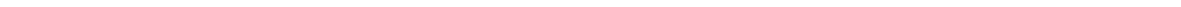


2011 Enrolled Actuaries Meeting

Questions to the PBGC and Summary of Their Responses

March 2011



Summary of Discussions between the Enrolled Actuaries Program Committee
and Staff of the Pension Benefit Guaranty Corporation
on February 3, 2011

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on February 3, 2010, 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:

Harold J. Ashner, Keightley & Ashner LLP
Bruce A. Cadenhead, Mercer
Ellen L. Kleinstuber, The Savitz Organization
Eric A. Keener, Aon Hewitt
Jeffrey S. Litwin, Sibson Consulting, a division of Segal
Marjorie R. Martin, Plan Synergies, LLC
John H. Moore, Aon Hewitt
Jay P. Rosenberg, Buck Consultants
Donald J. Segal, Aon Hewitt
Maria M. Sarli, Towers Watson

The following representatives of the Pension Benefit Guaranty Corporation took part in the discussions:

James J. Armbruster, Assistant Chief Counsel, Office of the Chief Counsel
Kenneth Cooper, Assistant General Counsel, Office of the General Counsel
David Gustafson, Director, Policy, Research and Analysis Department
Catherine Klion, Manager, Regulatory and Policy Division, Legislative and
Regulatory Department
Grace Kraemer, Attorney, Legislative and Regulatory Department
Daniel Liebman, Attorney, Legislative and Regulatory Department
Deborah C. Murphy, Attorney, Legislative and Regulatory Department
Bela Palli, Program Manager, Standard Termination Compliance Division,
Insurance Programs Office
Peggy Thibault, Actuary, Policy, Research and Analysis Department
Neela Ranade, Chief Negotiating Actuary, Department of Insurance Supervision
& Compliance
Amy Viener, Senior Policy Actuary, Policy, Research and Analysis Department

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

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QUESTION 1

Premiums: Effect of Plan Transfers on Five-Year Restriction on Changing Election of Alternative Premium Funding Target

PBGC's regulations provide that an election of the alternative premium funding target is binding for five years. Assume that the plan administrator of calendar-year Plan A elects the alternative premium funding target for the 2009 plan year and uses the alternative premium funding target for the 2009 and 2010 plan years.

- (a) Assume that Plan A spins off new calendar-year Plan X effective January 1, 2011. Is Plan X required to use the alternative premium funding target for the 2011 through 2013 plan years?
- (b) Assume instead that, effective January 1, 2011, Plan A consolidates with calendar year Plan B (for which an election of the alternative premium funding target was also first in effect for the 2009 plan year and also continued in effect for the 2010 plan year), resulting in the establishment of new calendar year Plan C in a "consolidation" (as defined at p. 50 of PBGC's 2011 Premium Payment Instructions). Is Plan C required to use the alternative premium funding target for the 2011 through 2013 plan years?
- (c) Alternatively, assume that, effective January 1, 2011, Plan A merges into calendar year Plan D, a plan for which an election to use the alternative premium funding target has not been made. Is Plan D required to use the alternative premium funding target, and if so, for what period?

RESPONSE

- (a) No. Plan X is a new plan and is not bound by the election made by Plan A.
- (b) No. Plan C is a new plan and is not bound by the election made by Plan A or Plan B.
- (c) Whether an election is in effect, and (if so) the period for which it is binding, is determined by whether (and if so when) the surviving plan made the election. Plan D must use the standard premium funding target unless and until the plan administrator makes an election to use the alternative premium funding target.

QUESTION 2

Premiums: Common errors

What are the most common errors found with respect to premium filings?

RESPONSE

With respect to premium payments, the most common errors are sending checks to the wrong address or using a private delivery service (e.g., FedEx) for checks sent to the P.O. Box.

Another common mistake is that some plan administrators don't file at all. PBGC has found a variety of reasons for not filing. In some cases, the plan administrator simply forgot and in others, there's a more serious problem (e.g., an abandoned plan). In a handful of incidents, the plan administrator believed the filing had been submitted when it had not. This confusion was caused by preparing a draft filing in My PAA, but not submitting it. PBGC has also learned of a few situations where a filing was prepared using private sector software, but the resulting XML file was never uploaded. Regardless of the electronic filing method chosen, My PAA offers the opportunity to print a record showing the date and time the filing was submitted. PBGC encourages all filers to take advantage of this feature to ensure that the filing has, in fact, been submitted and to have documentation for their files.

Most of the other common errors involve the variable-rate premium (VRP) calculation. Because an enrolled actuary must certify the VRP data, PBGC encourages all enrolled actuaries to make note of these common errors and to carefully review draft filings before certifying that the VRP information is correct. A summary of the most common VRP errors and some additional comments follow:

- Method-related errors
 - Actuary used alternative premium funding target (APFT) to determine VRP, but plan administrator didn't file an election to do so. In other words, either (1) box 5 in Part II of the comprehensive premium filing wasn't checked in the current filing or in a filing for a prior plan year or (2) box 5 was checked but the filing was submitted after the VRP due date.
 - Plan administrator made an election to use the APFT, but actuary used the standard premium funding target (SPFT) to determine VRP. In some cases, plan administrators reported that they inadvertently checked box 5 without realizing what they were doing.
- Discount rate errors & inconsistencies for plans using the SPFT
 - Segment rates for the month the plan year begins were used instead of the rates one month earlier. For example, a calendar year plan used January 2010 spot segment rates to determine the 2010 SPFT, instead of December 2009 spot segment rates. To minimize the chance of this error occurring, PBGC recommends that actuaries review the premium interest rate page on PBGC's website (www.pbgc.gov) before calculating the SPFT.
 - 24-month smoothed segment rates were used instead of spot segment rates.
 - Reported rates appear to have been entered incorrectly. For example, for a calendar year plan, the SPFT segments rates for 2010 are 2.35%, 5.65% and 6.45% respectively, but the reported rates were 2.35%, 5.65% and 6.54%. PBGC realizes that this type of error is likely the result of a data entry error (as opposed to a situation where the actuary actually used the wrong segment rates). However, PBGC systems cannot distinguish between this

type of error and the more serious errors noted above; if the reported discount rates are not what should have been used, the plan most likely will be contacted by PBGC.

