

**Joint Committee on Employee Benefits Q&A  
with the Pension Benefit Guaranty Corporation  
based on meeting with staff  
May 9, 2001**

The following questions and answers are based on informal discussions between private-sector representatives of the JCEB and PBGC staff members. The questions were submitted by ABA members and the responses were given at a meeting of JCEB and government representatives. The responses reflect the unofficial, individual views of the government participants as of the time of the discussion, and do not necessarily represent agency policy. This report on the discussions was prepared by designated JCEB representatives, based on the notes and recollections of the JCEB representatives at the meeting, and has not been reviewed by PBGC staff members. The questions were submitted in advance to the agency, and it was understood that this report would be made available to the public.

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### **PBGC Premiums**

1. **Question:** Former Executive Director David Strauss recommended before his resignation that the PBGC reduce premium rates in view of the PBGC's ongoing and projected financial surplus. Please describe whether action is being taken to implement this recommendation and the scope of the possible reduction.

**Answer:** Pending appointment of a new Executive Director, no action is being taken by PBGC to implement former Executive Director David Strauss' recommendation that PBGC reduce premium rates. Once a new Executive Director is appointed this issue will be discussed. Even though PBGC had a \$9.7 billion surplus, the economy has turned. PBGC pointed out that it has its own economic models that analyze its financial condition. PBGC also indicated that there are people in government who are still concerned about PBGC's financial condition. If there is a decision to pursue a reduction in the premium rate, this decision will need to be moved through the administrative process. PBGC believes it unlikely that any premium reduction recommended by PBGC will be able to move through this process and be passed by Congress this year because of the time involved to make a decision, prepare legislation, etc.

2. **Question:** Please describe the current status of the PBGC's premium audit program.

**Answer:** PBGC is presently reevaluating its premium audit program in order to add more structure. PBGC is concerned that relying on W-2's for the participant count is inaccurate. PBGC is considering allowing an employer to demonstrate the size of its participant population based on employer records in order to be more flexible. PBGC also may begin to issue the audit results in draft, enabling

employers to provide comments, following which the PBGC would issue the final audit report. In addition, PBGC is considering more elaborate advance notice to sponsors, including an initial conference.

3. **Question:** Only since 1994 has the PBGC applied a six year statute of limitations to refund premiums with respect to plans (*e.g.*, church plans) that were inappropriately making such payments. What was the basis for this change in position and what was the basis for the prior position?

**Answer:** 1994 was the first time that the PBGC took this formal position. Prior to that time, their practice may have been at variance with the six year statute approach.

4. **Question:** The PBGC's recent guidance concerning waivers of premium penalty assessments provides criteria that the PBGC will use in determining whether premium penalties should be waived. Section 32 describes situations that may demonstrate "reasonable cause." Does PBGC consider reliance on professional advisors (attorneys, benefit consultants, etc.) as potentially satisfying the "reasonable cause" requirement where this situation was not described in PBGC guidance? Such reliance situations are routinely recognized by the IRS for Form 5500 filing penalties and other tax return problems.

**Answer:** The question describes PBGC's "proposed policy." The PBGC generally does not intend to provide relief merely because an advisor was used, whether the advisor was either an inside or outside advisor. Relief would only be available were the advisor to have justification on a reasonable cause basis in its own right. Accordingly, a "business prudence standard" applies.

## **Guaranteed Benefits**

5. **Question:** A plan engages in a "spinoff termination" under the Joint Implementation Guidelines issued by the IRS, DOL and PBGC in 1984. "Irrevocable commitments" must be purchased from an annuity provider with respect to the accrued benefits of the active participants in the ongoing, spinoff plan for accrued benefits as of the spinoff date. Will such benefits continue to be guaranteed by the PBGC in view of the fact that IRS would not permit such benefits to be distributed except in limited circumstances where a distributable event had occurred?

If PBGC will not guarantee the pre-spinoff accruals, and if active participants have yet to accrue additional benefits (and the plan does not have any other benefit liabilities) as of the snap shot date for determining the participant count for PBGC premium purposes, would this mean that no PBGC premiums would be due for the premium payment year following the spinoff?

**Answer:** PBGC referred to Opinion Letter 91-4 for the proposition that the plan has retained no liability to employees for Title IV purposes. Therefore, there is neither a PBGC guarantee nor a premium payment obligation if no other benefits have accrued.

### **Employer Liability/PBGC Enforcement**

6. **Question:** In PBGC Technical Update 00-3, the PBGC issued questions and answers on the "Early Warning Program." Have any changes to the Program been implemented since publication of the Technical Update?

**Answer:** There have been no changes.

7. **Question:** Under the Early Warning Program, the PBGC follows two types of companies: (1) financially-troubled companies (*i.e.*, below investment-grade bond rating and a plan that has current liabilities exceeding \$25 million), and (2) companies with underfunded pension plans (*i.e.*, a plan that has current liability exceeding \$25 million and unfunded current liability exceeding \$5 million). The companies that are followed have a strong interest in PBGC activity. Would the PBGC be willing to contact those companies periodically to advise that they are being tracked in the Program, especially in order to help to avoid inappropriate inclusion?

