must the lump sums be calculated and paid on the alternative basis?

RESPONSE

The lump sums must be calculated and paid on the alternative basis.

QUESTION 10

Standard Terminations: Lump Sum Amendments

How do the PPA 2006 changes in the interest rate and mortality table used in calculating minimum lump sum amounts apply in standard terminations where lump sums are paid in a year subsequent to the year of termination?

RESPONSE

Guidance on this issue was provided in Technical Updates 07-3 and 08-4. In summary:

- Technical Update 07-3 addresses the situation where the plan's termination date is before the PPA 2006 effective date of the changes to IRC 417(e) (i.e., plan years beginning after 2007). In these cases, the PPA 2006 changes do not apply. Minimum lump sums are determined based on the pre-PPA 2006 statutory requirements regardless of when the lump sum is paid.
- Technical Update 08-4 addresses the situation where the plan's termination date is on or after the PPA 2006 effective date of the changes to IRC 417(e). In these cases, assuming the plan was amended to reflect the PPA 2006 changes before termination, the interest rate phase-in percentage and mortality assumption are tied to the annuity starting date², not the year of termination.

For example, assume a calendar year plan is amended in 2008 to reflect PPA 2006 minimum lump sum assumptions and terminates on July 1, 2009. Also assume that the plan has a one-year stability period and a two-month lookback. Therefore, a lump sum paid in 2010 is calculated using the following assumptions:

- Interest — based on the phase-in percentage for the plan year beginning in 2010 and the November 2009 rates. Accordingly, a lump sum paid in 2010 would be determined using a blended rate based on a 60 percent weighting of the November 2009 segment rates and a 40 percent weighting of the November 2009 30-year Treasury rate.
- Mortality — based on the RP-2000 unisex mortality table project, in accordance with IRS rules, for annuity starting dates in 2010.

Technical Updates 07-3 and 08-4 are available at <http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16272.html>) and <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16620.html>) respectively.

² For convenience, this response assumes that the distribution date is the annuity starting date.

QUESTION 11

Standard Terminations: Audits

In the response to Question 6 of the 2007 Blue Book, PBGC stated that it interpreted 29 CFR § 4041.24(a), which requires the issuance of a Notice of Plan Benefits to each person (other than the PBGC and any employee organization) who is an affected party as of the proposed termination date, as not requiring issuance of such a notice to a participant whose benefits are paid out in accordance with 29 CFR § 4041.22 on or before the due date for issuing the Notice of Plan Benefits. Then, in the response to Question 7 of the 2008 Blue Book, PBGC stated that such a participant is to be included among the participants whose distributions of benefit liabilities are certified to and described (by category and amount) in the post-distribution certification (PBGC Form 501), unless the participant's benefits are paid out prior to the plan's termination date. Assuming that such a participant's benefits are not paid out prior to the plan's termination date, would the distribution of benefits to that participant be subject to PBGC review as part of a standard termination audit, even though the affected party's benefits were paid out in accordance with 29 CFR § 4041.22 before the distribution period for the standard termination?

RESPONSE

Yes. A PBGC standard termination audit will generally cover (at least through sampling), at a minimum, any participant or beneficiary who is an affected party as of the plan's termination date, regardless of the timing of the distribution for that affected party.

QUESTION 12

Distress or Involuntary Terminations: Disclosure of Termination Information

Please describe PBGC's experience in connection with any requests that have been made, whether to PBGC or to the plan administrator or contributing sponsor, for information in accordance with PPA section 506 ("Disclosure of Termination Information to Plan Participants")?

RESPONSE

PBGC has received one request (from a labor union) for information in accordance with PPA section 506. The request was made before PBGC published its final rule on Disclosure of Termination Information. PBGC complied with that request following procedures set forth in its proposed rule. On November 18, 2008 (at 73 FR 68333), PBGC published the final rule; the procedures in the final rule are the same as those in the proposed rule. PBGC has no information on whether any requests for such information have been made to plan administrators or plan sponsors

QUESTION 13

Distress or Involuntary Terminations: Disclosure of Termination Information

Section 506 of PPA, which deals with disclosure of termination information in distress and involuntary termination proceedings, provides that a court may limit disclosure of confidential information to an “authorized representative” of the participants and beneficiaries that agrees to keep the information confidential. Does the PBGC interpret this provision, in the context of a plan covering non-union employees, to allow for the designation by the court of a non-union “authorized representative” for this purpose?