- Discount rate errors & inconsistencies for plans using the APFT
 - Segment rates used were not acceptable given the reported valuation date. For example, a 2009 calendar year small plan with a December 31, 2009 valuation date used November 2008 24-month smoothed segment rates.
 - Reported rates appear to have been entered incorrectly as explained above.
- Other VRP errors
 - Reported UVB valuation date is before plan year begins (e.g., 12/31/2009 reported as the valuation date for a 2010 calendar year plan).
 - APFT used but liability didn't match vested funding target reported on Form 5500 Schedule SB.
 - Estimated VRP was not reconciled in timely manner.

QUESTION 3

Premiums: My PAA enhancements

Has My PAA been enhanced to reduce the likelihood of filers making common errors?

RESPONSE

PBGC has spent considerable time and effort modifying My PAA to reduce the likelihood of filers making common mistakes. Several enhancements were added in advance of the first 2010 comprehensive premium filing deadline and more will be added in conjunction with the next release (scheduled for mid-April, before the April 30 due date for small plans). In general, these enhancements take the form of “warning messages” or “reminders” as opposed to stopping a potentially inconsistent or incorrect filing from being submitted. For example, with the new release, as a user enters data on the screens, warning messages will appear if:

- The standard method is used, but the reported discount rates are not the correct rates given the reported plan year.
- The method used is inconsistent with election status. This error takes two forms:
 - The alternative method is used (i.e., “alternative” is selected in line 7d(1) of Part III of the comprehensive premium filing), but there is no election in effect from a prior year and box 5 in Part II of the comprehensive premium filing is not checked in the current filing.
 - The standard method is used, but an election to use the alternative premium funding target is in effect from a prior year or box 5 is checked in the current filing.
- The UVB valuation date is not within the plan year.

It is important to note that warning messages will appear for only the most common errors. Additional warnings may be added in future releases (e.g., to notify user if alternative segment rates reported are unacceptable given the reported UVB valuation date). Practitioners are cautioned against assuming that the premium filing is correct and consistent solely because My PAA accepts the filing (regardless of whether warnings appear). Actuaries are encouraged to review their client’s draft filings carefully before certifying the VRP data.

Note re: filings created using private sector software — whether your software vendor offers the ability to screen data for accuracy, consistency, etc. is not something PBGC controls. However, filers using private sector software can take advantage of the My PAA enhancements by importing the data instead of uploading it. With this approach, any applicable warning messages will appear as the filer reviews the screens after importing the data. But, if an imported filing is submitted without any review, most of the My PAA warnings will be bypassed. It’s important to note that when a filer uploads an XML file created using private sector software, the filer, in essence, bypasses My PAA’s validation system and therefore will not see the warning messages.

See the “online premium filing with My PAA” page on PBGC’s website (www.pbgc.gov) for more information on e-filing options.

QUESTION 4

Premiums: Premium Filing Obligations after PBGC Trusteeship

Assume that a premium filing for a plan is due after the date on which PBGC and the plan administrator have executed a termination and trusteeship agreement for the plan.

- (a) Is the former plan administrator required to submit the premium filing for the plan?
- (b) If the answer to (a) is yes, will PBGC pay for the expenses associated with making the filing?

RESPONSE

- (a) No.
- (b) Not applicable.

QUESTION 5

Standard Terminations: Audits

Please describe PBGC's recent experience with audits of standard terminations, including the level of compliance, common errors found, and any issues with the PPA changes in the interest rate and mortality table used in calculating minimum lump sum amounts.

RESPONSE

PBGC required corrective action in approximately 22% of the plans audited in FY 2010. The most common errors involved incorrect accrued benefit calculations, inaccurate lump sum calculations, missing participants' benefits not transferred to PBGC, and attempted election of alternative treatment of benefits by individuals who were not majority owners.

Accrued benefit calculation errors generally resulted from plans incorrectly taking into account service or compensation in the calculation of the benefit. In some plans, the correct vesting percentage was not applied to the benefits of terminated participants who had not incurred a five-year break in service and had not received a distribution of the entire benefit as of the date of plan termination.

PBGC also pursued enforcement action in cases where:

- plans terminated in plan years beginning prior to January 1, 2008, (the effective date for applying the PPA assumptions) and used the PPA applicable interest rate and mortality table to calculate minimum lump sum values, and
- plans adopted the PPA assumptions after the date of plan termination and did not protect the value of the accrued benefit based on the assumptions in effect at termination.

In a few plans the definition of "Applicable Interest Rate" did not comply with the Code, resulting in an invalid look back month.

PBGC continues to see plans that roll over missing participants' benefits to Individual Retirement Accounts instead of either purchasing irrevocable commitments (and submitting the information to PBGC) or transferring the designated benefit to PBGC. Occasionally, PBGC finds that designated benefits have not been calculated in accordance with PBGC's Missing Participants regulation, or that interest is not paid to the extent designated benefits are sent to PBGC more than 90 days after the distribution deadline.