**Answer:** PBGC does not notify targets in advance. This will only occur when a transaction arises. In PBGC's view, to provide advance notice would require significant additional staffing at the agency. Employers should already be on notice through the criteria that were described in Technical Update 00-3.

8. **Question:** Please describe any recent situations in which the PBGC has determined that the principal purpose of a transaction is to evade liability to the PBGC, pursuant to Section 4069.

**Answer:** There have been no recent situations

9. **Question:** In assessing penalties for failure to issue information notices under Section 4071, PBGC rules indicate that certain mitigating factors will be taken into account in determining whether penalties should be waived. In circumstances where a sponsor self-corrects a failure, PBGC guidance requires that the PBGC be notified of such self-correction in addition to the sponsor having taken such corrective action. Why is PBGC notification necessary in order for the sponsor to be afforded leniency in a penalty situation? Would leniency be available absent such notice?

**Answer:** Notification to the PBGC is a mitigating factor in the context of self-correction. PBGC wants notice in order to know if any further action needs to be taken to protect the plan and/or participants.

## **Standard Terminations**

10. **Question:** In certain cases, a plan that is preparing to terminate under a standard termination will purchase and distribute annuity contracts to retirees in advance of the proposed termination date in order lock-in favorable interest rates and annuity costs. Because these individuals cease to be "participants" after "irrevocable commitments" are purchased and distributed, they are not included as part of the standard termination process. Does PBGC agree that such transactions are permissible?

**Answer:** The PBGC would have concerns in situations where the plan is either underfunded or the adequacy of funding is on the borderline, where in either case annuity purchases could circumvent the Section 4044 asset allocation rules. The PBGC reminded the group that it retains authority under Section 4045 to recoup payments exceeding guaranteed benefits.

11. **Question:** Under the 1984 Joint Implementation Guidelines, benefits must be annuitized for ongoing participants in the continuing plan in a spinoff/termination. During the 1980s, the PBGC issued three opinion letters (PBGC Op. Letters 85-11, 85-21, 85-25) advising that, in certain circumstances, annuitization was not required where the plan spinoff prior to termination of the remaining plan occurred due to independent business reasons or because the "form over substance" doctrine did not apply (*e.g.*, as a result of collective bargaining). Does the rationale of the opinion letters continue to represent PBGC policy?

**Answer:** Last year PBGC reviewed the rationale of the three opinion letters issued in 1985 relating to whether benefits must be annuitized for ongoing participants in the continuing plan in a spinoff termination. PBGC suggested that PBGC would require an annuity purchase for participants in similar situations at this time. PBGC noted the 1985 letters involved collective bargaining situations. But the DOL and the IRS expressed concerns about the 1985 opinion letters. Therefore, PBGC would enforce the annuity requirement under the Joint Implementation Guidelines, without exceptions, if similar situations to those in the letters were to arise today. PBGC pointed out that the letters by their terms do not discuss the rationale for PBGC's decision, such as an independent business reason for the spinoff..

12. **Question:** What is the treatment of a Section 401(h) retiree medical account in a standard termination?

**Answer:** This issue has never been raised before; therefore, PBGC did not have a prepared response.

## Miscellaneous

13. **Question:** If an ongoing plan with no intention of terminating purchases and distributes irrevocable commitments to retired participants in order to reduce administrative costs and eliminate PBGC premium obligations, is there anything under Title IV that would prevent such a transaction?

**Answer:** Some plans purchase and distribute annuity contracts on a periodic basis. So long as there is no subterfuge concerning a contemplated termination, there are no Title IV issues.

14. **Question:** Please describe significant PBGC litigation in the past year that has established important precedent that would be of interest to benefits attorneys.

**Answer:**

Pineiro v. PBGC (SDNY 2000) (Pan Am). This case involves the tension between the PBGC's role as plan fiduciary and administrator of Title IV. The critical issue is what capacity PBGC is acting in on the issue of the amount of guaranteed benefits.

PBGC v. Haberbusch, 25 EBC 1481 (CD Ca 2000). This case involves the involuntary (distress) termination of a law firm plan after lump sums were distributed to the top partners. Although the plan had a claim against its professional advisors, PBGC moved to terminate. The judge upheld PBGC's position.

PBGC v. White Consolidated Industries, 215 F 3d 407 (3rd Cir 2000) (Blaw Knox). A Swedish company recently acquired the company and will underwrite employee pensions under the Blaw Knox plan under a settlement with the PBGC.

PBGC v. Belfance, 232 F 3d 505 (6th Cir 2000) (Copperweld). PBGC was unsuccessful in its position on the calculation of unfunded vested benefits in bankruptcy. The court deferred to the Bankruptcy Court on this issue.

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