RESPONSE

Section 506 of PPA does not address limiting the disclosure of confidential information in cases where there is no “authorized representative.” PBGC has not provided guidance on this issue. Courts may address this issue in specific cases.

QUESTION 14

Guaranteed Benefits: Application of Title IV Guarantee Limitations to Participants' Plan Benefits

- (a) In what order does PBGC apply the three principal guarantee limitations – the “accrued-at-normal” limitation, the “maximum guarantee” limitation, and the “phase-in” limitation – to participants’ plan benefits?
- (b) How is the accrued-at-normal limitation in section 4022.21 of PBGC’s regulations applied when there are early retirement factors and/or reductions for a form of benefit other than life-only?

RESPONSE

- (a) PBGC applies these limitations by first determining the plan benefit, and then applying the limitations in “A-M-P” order: i.e., first the “accrued-at-normal” limitation, then the “maximum guarantee” limitation, and then the “phase-in” limitation.
- (b) Here is an example showing how the accrued-at-normal limitation is applied.

Assumptions

- A plan has an early retirement benefit that is reduced by 5% for each year by which commencement precedes age 62. Participants who retire prior to age 62 with 30 or more years of service receive a \$400 monthly early retirement supplement. The supplement ends at age 62. No Title IV limitation other than the accrued-at-normal limit applies.
- Employee A retires at age 60 with a 50% J&S option, 30 years of service, and a life-only accrued benefit of \$1,000. The 50% J&S option factor is 91%. Employee A’s early retirement benefit adjusted for form is $\$1,000 \times .9 \times .91 = \819 . The plan would pay Employee A \$819 for life plus a \$400 supplement from ages 60 to age 62 (for a total of \$1,219 before age 62).

Application of the accrued-at-normal limitation

A participant’s guaranteed benefit under section 4022.21 is limited to his or her life-only accrued benefit payable at normal retirement. For Employee A, this limit is \$1,000. Therefore PBGC would guarantee payment of \$1,000 to Employee A from ages 60 to 62 and \$819 after age 62.

QUESTION 15

Guaranteed Benefits: Phase-in of Shutdown Benefits

Section 403 of the Pension Protection Act equates the date that a shutdown (or other unpredictable contingent event) occurs to the date a plan amendment is “adopted.” The phase-in period for the PBGC’s guarantee starts to run on the later of the adoption date and the effective date of an amendment. How would the PBGC determine the “effective” date of such a deemed amendment? In particular, would it be a single date for a particular shutdown, such as the date the shutdown occurs (i.e., the deemed adoption date of the plan amendment) or could it be multiple dates for a particular shutdown (e.g., by tying it to the date each participant is separated as a result of the shutdown)?

RESPONSE

PBGC is in the process of drafting a proposed regulation implementing Section 403 of PPA 2006. PBGC expects to address this and other related issues in that proposed regulation.

QUESTION 16

Valuation and Payment of Benefits: Hybrid Plans

PPA Section 701 added ERISA Section 204(b)(5)(B)(vi), which requires hybrid plans with variable indices to determine the interest crediting rate and conversion rate that apply if the plan terminates as the average of the rates used under the plan during the 5-year period ending on the termination date. If the requirement is not met, the hybrid plan is treated as failing to meet the age discrimination requirements of ERISA Section 204(b)(1)(H).

- (a) Does the 5-year average rule apply in the case of an equity index?
- (b) Is the “5-year period ending on the termination date” measured in plan years, calendar years or months?
- (c) Will this provision change how PBGC values cash balance plans and provides information to participants as to their benefits?

RESPONSE

PBGC is in the process of drafting a proposed regulation implementing Section 701 of PPA 2006. PBGC expects to address this and other related issues in that proposed regulation.

QUESTION 17

Reportable Events: PPA Transition Guidance

PBGC Technical Update 07-2 generally provided (among other things) that, for event years that begin in 2008 under the reportable events regulation (29 CFR Part 4043, subparts A, B, and C), certain premium-related determinations are made without regard to the PPA 2006 changes to the variable-rate premium (VRP) rules that went into effect starting with the 2008 plan year. (Technical Update 07-2 — “Funding-Related Determinations for Reporting under Parts 4010 and 4043; Effect of the Pension Protection Act of 2006; Transitional Guidance” — is available at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16267.html>.)

What is the status of any guidance relating to event years that begin after 2008?