QUESTION 6

Standard Terminations: Mechanism for Providing Additional Payments Based on Audit Findings

If PBGC determines as part of a standard termination audit that additional payments must be made to participants whose lump sums were underpaid, may the sponsor make the additional payments directly or must a trust be established and funded with the plan administrator making the payments from the trust? Is the use of a trust required to enable the participants to be able to roll over the distributions?

RESPONSE

In such situations, PBGC's concern is that the participant's benefit liability be fully satisfied. Questions about whether payments must be made through a trust should be directed to the IRS.

QUESTION 7

Standard Terminations: Pre-Termination Purchase of Irrevocable Commitments

Have there been cases in which PBGC has allowed a plan to purchase irrevocable commitments (annuity contracts) shortly before termination to lock in what were believed to be favorable interest rates and, if so, what were the circumstances resulting in PBGC's willingness to allow the purchase?

RESPONSE

PBGC has not approved the purchase of irrevocable commitments (annuity contracts) shortly before initiating a standard termination to lock in interest rates or for any other reason (where there has been no other distributable event). PBGC will continue to audit all plans that make a final distribution of plan assets before or without filing a standard termination notice. 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. 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 verifies the accuracy of the benefits provided, determines whether the annuity contract mirrors the provisions of the plan document, and requires the plan to take corrective action where appropriate. The scope of the audit for such plans involves much larger samples than in a typical audit. PBGC reserves the right to take other appropriate action, including assessing penalties under ERISA section 4071 for each missed notice or filing.

After reviewing comments received in response to PBGC's November 23, 2009 request for public comments on this topic, PBGC decided not to take any regulatory action or provide specific guidance at this time. See PBGC's December 29, 2010 notice in the Federal Register ([75 Fed. Reg. 82095](#)) for more information. In that notice, PBGC stated that it will continue to monitor industry practices to determine whether further regulatory action or specific guidance is needed in the future.

QUESTION 8

Standard Terminations: Coverage – Substantial Owner Plan

Section 4021(b)(9) of ERISA states that the PBGC pension plan termination insurance program under Title IV of ERISA does not cover substantial owner plans. ERISA section 4021(d) defines a “substantial owner” as an individual who owns the entire interest in an unincorporated business, or a partner or shareholder who owns directly, or indirectly, more than 10 percent of the partnership or corporation. For purposes of determining the ownership interest of a corporation, the constructive ownership rules of Code § 1563(e) apply, including the application of such rules under Code § 414(c).

Assume that a plan at one time included several non-owner participants. Over time, most of the employees have been terminated and their benefits paid out. At this point, the plan is frozen and only two participants remain: the owner of all of the stock of the plan sponsor and the owner's parent. The owner is over 21 years of age. Does the plan remain covered by Title IV of ERISA?

RESPONSE

The answer depends on the age of the owner at the time of the coverage determination. Under ERISA section 4021(d), an individual is a substantial owner if at any time during the 60-month period ending on the date the coverage determination is made, the individual meets the definition for substantial owner provided above.

Under the constructive ownership rules of Code §1563(e)(6), there are two ways a child's stock ownership is attributed to a parent:

- The child is under age 21 (§1563(e)(6)(A)).
- The child is age 21 or older and the parent (without attribution) owns more than 50% of the stock (§1563(e)(6)(B)).

If the owner were under age 21 at any time during the 60-month period ending on the date of the coverage determination, the owner's interest would be attributable to the parent under Code §1563(e)(6)(A). Because both participants would be substantial owners, the plan would be exempt from coverage under ERISA section 4021(b)(9).

If the owner had turned 21 on or before the beginning of the 60-month period ending on the date of the coverage determination, neither condition would apply in the example. Because the owner's interest would not be attributable to the parent, the parent would not meet the definition of a substantial owner. Because the plan would not be maintained exclusively for substantial owners, the plan would be covered.

QUESTION 9

Distress or Involuntary Termination: Experience with Distress Terminations Outside of Bankruptcy

Please describe PBGC's experience over the past year in connection with applications for distress termination outside of bankruptcy under Distress Test 3 ("Continuation in Business") or Distress Test 4 ("Unreasonably Burdensome Pension Costs").

RESPONSE

The number of Distress Test 3 applications by Controlled Group dropped significantly from FY 2009 to FY 2010. However, the count was still substantially higher than for FY 2008. There were very few Distress Test 4 applications and some of these had also applied for termination on the basis of Distress Test 3.

QUESTION 10

Distress or Involuntary Termination: Payment by PBGC of Plan Expenses

Assume that certain expenses are or may be incurred (e.g., to respond to a PBGC request for participant or benefit information) for a plan that is undergoing, or that has undergone, a distress or involuntary termination, and that the expenses would have been properly payable from plan assets when the plan was ongoing. Assume further that PBGC has become trustee of the plan pursuant to ERISA § 4042 before the expenses have been paid. Will PBGC pay these expenses, whether out of plan assets or other funds?

RESPONSE

Until the plan is terminated and PBGC is appointed as the plan's trustee (whether by agreement between the plan administrator and the PBGC or by a court order), reasonable and necessary expenses generally are paid from plan assets, provided that the plan document so permits. This applies even for expenses incurred after the plan's termination date. If such expenses have not been paid before PBGC has been appointed as the plan's trustee, PBGC will generally pay the expenses if it determines them to be reasonable and necessary. However, reasonable and necessary services may be performed by service providers and paid for out of the PBGC funds during the period immediately following trusteeship. Reasonable and necessary services are those required for PBGC to operate the trusteed plan, typically when third parties continue to administer terminated pension plans during the limited period before PBGC is able to exercise control or to acquire the assets. PBGC ensures that a reasonable amount is being charged for these services. It is recommended that PBGC be consulted before any expenses are incurred for the period after PBGC has been appointed trustee of the plan.

