

**American Bar Association  
Joint Committee on Employee Benefits**

**Q&A Session with PBGC  
May 6, 2009**

*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 in advance to the agency 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 the official position of PBGC. This report on the discussions was prepared by designated JCEB representatives, based on the notes and recollections of the JCEB representatives at the meeting (with informal review by PBGC staff), and it was understood that this report would be made available to the public.*

**PREMIUMS**

- 1. QUESTION:** 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.

**PROPOSED RESPONSE:**

**RESPONSE:** Oneida -- see Q&A 34 response

The PBGC has collected termination premiums as part of broader settlement agreements that cover all of its claims regarding the terminated plans involved, and in those cases it would be difficult to allocate a specific portion of the settlement amounts as relating to the termination premiums. The PBGC has not had to rely on Form T filings with respect to collection of termination premiums. The PBGC staff is not aware whether any company has filed a Form T to date.

- 2. QUESTION:** 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 and any guidance PBGC can provide relating to the kinds of circumstances PBGC is likely to view as meeting this "good cause" standard.

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 4 of the 2009 Blue Book.

[Scrivener's Note: References herein to the "Blue Book" for a given year refer to the Summary of Discussions between the Enrolled Actuaries Program Committee and Staff of the Pension Benefit Guaranty Corporation held at the Enrolled Actuaries Meeting for the year involved. Copies of the Blue Books (copyright ©, Enrolled Actuaries Meeting), can be found on the PBGC's website at (<http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html>). The questions and proposed answers herein that were based on those in Blue Books were presented to the PBGC at this session with the general goal of obtaining confirmation on matters of legal interest or a more extended response. Except as otherwise indicated, where the PBGC cites to a question and answer in a Blue Book, the question and proposed answer herein are either identical or very similar to the referenced question and answer in the Blue Book. Thus, such a response effectively represents agreement with the proposed answer. In some cases, the response also includes a further elaboration of the issue involved and the views of the PBGC.]

- 3. QUESTION:** Please describe the PBGC's audit 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.

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 5 of the 2009 Blue Book.

4. **QUESTION:** PBGC issued the following guidance regarding whether and when a contingent-type benefit is considered “vested” for variable-rate premium purposes in the preamble to its October 5, 1988, proposed rule implementing the variable-rate premium:

Finally, the PBGC has received inquiries as to whether to include contingent benefits, such as “30-and-out” and disability benefits, in determining a plan’s vested benefits. Unless a participant has met the requirements for and become entitled to receive a contingent-type benefit, the benefit is not a vested benefit for premium purposes. . . . Thus, 30-and-out benefits and disability benefits for which a participant is not immediately eligible as of the last day of the plan year preceding the premium payment year are not included in vested benefits as of that date.

53 F.R. 39200, 39201–202. PBGC incorporated this 1988 guidance into its Premium Payment Package for all premium payment years from 1998 through and including 2007, but not in its Comprehensive Premium Payment Instructions for the 2008 or 2009 plan years. (The 2008 and 2009 instructions do incorporate substantial *new* guidance on the meaning of “vested” that had been developed in connection with PBGC’s rulemaking implementing the

PPA 2006 changes to the variable-rate premium (73 F.R. 15065 (Mar. 21, 2008)).) Is this 1988 guidance still valid for post-PPA plan year (*i.e.*, 2008 and beyond)?

**PROPOSED RESPONSE:** Yes.

**RESPONSE:** The current regulations on PBGC premiums provide only limited guidance with respect to what constitutes “vesting” for premium purposes; contingent benefits are not addressed. Until further guidance is released, employers should use a reasonable interpretation of the statutory requirements. In this regard, relying on the prior instructions may constitute evidence of good faith, and it is unlikely that the PBGC would challenge an employer which relied on those prior instructions.

5. **QUESTION:** PPA Section 406 allows PBGC to pay, “subject to regulations prescribed by [PBGC],” interest on overpayments made by premium payors, effective with respect to interest accruing for periods beginning not earlier than PPA’s August 17, 2006, enactment date. Does PBGC believe it needs to adopt regulations to be able to pay such interest? What are PBGC’s plans to pay such interest, and for what periods, either with or without implementing regulations?

**PROPOSED RESPONSE:**

**RESPONSE:** The PBGC plans to issue regulations regarding interest on premium overpayments. It will need to coordinate those regulations with the development of information technology systems needed to allow for such payments, however. The timing of that process is uncertain. The PBGC does not currently intend to pay interest on premium overpayments until the implementing regulations are issued. No determination has yet been made regarding whether such regulations would apply retroactively.