RESPONSE — PBGC is working on a proposed rule to amend its reportable events regulation to conform to changes under the Pension Protection Act of 2006 and PBGC’s premium regulations. On January 9, 2009, PBGC issued Technical Update 09-1, providing transitional guidance relating to event years that begin in 2009. (Technical Update 09-1 — “Reportable Events; Funding-Related Determinations for Threshold Test, Waivers, and Extensions; Effect of the Pension Protection Act of 2006; Guidance for 2009 Plan Years” — is available at <http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16637.html>.)

In general, Technical Update 09-1 provides that for purposes of the reportable events regulation, a plan’s unfunded vested benefits and the value of its assets and vested benefits are determined for a plan year beginning in 2009 in the same manner as for premiums for the preceding plan year. For example, in the case of a calendar year plan with a January 1 valuation date, the value of assets and vested benefits and the amount of unfunded vested benefits determined as of January 1, 2008, for purposes of the 2008 variable rate premium are also used for applying the \$50 million advance-reporting threshold test for events becoming effective in 2009.

QUESTION 18

Reportable Events: Small Plan Missed Quarterly Waivers

PBGC Technical Update 08-2 (“Waiver for Small Employer Reporting of Missed Quarterly Contribution” (available at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16372.html>) provided a waiver of ERISA 4043 reporting requirements for small plans that did not make a required quarterly installment (either intentionally or in error) if certain criteria were met (generally related to funded status). That waiver applied only to plan years beginning in 2008. Similar waivers were granted for plan years beginning in 1996-2007

Has a similar waiver been granted for plan years beginning in 2009?

RESPONSE — No. For plan years beginning in 2009, small plans must follow the same rules as all other plans with respect to 4043 reporting requirements related to a missed quarterly installment. See Subpart B of PBGC’s reportable events regulation (29 CFR Part 4043) for information on such reporting requirements (available at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page14762.html>.)

QUESTION 19

Reportable Events: Effect of Merger on Active Participant Reductions

Under the guidance in Q&A 12 of the 2006 Blue Book, active participants who are transferred to another plan as part of a spinoff are considered to be part of any active participant reduction for purposes of the reportable events rules and, therefore, a spinoff in and of itself may trigger an active participant reduction reportable event. Would active participants who are transferred from another plan in a merger similarly be treated as offsetting any active participant reduction that might otherwise have occurred for the transferee plan for reportable events purposes? For example, assume that Plan A, a calendar-year plan, has 1,000 active participants throughout 2008 and at 1/1/09; that Plan B with 500 active participants merges into Plan A on 4/1/09, and that 300 active participants who were always in Plan A (and not in Plan B) are separated on 7/1/09. In such a fact pattern, assuming no other changes to Plan A's active participant count in 2009, was there an active participant reduction for Plan A under the reportable events rules in 2009?

RESPONSE

No. Since the Plan B participants became Plan A participants prior to the reduction, at no time in 2009 was the number of active participants in Plan A less than 80% of the number at the beginning of the current plan year or less than 75% of the number at the beginning of the prior plan year. Therefore the active participant reduction does not result in a reportable event.

Although this is not a reportable event, if PBGC has knowledge of the active participant reduction from other sources, such as media reports, the agency might investigate whether the merger or the subsequent reduction in active participants raised any concerns for the insurance program and, based on the facts and circumstances, might take appropriate action.

QUESTION 20

ERISA 4010 Reporting: Experience with Waivers and Extensions

Please describe PBGC's experience in connection with requests for waivers or extensions under ERISA Section 4010, including examples of situations where relief has been granted or denied.

RESPONSE

In recent years, PBGC has gotten very few requests for 4010 waivers, so its experience is quite limited. In one recent situation, a waiver was requested and granted because the plan was in the process of doing a standard termination.

PBGC usually receives a handful requests for extension of the filing deadline for 4010 information because certain financial information is not available. Some of the reasons given have been that the controlled group included foreign subsidiaries; there were companies with different fiscal years in the controlled group, etc. In such cases, if an extension was granted, the extension did not apply to the entire report, but rather to a very limited number of required data items. In many such cases, PBGC required the filer report certain substitute information that was available (e.g., monthly management reports, liquidity reports, etc.) as a condition of the limited extension.

It is too soon to tell if the PPA changes to the 4010 gateway test will impact the number of waiver or extension requests.

QUESTION 21

ERISA 4010 Reporting: Anticipated Impact of PPA

PPA Section 505(a) changes the primary reporting trigger for ERISA Section 4010 reporting from whether aggregate unfunded vested benefits on a PBGC premium basis exceed \$50 million to whether any *one* plan maintained by the controlled group has a funding target attainment percentage (FTAP) below 80%. Under PBGC's pending proposed rule, controlled groups with aggregate underfunding not exceeding \$15 million will be exempt from filing based on this revised trigger. What effect does PBGC anticipate that these changes (assuming implementation of the exemption in the proposed rule) will have on the number and nature of controlled groups required to file, taking into account the recent economic downturn?