QUESTION 11

Distress or Involuntary Terminations: Treatment of ERISA § 4062(e) Escrow Payments in Plan Termination

Assume that the sponsor of a plan that has an ERISA § 4062(e) event makes an escrow payment to PBGC pursuant to ERISA § 4063, that the plan terminates in a distress or involuntary termination during the five-year period following the event, and that PBGC treats the escrowed payments as if they were plan assets in accordance with ERISA § 4063(c)(3)(B). Is PBGC's claim for unfunded benefit liabilities net of the amount of the escrowed payments (i.e., are the assets used to determine unfunded benefit liabilities inclusive of the escrowed payments)?

RESPONSE

As the question suggests, ERISA section 4063(c)(3)(B) provides that upon plan termination, PBGC shall "treat any escrowed payments under this section as if they were plan assets and apply them in a manner consistent with this subtitle" (governing "Liability"). PBGC will determine how to do that in the event such a situation arises.

QUESTION 12

Upcoming Guidance: Status of Various Regulations

How can a practitioner find out the status of PBGC regulatory items, for example - interest on premium overpayments, reportable events, 4062(e), and the expansion of the missing participants program?

RESPONSE

PBGC issues a semi-annual Regulatory Agenda each Spring and Fall. All Regulatory Agendas can be found on www.reginfo.gov. For the most recent Regulatory Agenda (Fall 2010), click on Unified Agenda (Current Unified Agenda and Regulatory Plan), scroll down to Current Agenda Agency Regulatory Entries, and select PBGC. To find out whether a rule has been submitted to OMB for review as a significant regulatory action (which typically takes up to 90 days) or whether such review has been completed in the past 30 days, go to www.reginfo.gov, click on Regulatory Review (EO 12866 Regulatory Review), and select PBGC.

In response to questions about the specific items mentioned in the question:

- PBGC's Fall 2010 Regulatory Agenda lists Interest on Premium Overpayment as a long-term action, which means that as of the date of the Agenda, PBGC did not expect to issue a proposed rule within a year.
- PBGC published a proposed rule on Reportable Events in 2009. In light of [Executive Order 13563](#) (Improving Regulation and Regulatory Review) and comments received on the proposed rule, PBGC plans to re-propose this rule with an emphasis toward reducing the burden on employers to the extent feasible. For example, PBGC is considering whether and to what extent:
 - We can take advantage of other reporting requirements to avoid burdening companies and plans with unnecessary reporting;
 - There should be different requirements for small plans.
- PBGC published a proposed rule on ERISA section 4062(e) in 2010 and is in the process of carefully considering the comments received.
- PBGC is working on proposed regulations to implement PPA's expansion of the Missing Participants program.

PBGC's Spring 2011 Regulatory Agenda, which is scheduled to be issued in April 2011, will update the information in the Fall 2010 Regulatory Agenda.

QUESTION 13

Reportable Events: Lookback for Funding Waivers Under Technical Update 10-4

Assume that Plan B merges into Plan A, effective January 1, 2011, and that a reportable event occurs for Plan A on February 1, 2011. How do the rules under Technical Update 10-4, which (among other things) allow for a one-year lookback to determine whether a funding-related waiver test is met under the reportable events regulation, work in such a situation? In particular, may Plan A use its own stand-alone funding status for the prior plan year without taking into account the funding status of Plan B?

RESPONSE

Technical Update 10-4 provides the following guidance:

The VRP values (the amount of UVBs and the value of assets and vested benefits) as of the testing date to be used for an event year beginning in 2011 for purposes of subparts A through C of the reportable events regulation are those determined for premium purposes for the plan year preceding the event year under the premium regulations as amended to conform with PPA 2006. For example, in the case of a calendar year plan with a January 1 valuation date, the VRP values determined as of January 1, 2010, for purposes of the 2010 variable rate premium are also used for applying the \$50 million advance-reporting threshold test for events becoming effective in 2011.

The guidance is not explicit regarding a situation where one plan merges into another. However, if applied literally, the guidance would indicate that the “look-back” is to the prior-year VRP values of the plan involved in the reportable event, which in the case of a pre-event merger would be the surviving plan. Furthermore, if the surviving and disappearing plans used different actuarial assumptions and UVB valuation dates for the prior year, looking back to VRP values reflecting both plans might raise issues (such as whether and if so how to adjust the values to account for the differences) that the Technical Update does not address. It thus seems reasonable to read the Technical Update as being consistent with a look-back to the surviving plan’s VRP values alone.

The guidance in Technical Update 10-4 represents PBGC’s current thinking on this matter. It does not create or confer any rights for or on any person or operate to bind the public. Any approach that satisfies the requirements of the statute (as amended by the Pension Protection Act of 2006) and regulation is acceptable. To discuss an alternative approach (which is not required) or a reporting waiver, contact PBGC at 800-736-2444.