6. **QUESTION:** PBGC’s Comprehensive Premium Payment Instructions for the 2009 premium payment year state (at p. 40) that “[a] request for a refund must be made within the period specified in the applicable statute of limitations (generally six years after the overpayment was made).” If a premium refund (or credit) request is made within that period and is pending at the time the applicable statute of limitations period ends, will PBGC rely on the statute of limitations as a basis for denying the request?

**PROPOSED RESPONSE:** No.

**RESPONSE:** The PBGC agrees with the proposed response. There was a follow-up question as to whether the PBGC would rely on the statute of limitations as an affirmative defense, if the PBGC were to deny such a refund request (*i.e.*, one that was pending with the PBGC when the statute of limitations ran) on the merits and the matter ended up in litigation. In such a situation, the PBGC would not expect to rely on the statute of limitations as an affirmative defense, but cannot rule out the possibility that a case could arise in which the equities would weigh in favor of the PBGC relying on such a defense.

7. **QUESTION:** Assume that a new calendar year plan is adopted on October 1, 2009, retroactively effective to January 1, 2009, and gives past service credit for all prior plan years, effective October 1, 2009. What is the premium due date and as of when are UVBs and the participant count determined for this plan for the 2009 premium payment year? Would the answer be different if the plan was not retroactively effective, but rather effective as of the October 1, 2009, adoption date?

**PROPOSED RESPONSE:**

**RESPONSE:** The date for determining the UVBs for a year would be the valuation date under the defined benefit pension plan funding rules, over which the IRS, not PBGC, has jurisdiction. In contrast, PBGC rules would govern the date for determining the participant count, and it would depend on the plan effective date. As a result, for the 2009 premium payment year, it would be January 1, in the event the plan was effective on that date, and October 1, if the plan was effective as of that date.

### **STANDARD TERMINATIONS**

8. **QUESTION:** 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?

**PROPOSED 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).

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 8 of the 2009 Blue Book.

9. **QUESTION:** 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?

**PROPOSED RESPONSE:** The lump sums must be calculated and paid on the alternative basis.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 9 of the 2009 Blue Book.

**10. QUESTION:** 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?

**PROPOSED 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 date,<sup>1</sup> 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 10 of the 2009 Blue Book.

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<sup>1</sup> For convenience, this response assumes that the distribution date is the annuity starting date.

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

**PROPOSED RESPONSE:**

**RESPONSE:** PBGC audited 280 plan termination filings in fiscal year 2008, of which 77% were plans with 300 or fewer participants (PBGC is continuing to audit the termination of all plans with more than 300 participants). Of the audited plans, PBGC required corrective action in 13% of the cases. The most common errors involved inaccurate lump sum calculations (often due to incorrect annuity starting dates or ages or use of the wrong interest rate or mortality assumptions), missing election forms, attempted election of alternative treatment ("waiver") of benefits by individuals who were not majority owners, failure to include all of the plan's benefit options under the terminal funding annuity contracts, and incomplete information on missing participants. As a general matter, PBGC requires all of the plan's distribution options, including unusual annuity forms, to be included in any annuity contracts through which plan benefits are provided upon termination.

**12. QUESTION:** 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?

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 11 of the 2009 Blue Book.

## **DISTRESS AND INVOLUNTARY TERMINATIONS**

**13. QUESTION:** 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”).

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 12 of the 2009 Blue Book.

**14. QUESTION:** 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?

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 13 of the 2009 Blue Book.

**15. QUESTION:** 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. Please describe PBGC’s experience since the issuance of this Appeals Board decision in dealing with situations where a private equity fund does or might have such liability.

**RESPONSE:** Subsequent to the Appeals Board decision, PBGC has continued to refer to applicable law to determine whether a private equity fund is part of a controlled group. Several matters including the case that was before the Appeals Board have been resolved to PBGC's satisfaction, and there has been no other litigation to date.

**16. QUESTION:** Assume that a substantial employer withdraws from a multiple-employer plan and satisfies its liability under ERISA Section 4063 through an escrow payment to PBGC. Assume further that the plan terminates in a distress or involuntary termination within the five year period beginning on the date of the withdrawal and, as a result, PBGC treats the escrowed payments as if they were plan assets. How would PBGC determine the liability of the withdrawn employer for the underfunding upon plan termination under ERISA Section 4063? In particular, what credit would the withdrawn employer get for the payment it made under ERISA Section 4063?

**PROPOSED RESPONSE:** PBGC would: (1) determine what the liability of the withdrawn employer would have been, as of the plan termination date, under ERISA Section 4064 if the escrow payment had not been made; and (2) give the withdrawn employer a credit against that liability equal to: (a) the amount of the escrow payment, plus (b) interest thereon during the period from the date of payment to the plan's termination date. The interest used for this purpose would be the PBGC select rates as in effect for each month or quarter during that period.