RESPONSE

It is very difficult to estimate the impact, especially because PPA 2006 changed the way in which assets and liabilities are measured for this purpose. In addition, it is difficult to predict employer behavior with respect to whether credit balances will be waived or additional monies contributed to avoid benefit restrictions.

PBGC does, however, expect that many long-time filers with large amounts of underfunding will no longer be required to file. That is because a large plan with hundreds of millions of dollars in underfunding will likely be over 80% funded. Under pre-PPA law, 4010 reporting would have been required for such plans, but because of the PPA change to a percentage-based test, filing is no longer required.

PBGC does not expect the economic downturn of late 2008 to have any impact on filings for 2008 (generally due April 15, 2009) because, under the proposed 4010 regulation, the FTAP for most calendar year plans will be based on January 1, 2008 asset values. PBGC expects the number of filers will increase somewhat for 2009 because for that year, the funded status will generally be based on January 1, 2009 asset values. However, given the ability to smooth assets and the increase in corporate bond rates, it is difficult to predict how many (or which) plans will have FTAPs below 80%.

Note —Pending issuance of the final 4010 rule, PBGC issued Technical Update 08-3 implementing the \$15 million waiver information years beginning in 2008. For more information see: <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16612.html>.

QUESTION 22

ERISA 4010 Reporting: Modified Actuarial Valuation Reports

An actuarial valuation report (AVR) containing (or supplemented by) certain specific data items must be submitted as part of a 4010 filing. In situations where the AVR is not available by the 4010 due date, § 4010.10(b) permits filing it at a later date (i.e., within 15 days after the applicable Form 5500 deadline).

Because the Worker, Retiree, and Employer Recovery Act of 2008 amended the rules related to asset smoothing, some plan sponsors may be reconsidering the asset method for the 2008 plan year, in many cases after an AVR has already been issued based on the sponsor's original choice of asset method.

If a filer believes that an already-issued AVR may be revised after the 4010 due date (for any reason), should the AVR be attached to the 4010 filing or should the filer take advantage of the alternative due date noted above until all decisions related to the 2008 valuation are final?

RESPONSE

In the situation described above, PBGC recommends attaching the already-issued AVR to the 4010 filing. If the AVR is subsequently revised, the 4010 filing must be amended. The e-4010 application is set up to handle this type of amendment very easily. To do so, the filing coordinator simply clicks the "Amend Filing" button from the e-4010 home page to open the submitted filing. Next, the filing coordinator goes to the Schedule P attachment page for the plan in question, deletes the old AVR, attaches the new AVR, and re-submits the filing. It should take only a few minutes.

Given the unusual situation for 2008 plan years, a filer who believes the AVR may be revised after the 4010 due date may want to include a comment to that effect with the original 4010 filing.

QUESTION 23

ERISA 4010 Reporting: Plan Mergers

A controlled group sponsors two calendar year pension plans at the beginning of the 2008 calendar year information year. Both plans have beginning of year valuation dates. Plan A's FTAP is over 80% and Plan B's FTAP is below 80%. Plan B is merged into Plan A in the middle of the year so that at the end of the information year only Plan A remains.

- (a) Would a 4010 filing be required, or would it depend on the FTAP as of the beginning of the plan year of the theoretical combined plan?
- (b) Would the answer be different if Plan A had been merged into Plan B?

RESPONSE

- (a) In this situation, a 4010 filing would not be required for 2008. An explanation follows:

For the 80% FTAP gateway test for the 2008 information year, Plan B is disregarded because Plan B does not exist on the last day of the information year. Plan A's FTAP is determined on the valuation date for the plan year ending within the information year, or in this case, January 1, 2008. Under the proposed 4010 regulation, there is no requirement to adjust the FTAP to reflect significant events that occur during the year. The FTAP used for the 80% 4010 gateway test is the same FTAP that will be reported on Plan A's 2008 Schedule SB.

- (b) Yes. If the Plan A had merged into Plan B during 2008 (and all other facts remained the same), then Plan B's FTAP would be the relevant measure and a 4010 filing would be required for 2008.