QUESTION 14

Other Reporting: 4010 – Acquisitions/Divestitures on Last Day of Information Year

In Q&A 22 of the 2010 Blue Book, which addressed the rule in PBGC's section 4010 regulation that only plans that are maintained by the filer (or any member of the filer's controlled group) on the last day of the information year are considered for purposes of the gateway tests, PBGC stated that, in a corporate transaction occurring on the last day of the information year which results in both a change of sponsor and a change in controlled group, both the seller and the buyer must count the plan for purposes of the gateway test. (PBGC also stated that it would be likely to grant a request to waive reporting of actuarial information with respect to the transferred plan for one of the filers.)

As a follow-up to Q&A 22 of the 2010 Blue Book, assume the following:

- The information year for both the seller and the buyer is the calendar year.
- The documentation relating to the corporate transaction makes it clear that the transaction takes effect at the "stroke of midnight" between information years (i.e., that the seller is the sole sponsor of the plan for all of December 31 and that the buyer is the sole sponsor of the plan for all of January 1).

Would PBGC still treat the buyer as the sponsor of the plan on December 31 for purposes of the ERISA § 4010 gateway test and for purposes of the requirement to report actuarial information under ERISA § 4010?

RESPONSE

Q&A 3 of the 2000 Blue Book discusses a similar question in the premium context, where the "merger-spinoff" rule avoids double-counting or non-counting of participants by shifting one plan's participant-count date from the last day of the prior plan year to the first day of the premium payment year. The response in that Q&A was that the merger-spinoff rule "is meant to capture situations where the pre-transaction status ends at the end of the prior year and the post-transaction status begins at the beginning of the current year. The language used by the parties is considered in determining the timing of the transaction."

The current question, dealing with section 4010, involves the same principle, namely that when a transaction takes effect is a question of fact, the resolution of which involves consideration of the language in relevant documents.

If the documentation relating to a corporate transaction makes it clear that the change in plan sponsorship takes effect at the "stroke of midnight" between information years, PBGC would treat the seller as the sole sponsor of the plan on the last day of the first of those information years for purposes of the 4010 gateway test and for purposes of the requirement to report actuarial information under ERISA section 4010.

QUESTION 15

ERISA § 4062 and § 4063: PBGC Settlement Authority Regarding 4062(e) Liability

Does PBGC have the same ability to settle claims for liability under ERISA § 4062(e) that it has to settle claims for unfunded benefit liabilities under ERISA § 4062(b)? In particular, does PBGC have the ability to settle claims for liability under ERISA Section 4062(e) for an amount that is less than the amount of liability PBGC believes has been incurred?

RESPONSE

PBGC has the authority to make appropriate arrangements with employers to settle liabilities. PBGC will continue, on a case-by-case basis, to discuss with employers arrangements that are workable given the business plans of employers and that protect the insurance program.

QUESTION 16

ERISA § 4062 and § 4063: Determination of Liable Entities for ERISA § 4062(e) Event

Does PBGC view the liability that arises under ERISA § 4062(e) as being joint and several among all members of the applicable controlled group? If so, or if not, how does PBGC decide which entity or entities to pursue for the liability?

RESPONSE

Yes, ERISA imposes liability on the sponsor and all members of its controlled group on a joint and several basis. Consequently, PBGC has the discretion to pursue any or all of those entities. The allocation of the liability is typically resolved in settlement negotiations with PBGC.

QUESTION 17

ERISA § 4062 and § 4063: Definition of "Required Contribution" for Purposes of ERISA Section 4063 and Section 4001(a)(2)

Section 4063 refers to the "amount required to be contributed" in defining the liability of a substantial employer withdrawing from a single-employer plan with two or more sponsors. The definition of Substantial Employer in Section 4001(a)(2) makes reference to "required contributions". Please provide guidance on what constitutes an "amount required to be contributed" or "required contribution" in the above sections.

RESPONSE

Single-employer plans that have two or more contributing sponsors not in the same controlled group are commonly referred to as multiple-employer plans. The contributing sponsors of a multiple-employer plan agree to use a method for requiring contributions that is usually included in the plan document. For a particular multiple-employer plan, the required contributions under the employer agreement could be defined as the same amount as determined by performing IRC 430 minimum required contributions separately for each employer as though each employer maintained a separate plan. Alternately, the required contributions may be based on some other method such as a variation of a "dollars per employee hour of service" rule.

The term "amount required to be contributed" is used in Section 4063(b) in defining the withdrawal liability as the unfunded benefit liabilities times the ratio of the individual sponsor's total amount required to be contributed for the 5 prior years to the total amount required to be contributed for the 5 prior years from all sponsors.

The terms "required contributions" and "amount required to be contributed" under Section 4001(a)(2) and under Section 4063 are synonymous and should be interpreted as the required contributions under the agreement between contributing sponsors to a multiple-employer plan. The required contribution may be more or less than the actual amount contributed by a particular employer to the plan. The required contribution should not be offset by any available carryover or pre-funding balance.

QUESTION 18

Other: Litigation Issues

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

RESPONSE

Adey v. PBGC, 2010 WL 892229 (N.D. W. Va. Mar. 9, 2010) – A group of participants in a terminated pension plan sued PBGC to challenge the agency’s determination that they did not meet certain service requirements. After issuing an initial decision precluding discovery outside the administrative record, the court granted PBGC summary judgment on all counts, finding that the agency’s interpretation of the plan’s terms was reasonable, and its application of such terms was sufficiently supported by the evidence.