**RESPONSE:** In the event of a plan termination, assets escrowed under Section 4063(b) must, under Section 4063(c)(3)(B), be treated as plan assets and applied in a manner consistent with Subtitle D of Title IV. When the situation arises, PBGC would determine the best method to apply such assets on a facts and circumstances basis.

**17. QUESTION:** 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").

**PROPOSED RESPONSE:**

**RESPONSE:** The number of applications by controlled groups for distress terminations under Distress Test 3 increased sharply this year; in fact the filings have about doubled from levels in recent years. Since it takes awhile to process such an application, PBGC staff cannot indicate the disposition of the filings. As in the past, there have been virtually no distress terminations under Distress Test 4.

**18. QUESTION:** 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?

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 26 of the 2009 Blue Book.

## **REPORTABLE EVENTS AND MISSED CONTRIBUTION LIENS**

- 19. QUESTION:** 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?

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 17 of the 2009 Blue Book.

**20.QUESTION:** 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?

**PROPOSED 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>.)

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 18 of the 2009 Blue Book), except to the extent it has been superseded by Technical Update 09-3 (issued on April 30, 2009, after the JCEB question was submitted to the PBGC). Under that Technical Update, there is a new reporting waiver for quarterly contributions for the 2009 plan year for small plans with fewer than 25 participants and simplified reporting method for other small plans with fewer than 100 participants, as long as the reason for missed quarterly installment is not motivated by financial inability (as opposed to, e.g., administrative

difficulties, timing of funding valuations). The participant count is based on the number of participants for whom PBGC premiums were payable for the 2008 plan year.

**21. QUESTION:** 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?

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 19 of the 2009 Blue Book.

**22. QUESTION:** 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?

**PROPOSED 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.

**RESPONSE:** The PBGC agreed with the response above, as reflected in Q&A 27 of the 2009 Blue Book, but supplemented it by indicating that the response also applies for 2009 installments missed to date. The issue of whether a quarterly installment is, 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 is one for the IRS to decide. To the extent that 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 that the PBGC will continue to use the same procedures as it used for 2008.

### **ANNUAL EMPLOYER REPORTING (ERISA SECTION 4010)**

**23. QUESTION:** 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.

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 20 of the 2009 Blue Book. In addition, PBGC indicated that for the Information Year 2008 reports

due by April 15, 2009, PBGC received and denied a few requests for extensions made purely on the basis that additional time was needed to prepare the filing. A few employers requested a waiver where a controlled group had only one plan, for which the funding target attainment percentage was less than 80 percent, but this plan was exempt from reporting actuarial information because it was an “exempt plan” under 29 C.F.R. § 4010.8(c)(1) (i.e., fewer than 500 participants and ERISA section 4010 shortfall not in excess of \$15 million). In general, PBGC denied such waiver requests. In one situation, based on the unique facts and circumstances presented, PBGC determined that a waiver was warranted.

**24. QUESTION:** 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 implementing regulations, controlled groups with aggregate underfunding not exceeding \$15 million are exempt from filing based on this revised trigger. What effect does PBGC anticipate that these changes will have on the number and nature of controlled groups required to file, taking into account the recent economic downturn?

**PROPOSED 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 on December 19, 2008, issued Technical Update 08-3 implementing the \$15 million waiver for information years beginning in 2008. On March 16, 2009, PBGC published the final 4010 rule, which adopted this waiver. For more information see: <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16612.html> and <http://edocket.access.gpo.gov/2009/pdf/E9-5741.pdf>.

**RESPONSE:** The PBGC agreed with the proposed response as reflected in Q&A 21 of the 2009 Blue Book (as expanded to reflect the recent issuance of the final 4010 rule). In addition, PBGC is in the process of reviewing the first filings under the post-PPA rules (those for 2008, generally due April 15, 2009) and has nothing further to report with respect to them at this time.

### **ERISA SECTION 4062(e) AND 4063 EVENTS**

**25. QUESTION:** 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.

#### **PROPOSED RESPONSE:**

**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 Program Office (IPO) settled five cases. The settlements provided protection valued at about \$125 million, in total, for pension plans covering over 13,000 participants. As of December 31, 2008, IPO was working on approximately 45 cases, and in the first quarter of 2009 has settled 4 cases providing protection valued as \$70 million. PBGC works with companies to structure flexible settlements that fit within the parameters of their business plans.

[Scrivener's Note: A portion of the information in this response is reflected in Q&A 24 of the 2009 Blue Book.]