QUESTION 24

Other Reporting: Enforcement Policy for 4062(e) Events

ERISA Section 4062(e) applies when an employer ceases operations at a facility and, as a result, more than 20 percent of employees covered by its defined benefit pension plan separate from employment. Please describe the PBGC's experience and enforcement plans in connection with finding out about such events (including its policy relating to penalties for reporting failures) and pursuing the related liability. In particular, please provide information relating to the number of such events over the past year and how PBGC has dealt with them, including a brief description of the kinds of settlements PBGC has entered into.

RESPONSE

PBGC learns of potential ERISA section 4062(e) events from its monitoring efforts and through notices filed under ERISA sections 4043 and 4063(a). Since the publication in 2006 of PBGC's regulation on calculation of liability pursuant to section 4062(e), PBGC has seen a noticeable increase in self-reporting under section 4063(a). PBGC's existing penalty policy applies to failures to file under ERISA section 4063(a). PBGC assesses penalties for such failures or takes other appropriate actions.

During FY 2008, PBGC's Insurance Programs Office (IPO) settled five cases. The settlements provided protection valued at about \$125M, in total, for pension plans covering over 13,000 participants. As of September 30, 2008, IPO was working on 38 cases. PBGC works with companies to structure flexible settlements that fit within the parameters of their business plans.

QUESTION 25

Other Reporting: Timing of Notice of 4062(e) Event

ERISA Section 4063(a) requires notification to PBGC of a Section 4062(e) event within a 60-day period.

- (a) When does the 60-day period start to run in the following situations?
 - (1) Assume an employer ceases operation on December 31, 2008, but the first date on which at least 20% of the plan's active participants have been separated from employment as a result of the cessation is March 31, 2009.
 - (2) Assume an employer ceases operation on March 31, 2009, but the first date on which at least 20% of the plan's active participants have been separated from employment as a result of the planned cessation was December 31, 2008.
- (b) Does PBGC's existing policy on the assessment of penalties under ERISA section 4071, as published in the Federal Register on July 18, 1995 (60 Fed. Reg. 36937), including the general "guideline" penalties described therein, apply to failures to comply with the ERISA Section 4063(a) reporting requirement when a Section 4062(e) event occurs?

RESPONSE

- (a) PBGC evaluates each case based on the facts and circumstances. PBGC encourages employers to contact the PBGC's Department of Insurance Supervision and Compliance (DISC) before any section 4062(e) event to discuss the situation and any potential liability. The direct telephone number for DISC is (202) 326-4070.
- (b) Yes.

QUESTION 26

Other: Overlapping PBGC Bankruptcy Claims

A plan is trustee by the PBGC and the PBGC presents its claims to the bankruptcy court. The plan in question has underfunding of \$3,000,000, an expected settlement rate of one third on unsecured claims, no unpaid PBGC premiums, and a claim for \$300,000 for contributions owed to the plan (including a priority claim for contributions of \$9,000).

The PBGC presents these claims as \$300,000 (including \$9,000 in priority status) plus a claim for \$2,894,000 (\$3,000,000 minus the expected amount to be recovered from its claim for contributions). Assuming this approach is used by the court and all goes as planned, the PBGC then recovers a total of \$1,070,667 ($\$9,000 + [\$291,000 + \$2,894,000] / 3$). How does essentially \$3,000,000 in “overlapping” unsecured claims (but with roughly an extra \$6,000 recoverable due to the priority claim) generate a recovery of anything other than roughly \$1,006,000? Obviously as monies are recovered for contributions owed to the plan the underfunding decreases so the two separate claims “overlap.”

The bankruptcy estate restates these claims for the court’s consideration as a \$9,000 priority claim plus a claim for an unsecured obligation of \$2,991,000 (\$3,000,000 minus just the priority claim for contributions). Assuming this approach is used by the court and all goes as planned, the PBGC then recovers a total of \$1,006,000 ($\$9,000 + \$2,991,000 / 3$).

Which approach, in PBGC’s view, is correct?

RESPONSE

The first approach is correct. The independent claims don’t so much “overlap” as recovery on one claim reduces the other.

Title IV provides that PBGC can recover unpaid contributions on behalf of the plan independently from its own claim for the plan’s underfunding. Contributions are plan assets. The plan recovers \$9,000 on its priority claim, and \$97,000 on its unsecured claim. Because the increased assets reduce PBGC’s underfunding claim, the latter becomes \$2,894,000. PBGC’s $\frac{1}{3}$ recovery on that is \$964,667. Therefore, PBGC’s total recovery is the \$1,070,667 in the first approach.