Central States Southeast & Southwest Area Pension Fund v. O’Neill Bros. Transfer & Storage Co., 620 F.3d 766 (7th Cir. 2010) – A contributing employer to a multiemployer pension plan notified the plan that the company was “preparing for its termination and liquidation.” The plan deemed the notification to be a withdrawal and determined that the employer was in default, and thus required to immediately pay the entire amount of its withdrawal liability. The plan sued the employer, seeking payment of the entire withdrawal liability while mandatory arbitration proceeded. The district court granted summary judgment for the plan, and the employer appealed. The circuit court invited PBGC to file a brief as amicus curiae. In affirming the district court’s decision, the Seventh Circuit agreed with PBGC, holding that under ERISA section 4219(c)(5)(B), when there is an “insolvency default,” the plan may require the employer to immediately pay its entire withdrawal liability pending arbitration.

In re Chemtura Corp., 2010 WL 4272727 (Bankr. S.D.N.Y. Oct. 21, 2010) – As part of a global settlement between PBGC, a pension plan sponsor, and its creditors, the sponsor agreed to maintain its pension plans and make a contribution to the largest plan, in exchange for PBGC agreeing not to initiate termination due to possible long-run loss. In confirming the plan of reorganization over objections of a committee of equity holders, the bankruptcy court held that “settling with . . . PBGC was entirely sensible,” and that “the wisdom of . . . pushing . . . pension funding issues off to another day, and risk[ing PBGC-initiated] termination of their pension plans . . . would be debatable, at best.” The court added that absent settlement, the plan sponsor “may well have had to create a huge reserve for satisfying [PBGC’s] plan termination claims.”

PBGC v. Divin (Tom’s Foods), 2010 WL 2196114 (M.D. Ga. May 27, 2010) – After PBGC terminated and trustee a pension plan, the agency intervened in a fiduciary breach suit originally brought by the plan’s participants against the plan sponsor’s former officers and directors for allegedly failing to prudently invest the plan’s assets. The court denied the defendants’ motion to dismiss, holding that the facts alleged in the complaint were a sufficient basis for the claims, and denied PBGC’s motion to strike two of the defendants’ affirmative defenses, holding that such a decision should not be made prior to the close of discovery.

PBGC v. New United Motor Mfg., Inc., 2010 WL 2739993 (N.D. Cal. Jul. 11, 2010) – PBGC initiated termination of a pension plan sponsored by a joint venture involving a bankrupt automobile manufacturer. After PBGC sued the joint venture under section 4042 of ERISA, the agency and the joint venture reached a settlement and together moved to dismiss the case. Under the settlement, the joint venture agreed to initiate a standard termination of the pension plan, make a contribution to the plan, and, if the standard termination could not be completed, make an additional contribution and execute a trusteeship agreement terminating the plan. A union representing the pension plan’s participants moved to intervene and opposed the parties’ motion

to dismiss. In denying the union's motion, the court held that "Congress gave the authority to PBGC, not the union, to bring . . . enforcement actions [under section 4042] and to settle them," and that intervention "would interfere with PBGC's ability to effectively manage and terminate [pension] plan[s] in the most beneficial manner."

PBGC v. Rouge Steel Co., 2010 WL 3324921 (E.D. Mich. Aug. 23, 2010) – In 2006, the district court vacated PBGC's decision to initiate the termination of two pension plans of a bankrupt sponsor, and remanded the matter to PBGC for further development of the administrative record. In this decision, the court granted PBGC's motion for summary judgment, ordering the two pension plans terminated as of the date PBGC chose and denying the UAW's motion for summary judgment, which sought a later termination date. The court concluded that the participants' expectation that the plans would continue had been extinguished both by actual notice of PBGC's termination action, and by constructive notice when the plans' sponsor ceased operations. The court rejected the union's argument that participants' receipt of benefits during the pendency of the litigation revived their expectations that the plans would continue. The court was also unconvinced by the union's argument that either the lengthy termination litigation or the possible assumption of the plans by a third party revived participants' expectations. Finally, the court rejected the union's request that the court equitably prohibit PBGC from recouping benefit overpayments.

Stephens v. US Airways Group, Inc., 696 F. Supp. 2d 84 (D.D.C. Mar. 17, 2010); appeal docketed, No. 10-7100 (D.C. Cir. Aug. 12, 2010) – A group of 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, and during an appeal, the plan was terminated. The participants named PBGC as a defendant, asserting that the delay deprived them of the actuarial equivalence of their benefit, and that PBGC committed a fiduciary breach by failing to compensate them for the interest/actuarial equivalence. After winning a change of venue, PBGC moved to dismiss certain parts of the case. In a 2008 decision, the court agreed with PBGC that the participants cannot maintain a fiduciary breach claim that arises from an alleged failure to pay benefits; that PBGC is not liable for this alleged breach by a prior fiduciary; and that the participants are not entitled to attorneys' fees under Title IV. In this decision, the court granted PBGC summary judgment, holding that the alleged delay was reasonable and that the participants were not entitled to interest on their lump sum benefits.

US Airline Pilots Ass'n v. PBGC, 2010 WL 3168048 (D.D.C. Apr. 16, 2010) – A union representing participants in a terminated pension plan asserted that PBGC failed to investigate and to rectify alleged wrongdoings by former plan fiduciaries, and moved for a preliminary injunction to have a "special trustee" appointed to fulfill the duties that PBGC allegedly refused to perform. The court denied the union's motion, finding that the likelihood of success on the merits was remote, and that the union failed to show irreparable injury because even if PBGC brought suit and recovered, the first \$510 million would go to PBGC, and not to participants. Moreover, according to the court, a decision to appoint a "special trustee" would inevitably "open the door to frequent disruptions" of PBGC operations.