**26. QUESTION:** PBGC's regulations implementing ERISA Section 4062(e) (29 CFR § 4062.8) provide that the liability arising from an ERISA Section 4062(e) event is the total underfunding (on a PBGC plan termination basis) for the plan, multiplied by the active participant reduction percentage for "the employer" resulting from the event. In a multiple-employer plan where one of many employers experiences an ERISA Section 4062(e) event resulting in an active participant reduction percentage *for that employer* of (e.g.) 75%, does PBGC interpret its regulations as resulting in that employer having ERISA Section 4062(e)

liability equal to the full plan underfunding times that active participant reduction percentage?

**PROPOSED RESPONSE:** No. The regulations do not take into account the special circumstances involved in the case of a multiple-employer plan. Where one of the employers in a multiple-employer plan experiences an ERISA Section 4062(e) event, PBGC interprets its regulations as requiring that the liability calculation be based not on the full plan underfunding, but rather on the portion of that underfunding that would be attributable to that employer under ERISA Section 4063 if the plan had terminated on the date of the event. That portion is then multiplied by the active participant reduction percentage for that employer resulting from the event to determine the ERISA Section 4062(e) liability.

**RESPONSE:** PBGC would analyze the application of 4062(e) in such a situation under a facts and circumstances basis. Anecdotally, PBGC staff is not aware that such a situation has yet arisen.

## PENALTIES

**27. QUESTION:** On January 12, 2001, PBGC issued a proposed rule (66 F.R. 2856) that, among other things, provided guidance on: (1) the meaning of “reasonable cause” for penalty waivers (both for premium underpayment penalties under ERISA Section 4007 and for late information penalties under ERISA Section 4071), and (2) the guidelines for assessing penalties under ERISA section 4071. In Q&A 18 of the 2001 Blue Book, PBGC stated that the proposed rule was “largely reflective of the PBGC’s current practices” and that “it is likely that current case-by-case penalty determinations will be generally consistent with the proposal.” Since then, however, PBGC has finalized its penalty policy guidance relating only to premium underpayment penalties (71 F.R. 66867, Nov. 17, 2006), not to late information penalties. Is it still true that the 2001 proposed guidance relating to late information penalties is largely reflective of PBGC’s current practices and that current case-by-case late information penalty determinations will be generally consistent with the 2001 proposal?

**PROPOSED RESPONSE:**

**RESPONSE:** As a general matter 2001 guidance largely reflects PBGC’s current practices. The PBGC considers the facts and circumstances of each case to ensure that the penalty fits the violation.

**28. QUESTION:** Please describe PBGC’s recent experience in connection with assessment and waiver of late information penalties under ERISA Section 4071.

**PROPOSED RESPONSE:**

**RESPONSE:** PBGC has not assessed any penalties in the last 12 months under Section 4071 for failure to make required filings with respect to a standard termination or PBGC premiums. PBGC has assessed penalties for failing to file reportable event notices or Section 4010 notices, but will not assess, or will waive, penalties if there are appropriate mitigating circumstances or where the issues involved unresolved interpretive issues relating to PPA changes.

**29. QUESTION:** Please describe PBGC’s recent experience in connection with waivers of late premium payment penalties under ERISA Section 4007.

**PROPOSED RESPONSE:**

**RESPONSE:** In most cases, PBGC denies requests for waivers, including where the cause for the delinquency involved failure to understand or properly apply rules, taking into account plan size, or forgetting to pay by the due date. In most situations in which a waiver has been approved, the reasonable cause has involved circumstances such as the sudden death of plan administrator or a natural disaster, so that the failure to pay was due to events beyond the premium payer’s control and not avoidable by the exercise of ordinary business care and prudence under the “reasonable cause” standard. Although PBGC has authority to grant waivers for reasons other than “reasonable cause,” it declined to indicate whether it has used such discretion.

### **MINIMUM FUNDING WAIVERS**

**30. QUESTION:** Please describe PBGC’s role and recent experience in connection with minimum funding waiver requests involving amounts in excess of \$1 million, including the criteria PBGC considers in evaluating such requests and options for addressing the requirement to provide security to ensure repayment of the waived amount.

**PROPOSED RESPONSE:**

**RESPONSE:** The number of minimum funding waiver requests has declined since PPA, largely because past due contributions are no longer rolled forward. So far, there has not been a big increase in the number of waiver requests this year.