QUESTION 27

Other: PBGC Enforcement Policy (Liens for Missed Quarterly Contributions)

In general, a lien, enforceable by the PBGC, arises on the assets of an employer that does not make a timely quarterly installment if the total of missed contributions (including interest) is at least \$1,000,000. In addition, such an employer is required to file a Form 200 to notify the PBGC of such a missed contribution.

The IRS proposed rule on minimum funding requirements released April 9, 2008, provides that if a plan sponsor wants to use a credit balance to satisfy the minimum funding requirement with respect to a quarterly installment, the sponsor must make a written election to do so by the due date for that quarterly installment. However, this rule is not yet final and it is not clear whether, in order to comply with the statute in 2008, it is reasonable not to follow the proposed rule in 2008.

How has the PBGC been enforcing, and how does it intend to enforce, these requirements with respect to a plan sponsor that (1) has a credit balance available and sufficient to offset an entire quarterly installment that (together with prior missed payments and interest) is in excess of \$1 million but (2) does not make a written election to do so by the time the installment is due, and (3) does not pay the installment?

RESPONSE

It is not for PBGC to say whether a 2008 quarterly installment was, in fact, “missed” in situations where the credit balance exceeded the required installment, but a written election was not made by the due date of the installment.

In 2008, if PBGC was notified of a situation like the one described, PBGC did not seek to perfect a lien if the sponsor confirmed that the amount of available credit balance exceeded the required installment and that it was electing to use the credit balance to offset the required installment. If the Treasury regulation is not final by the date an installment is due for the 2009 plan year, absent additional guidance from PBGC, it is likely the same procedures will be followed. In the meantime, questions about this should be directed to PBGC’s Department of Insurance Supervision and Compliance at (202) 326-4070.

QUESTION 28

Other: “Risk Mitigation” Program

Please provide an update on the number and kinds of cases the PBGC has been involved in over the past year under its “Early Warning” or “Risk Mitigation” program, including a description of the results of that involvement. How does the level of activity under this program compare to prior years?

RESPONSE

During FY 2008, PBGC’s Department of Insurance Supervision and Compliance identified more than 480 transactions that met the criteria discussed in Technical Update 00-3. PBGC investigated close to 100 transactions, sought protection related to 7 transactions, and were successful in obtaining economic protection in 4 cases for a total of \$121.7 million. The level of activity for 2008 was about the same as in prior years.

PBGC encourages plan sponsors and their advisors to discuss potential transactions with PBGC well in advance in order to allow PBGC time to complete its investigation and avoid delaying the closing. PBGC has substantial flexibility to structure settlements that mitigate risk to the pension plans while still working within the parameters of companies’ business plans.

QUESTION 29

Other: Litigation Issues

Please describe PBGC litigation in the past year that has established precedent that would be of interest to enrolled actuaries.

RESPONSE

Oneida, Ltd. v. PBGC (In re Oneida, Ltd.), 383 B.R. 29 (Bankr. S.D.N.Y. 2008), appeal pending, No. 08-2964-bk (2d Cir.): The debtor filed an adversary proceeding against PBGC, seeking a declaration that the agency's claim for the statutory termination premiums were pre-petition claims that were discharged upon the debtor's emergence from bankruptcy. The bankruptcy court held that the debtor's obligation to pay the termination premium is a pre-petition bankruptcy claim, rejecting PBGC's position that under the plain text of the statute, the premium is a post-discharge obligation that cannot be reduced by the bankruptcy court. PBGC and the debtor jointly obtained permission to appeal the bankruptcy court's ruling directly to the U.S. Court of Appeals for the Second Circuit, where the case has been fully briefed and argued.

Davis v. PBGC, 2008 U.S. Dist. LEXIS 106255 (D.D.C. Dec. 2, 2008): In this suit, about 1,700 retired pilots are challenging numerous aspects of PBGC's determination of their pension benefits under the terminated US Airways pilots plan. In this decision, the court denied the pilots' request to enjoin PBGC from recouping or seeking recovery of benefit overpayments from approximately 100 pilots pending completion of the case. The district court found that the pilots had failed to demonstrate that they were likely to succeed in their challenge of the way PBGC calculated their benefits, because PBGC's interpretation of ERISA and its regulations is entitled to deference. The pilots have appealed this decision to the U.S. Court of Appeals for the D.C. Circuit. PBGC's motion to dismiss the complaint in part is still pending before the district court.