In re Wolverine Proctor & Schwartz, LLC, 436 B.R. 253 (D. Mass. Mar. 12, 2010), appeal docketed, No. 10-1334 (1st Cir. Mar. 24, 2010) – PBGC settled its claims for termination liability with the liquidating trustee of the former plan sponsor. A creditor objected to the settlement on grounds that the so-called "prudent investor" rate should have been used to calculate PBGC's claim for the plan's unfunded benefit liabilities, and that PBGC was precluded from recovering more than the amount in its original proof of claim. Following *Raleigh v. Illinois Dep't of Rev.*, the bankruptcy court held that the substantive non-bankruptcy law controlled the amount of liability. Here, the substantive law is ERISA's definition of unfunded benefit liabilities, which includes PBGC's regulatory assumptions. Citing PBGC's amended claim, and the fact that PBGC had reserved its right to amend, the bankruptcy court overruled the objection. The district court affirmed, holding that the bankruptcy court did not abuse its discretion in approving the settlement agreement, but rather, correctly applied the relevant legal standard.

QUESTION 19

Other: "Risk Mitigation" Program

What employers does PBGC monitor under its Early Warning Program? What types of transactions or events involving such employers are of concern to PBGC? What does PBGC do if it learns of a transaction of concern?

RESPONSE

Under its Early Warning Program, PBGC proactively monitors certain employers to identify events that may pose a risk to the pension insurance system. Generally, PBGC monitors employers with pension plans that in the aggregate have \$50M or more in underfunding or 5,000 or more participants. PBGC also monitors employers for other reasons as appropriate.

Certain types of transactions involving employers monitored under the Early Warning Program may be of concern to PBGC. These transactions include (but are not limited to):

- Break-up of a controlled group.
- Leveraged buyouts.
- Payout of a large dividend.
- Substitution of secured debt for a significant amount of previously unsecured debt.

If PBGC learns of a transaction involving an employer monitored under the Early Warning Program that is of concern, PBGC typically contacts the CFO of the employer. PBGC sends an information request that includes a request for actuarial information on the pension plans and information about the transaction including financial information on the plan sponsor, information about the nature and timing of the transaction, and information regarding how the controlled group may be impacted by the transaction.

If appropriate, PBGC negotiates with the employer to reach a settlement designed to ensure the continuity of the plan after the transaction in question. PBGC encourages employers 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 flexibility to structure settlements that mitigate risk to pension plans while still working within the parameters of employers' business plans. Settlements reached in the past have included cash contributions to pension plans, letters of credit, liens on assets, and guarantees from former controlled group members.

Some transactions or events may require filing of an advance or post-event notice under ERISA section 4043 (Reportable Events). Generally, employers that do not report publicly to the SEC and have plans with more than \$50M in underfunding are required to file advance notice of certain reportable events no later than 30 days before the effective date of the event. Employers and plans may be required to file post-event notices of reportable events. Employers and their advisors should see ERISA section 4043, 29 CFR part 4043, and Technical Update 10-4 for details on reportable events requirements.

QUESTION 20

Other: PBGC Administrative Decisions of Interest

Please describe any decisions of PBGC's Appeals Board that would be of interest to enrolled actuaries.

RESPONSE

PBGC Appeals Board decisions are available on PBGC's Website at <http://vwww.pbgc.gov/practitioners/law-regulations-informalguidance/contenUpage15626.html>. There is a search feature that can be used to find decisions that address topics and issues that may be of interest.

There are 2 decisions of note from 2010. In an appeal involving the Huffey Corp. Retirement Plan, the participant and his first wife had started payments under the Joint & 100% Survivor Annuity form before their divorce. After the first wife had waived her right to the survivor benefit in a divorce decree, the participant attempted to obtain a QDRO that would assign the survivor's benefit to his second wife. The Appeals Board, following the holdings in several federal court cases, decided that the survivor's benefit that had already "vested" in the first wife could not be reassigned to the second wife through a QDRO. You can find the decision at <http://www.pbgc.gov/Documents/apbletter/Decision--Huffey-Corp-2010-11-24.pdf>

In an appeal involving Title IV coverage, Compass Capital Partners sponsored a defined benefit pension plan that was established and maintained by a professional service employer which did not at any time have more than 25 active participants. Compass represented buyers and sellers of printing companies and performed valuations for businesses of all types. The Appeals Board found that Compass was a professional service employer under section 4021(c)(2) of ERISA. Accordingly, the Appeals Board found that the pension plan is not covered by Title IV. You can find the decision at <http://www.pbgc.gov/Documents/apbletter/Decision--Compass%20Capital%20Partners%20LTD%202010-08-03.pdf>

QUESTION 21

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

Frozen plans

Since 2008, information about frozen plans has been included in the annual comprehensive premium filing, so PBGC has more detailed information to share than it did in prior years. Because the due date for some 2009 filings has not yet passed (e.g., small plans with a 12/1/2009-11/30/2010 plan year), it is too soon for a final comparison of the 2008 and 2009 information. However, there appears to be an acceleration of plan freezes between the two years.

Based on single-employer plan premium data received as of March 1, we estimate that as of the beginning of the 2009 plan year:

- 13% of participants were in plans for which accruals had ceased completely (i.e., “hard freeze for all”) compared to 9% of participants as of the beginning of 2008.
- Generally, larger plans are less likely to be “hard frozen”. For example, in plans covering 1,000 or more participants, 12% of participants were in “hard frozen” plans compared with 29% of participants in plans with fewer than 1,000 participants.
- Hard-frozen plans represent 26% of the covered DB plans (up from 21% as of the beginning of 2008).