Sara Lee Corp. v. American Bakers Ass'n, 512 F.Supp.2d 32 (2007); 252

F.R.D. 31 (D.D.C. 2008): PBGC made an administrative determination classifying a pension plan to which more than one employer contributed as a multiple-employer plan, rather than an aggregate of single-employer plans, as it previously had determined. Several contributing employers and the plan trustees challenged PBGC's determination. The district court held that the deferential "arbitrary and capricious" standard applied to PBGC's reclassification of the plan, but held in abeyance its decision with respect to PBGC's motion for summary judgment until it was assured that the administrative record was complete. Sara Lee and others then sought extensive discovery, arguing that PBGC had used flawed procedures, changed the applicable legal standard, and failed to adequately explain various aspects of its determination. The court held that PBGC's submission of the administrative record is entitled to a "strong presumption of regularity," which the challengers fell far short of rebutting. And the court found PBGC's determination, far from being inadequately explained, "clear on its face."

Adey v. PBGC, 2008 WL 4724314 (N.D. W. Va Oct. 24, 2008): In this suit, 49 participants in the terminated Weirton Steel Corporation Retirement Plan assert that PBGC incorrectly determined that they failed to meet the service requirement for a 30-year pension. In this decision, the court held that PBGC's benefit determinations are entitled to deferential review under the Administrative Procedure Act based on the administrative record submitted by the agency, and no discovery to develop an independent factual record is allowed.

Koehler v. PBGC, 2008 WL 1751732 (6th Cir. Apr. 16, 2008): Participants in a terminated plan brought suit against PBGC, claiming that they were entitled to disability pensions, which had been denied them by the former plan sponsor and, subsequently, by PBGC. The participants asserted that PBGC had breached its fiduciary duties by failing to pay the claimed benefits. None of the participants had appealed their benefit determinations to PBGC's Appeals Board. The district court dismissed the complaint based on the participants' failure to exhaust their administrative remedies. The court of appeals affirmed.

Stephens v. US Airways Group, Inc., 555 F.Supp.2d 112 (D.D.C. 2008): A group of pilot participants sued US Airways for paying lump sum benefits 45 days after their retirement date, and without interest. The suit was delayed for years due to US Airways' bankruptcy. While the case was on appeal, the pilots' plan was terminated. Upon remand to district court, the pilots named PBGC as a defendant, seeking interest from PBGC, asserting that the alleged delay deprived them of the actuarial equivalent of their benefit, and that PBGC committed a fiduciary breach by failing to compensate them for the interest/actuarial equivalent they claimed was due. PBGC moved to dismiss certain parts of the case. The court agreed with PBGC that the pilots cannot maintain a fiduciary breach claim that arises from an alleged failure to pay benefits; that PBGC is not liable for the alleged breach by a prior fiduciary; and that the pilots are not entitled to attorneys' fees under Title IV of ERISA. The court found that PBGC's statute of limitations assertion needed further factual development, but noted that the plaintiffs' arguments on this were "quite shaky."

Douglas v. PBGC, 2008 WL 2805604 (E.D. Pa. July 18, 2008): Applying the deferential "arbitrary and capricious" standard, the court upheld PBGC's benefit determination against a challenge by the participant regarding his years of continuous service.

QUESTION 30

Other: Private Equity Fund as "Trade or Business" for Controlled Group Purposes

A PBGC Appeals Board decision issued on September 26, 2007, held that a private equity fund that was unincorporated and that had a controlling interest (at least 80%) in one of its portfolio companies was a “trade or business”—rather than, as the private equity fund had argued, a passive investment vehicle that was not conducting a “trade or business”—and therefore was exposed to ERISA Title IV joint and several controlled group liability for the underfunding upon termination of the pension plan of that portfolio company. The Appeals Board had based its determination that this private equity fund was a “trade or business” on the test announced in *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), i.e., (1) whether a taxpayer is engaged in an activity with “the primary purpose of income or profit” and (2) whether the activity is conducted with “continuity and regularity.” However, in its response to Question 19 of the 2008 Blue Book, PBGC stated, without any reference to the *Groetzinger* test, that “a private equity fund is a trade or business under common control with a plan sponsor if the fund meets the bright-line test of 80% or greater ownership of the plan sponsor.”

Is it PBGC’s position that every private equity fund, regardless of its primary purpose or level of activities with respect to a portfolio company, would constitute a “trade or business” under the *Groetzinger* test?

RESPONSE

No. As noted in the introduction of the Blue Book, the responses in the Blue Book are not PBGC positions. They reflect the current views of individual PBGC staff members. The 2008 Blue Book response was intended to reflect the staff experience that, absent unusual facts and circumstances, it is likely that a private equity fund will be a “trade or business.” Of course, each case must be decided based on its particular facts and circumstances.

QUESTION 31

Other: Substantial Cessation of Operations

In its response to Question 22 of the 2007 Blue Book, PBGC stated that a spinoff of a portion of a multiple-employer plan to a substantial employer of that plan constitutes a withdrawal that needs to be reported under ERISA Section 4063. Assume a multiple-employer plan, Plan AB, in which two employers, Employer A and Employer B, participate. Assume further that these two employers, both of which are substantial employers, decide that they no longer want to participate in a multiple-employer plan and that, effective January 1, 2009, Plan AB is split into two plans: Plan A, which is maintained solely by Employer A, and Plan B, which is maintained solely by Employer B. How should it be determined whether Employer A, or Employer B, or both, have withdrawn from Plan AB within the meaning of ERISA Section 4063?

RESPONSE

The transaction should be reported to PBGC as a withdrawal of both Employer A and Employer B. PBGC will decide, based on all of the facts and circumstances, how the matter should be handled. If you have a case in which this is an issue, PBGC recommends that you discuss the issue with PBGC's Department of Insurance Supervision and Compliance (DISC) and PBGC's Office of Chief Counsel (OCC) as early as possible. The direct telephone numbers for DISC and OCC are (202) 326-4070 and (202) 326-4020.

QUESTION 32

Other: Plan Restoration Initiative

It was reported in late 2008 that PBGC had launched an initiative to consider restoring terminated plans to companies that may be able to afford to maintain plans that had previously been taken over by the PBGC. Please describe the program.

RESPONSE

The program was described in PBGC's FY 2008 Annual Report (page 5). That description is copied below.

In 2008, PBGC initiated a process to analyze the financial condition of former sponsors of trustee pension plans to examine whether plan restoration may be possible. Under ERISA, PBGC has authority to restore a terminated plan to the former sponsor, and a key issue is whether the sponsor has become financially healthy enough to support the pension plan. Prior to adoption of this new process, PBGC did not systematically review the financial condition of ongoing companies that previously terminated and transferred their underfunded pension plans to PBGC. This analysis will now be a recurring operating procedure within the organization.

PBGC's annual report is available at http://www.pbgc.gov/docs/2008_annual_report.pdf.

QUESTION 33

Other: Recent DB Plan Trends

During the past year, has PBGC seen any pattern in plan freezing, termination of frozen plans, or growth of cash balance plans?

RESPONSE

Most of the data available about plan freezes, frozen plan terminations and hybrid plans comes from the Form 5500, so PBGC does not yet have information about patterns that may have emerged in 2008. In general, there is a lag of about 2 years for this type of data. However, beginning with 2008 plan years, additional information about plan freezes will be reported on the PBGC premium filing, so PBGC will have access to plan freeze data in a timelier manner.

The approximate percentage of plans that were “hard frozen” (i.e., had ceased benefit accruals) as of the end of the plan year in 2003-2006 were 9.5%, 12%, 14.6%, and 16.8% respectively. The rate of plan freezes seems to be slowing, however. Most of the plans that are frozen are relatively small plans.

The termination of frozen plans has appeared to be relatively constant, with approximately 20% of frozen plans being terminated in any given year.

The growth of hybrid plans appears to be continuing. Our preliminary data indicates that as of the end of the 2006 plan year:

- Almost a third of participants in plans PBGC insures were in hybrid plans, and
- Hybrid plans represented over 8% of single-employer DB plans (the corresponding percentage for the prior year was 7.3%). The percentage is much higher if you consider only large plans. For example, as of the end of 2006, almost a third of insured plans with 5,000 or more participants were hybrid plans.

QUESTION 34

Other: PBGC copy of ERISA 101(f) Annual Funding Notice

What is the address for sending a copy of the Annual Funding Notice to PBGC?

RESPONSE

PBGC will accept an electronic or a hard copy of annual funding notices. Addresses for the PBGC-copies are shown below:

	Single employer plans	Multiemployer plans
Hard copies	Pension Benefit Guaranty Corporation ATTN: Single-Employer AFN Coordinator 1200 K Street, NW, Suite 270 Washington, DC 20005-4026	Pension Benefit Guaranty Corporation ATTN: Multiemployer Data Coordinator 1200 K Street NW., Suite 930 Washington, DC 20005-4026
Electronic copies	Single-employerAFN@PBGC.gov	Multiemployerprogram@PBGC.gov