Partial freeze provisions thus far have not shown any change between 2008 and 2009. About 7% of participants were in plans for which accruals have ceased for some, but not all, participants. PBGC does not have data to determine the extent to which these plans are “hard frozen”. For example, in some cases, the freeze might apply to participants who work in a certain location and in others it might apply to all but certain grandfathered participants.

Another 4% of participants are in plans for which there is some other sort of freeze in effect either for all or some of the participants (e.g., a plan for which the only accruals are salary upticks in a final average pay plan).

In addition to freeze provisions, the premium filing also identifies plans that are closed to new employees. As of 2009, about 11% of participants in single-employer plans are in plans that do not cover new employees.

About one percent of participants in multiemployer plans are in plans that are either frozen, partially frozen, or closed to new employees.

Termination of frozen plans

The rate of termination of frozen plans has appeared to be relatively constant. Approximately one in five frozen plans reported resolutions to terminate according to Form 5500 reports for plan years 2006, 2007, and 2008.

PBGC has also looked at plans trustee by the PBGC during Fiscal Year 2010, and found that 41% were fully frozen before the date of plan termination.

Hybrid plans

Data about the prevalence of hybrid plans comes from Form 5500. Data from Form 5500 are two years old and do not provide a particularly insightful look at current trends in the pension world, but they are PBGC's primary source of plan characteristic data.

The data for PBGC-insured single-employer plans from the 2008 Form 5500 indicates that, as of the end of 2008, hybrid plans represented about 13% of single-employer DB plans (the corresponding percentage for the prior year was 11.8%). The percentage of participants in hybrid plans has also increased from 31.5% to 35.0%. While increases were noted across all size classes examined, insured plans with fewer than 1,000 participants are much less likely to include cash balance or similar benefit formulas.

QUESTION 22

Other: Determinations Regarding Title IV Coverage of Church or Governmental Plans

PBGC has been coordinating with the other ERISA agencies for several years on a variety of issues relating to church plans and government plans.

- (a) Under what circumstances, if any, is PBGC treating the termination of such a plan as subject to Title IV requirements and, if underfunded, eligible for the PBGC's guarantee? Does it matter for purposes of the termination rules or guaranteed benefits whether the plan has been paying PBGC premiums?
- (b) How is PBGC dealing with such plans in the context of PBGC premium requirements?
- (c) In the case of a plan that is or may be a church plan, how does the making of an election under IRC Section 410(d) (and the timing of any such election), or the failure to make such an election, affect these issues?
- (d) If PBGC grants a request for a premium refund for a plan that claims non-electing church plan or government plan status, does it first issue an initial determination that the plan is not covered by Title IV of ERISA because it is a non-electing church plan or a government plan?
- (e) In any case in which PBGC issues an initial determination that a plan is not covered by Title IV of ERISA because it is a non-electing church plan or a government plan, the initial determination may be appealed to PBGC's Appeals Board under 29 CFR §§ 4003.1(b)(5), 4003.51, by "[a]ny person aggrieved by" the initial determination." What notice of the initial determination is given to persons who may be aggrieved by the initial determination?

RESPONSE

IRS has placed a moratorium on governmental plan determinations until it issues further guidance. PBGC does not anticipate making government plan determinations before IRS issues that guidance. IRS is expected to issue a revenue procedure relating to church plan determinations. PBGC typically does not make church plan determinations, relying instead upon IRS church plan determinations. However, generally speaking:

- Plans which are correctly determined to be church or government plans are not covered by Title IV and are not required to pay premiums. Benefits under such plans are not guaranteed by PBGC.
- The payment of premiums for a non-electing church plan or a government plan does not affect the plan's non-covered status.
- If a church plan makes an election to be covered, it is covered and PBGC guarantees benefits under it, subject to the phase-in rules including the provisions in ERISA § 4022(b) applicable to newly-covered plans.

QUESTION 23

Other: Withdrawal Liability for Multiemployer Plan that has Eliminated Adjustable Benefits

A multiemployer plan in critical status may elect to eliminate certain “adjustable” benefits. For purposes of determining withdrawal liability, these adjustable benefits must still be reflected.

Consider a plan that has provided for an unreduced early retirement benefit at age 55 with 30 years of service. After eliminating adjustable benefits, this plan provides an early retirement benefit that is actuarially equivalent to the age 65 normal retirement benefit.

The actuary updates retirement decrements in response to the change in plan provisions. As a result, far fewer participants are assumed to retire immediately upon reaching eligibility for unreduced benefits than was previously the case. Applying the revised retirement decrements to the withdrawal liability calculation will reduce withdrawal liability, even though the unreduced early retirement benefit is still being valued for purposes of this calculation. Is this a reasonable approach to calculating withdrawal liability?

RESPONSE

Technical Update 10-3 provides guidance on simplified methods for the application of the statutory requirement that multiemployer plans in critical status disregard certain benefit reductions in determining the plan's unfunded vested benefits for purposes of determining an employer's withdrawal liability. Under the simplified method described in Technical Update 10-3, the value of the benefit reductions which are to be disregarded under section 432(e)(9) of the Code is determined using the same assumptions that the plan uses to determine unfunded vested benefits for purposes of section 4211 of ERISA. Under this guidance, it would not be reasonable for the plan to use the revised retirement decrements for purposes of calculating withdrawal liability.

The guidance in Technical Update 10-3 represents PBGC's current thinking on the issue. It does not create or confer any rights for or on any person or operate to bind the public. An alternative approach that satisfies the requirements of the statute (as amended by the Pension Protection Act of 2006) and regulations is acceptable. To discuss an alternative approach (which is not required), contact PBGC at 800-736-2444.