The IRS is responsible for determining whether to grant the waiver, but receives input from the PBGC. With respect to some applicants last year, the IRS’ ruling came after the due date for the catch up payment. PBGC is coordinating with IRS to streamline the waiver ruling process. In addition, PBGC staff noted that the process can move more quickly if the applicant contacts PBGC and provides all information needed to evaluate the waiver request. In this regard, PBGC noted that it is interested in reviewing five year projections for required contributions and the sponsor’s free cash flow and that it looks at affordability of the plan, like a bank would do for a credit or loan analysis. While PBGC is flexible about security, it

routinely recommends to IRS that security be granted for a waiver. PBGC also indicated that a minimum funding waiver request is a reportable event.

PBGC staff also noted, anecdotally, that Congressional staffers have recently inquired whether the funding waiver process could be made more attractive.

## **EARLY WARNING/RISK MANAGEMENT PROGRAM**

**31. QUESTION:** 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 (*e.g.*, the number and types of settlements reached). How does the level of activity under this program compare to prior years? What kinds of protection does PBGC generally look for in settlements under this program?

### **PROPOSED RESPONSE:**

**RESPONSE:** In 2008, the PBGC reviewed 480 transactions that satisfied the criteria set forth in Technical Update 00-3 and investigated 100 of those transactions. (PBGC noted that this Technical Release will have to be updated for the PPA.) In seven of those transactions, PBGC sought protections. It obtained economic protection in four (in the aggregate, \$122 million), and in some of the three others it received other protections, such as additional financial disclosure. The number of transactions reviewed in 2008 was about the same as in 2007. The PBGC encourages employers to contact it early to begin discussions, so that transactions will not be delayed, and notes that it has substantial flexibility to structure settlements.

## **VALUATION AND PAYMENT OF BENEFITS**

**32. QUESTION:** 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)?

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 15 of the 2009 Blue Book.

**33. QUESTION:** Plan A is a defined benefit plan that does not allow payments to an alternate payee (AP) under a domestic relations order (DRO) to commence prior to the earliest retirement age (as defined in IRC Section 414(p) and ERISA Section 206(d)). Plan A does not contain a provision for pre-retirement death benefits other than the QPSA for a spouse. AP submits a “separate interest” DRO awarding a portion of participant P’s benefits to AP and does not name AP as the surviving spouse for any portion of participant P’s benefits (including the portion awarded to AP). The DRO also provides that the separate interest is required to be paid to AP even if P dies prior to the earliest retirement age. Can the plan administrator of Plan A refuse to qualify the DRO because it would require the Plan to pay more than it otherwise would have been required to pay if P and AP had continued to be married, AP had waived the right to surviving spouse benefits, and P died prior to the earliest retirement age? Does it make a difference if Plan A provides for a pre-retirement death benefit for a non-spouse beneficiary?

**PROPOSED RESPONSE:** The plan administrator of Plan A can refuse to qualify the DRO whether or not Plan A provides for a pre-retirement death benefit for non-spouse beneficiaries. It is permissible, but not required, for a plan to permit the separate interest to be paid to AP when P would have reached the earliest retirement age if P dies prior to the earliest retirement age.

**ANALYSIS:** The Senate Finance Committee Report under the Retirement Equity Act, on page 80, contains the following paragraph (emphasis added):

“The bill provides that a domestic relations order is not treated as failing the requirement for a qualified domestic relations order merely because the order provides that payments must begin to the alternate payee on or after the date on which the participant attains the earliest retirement age under the plan whether or not the participant actually retires on that date. **If the participant dies before that date, the alternate payee is entitled to benefits only if the qualified domestic relation order requires survivor benefits to be paid.** In the case of an order providing for the payment of benefits after the earliest retirement age, the payments to the alternate payee at the time are computed as if the participant had retired on the date on which benefit payments commence under the order.”

The separate interest concept is solely for the purpose of allowing an AP to have payments begin at the earliest retirement age (or earlier if the plan permits) and to have the benefit paid over the AP’s lifetime and therefore not be affected by P’s death after the payments to AP begin. To require otherwise would require a plan to pay a benefit greater than it otherwise would be required to pay. The result is different if P dies after the earliest retirement age because that is the earliest time that AP has the right under the Code and ERISA to commence payment and to name a beneficiary if the plan provides for single participant death benefits.

An illustrative example using the above facts is as follows. Assume AP is awarded 75% of P’s benefit as a separate interest and P remarries and dies at 40 when the earliest retirement

age is 55. If AP's separate interest is payable beginning at P's earliest retirement age even if P dies prior to age 55, the benefit payable from the plan is a 25% death benefit to P's surviving spouse (starting at P's age 55) and a 75% benefit (adjusted for AP's life expectancy starting at P's age 55). The 2 payments together represent more than 100% of P's accrued benefit under the plan. If, instead, AP is named as the surviving spouse as to the 75% share awarded to her, the total benefit paid from the plan (assuming a 50% QPSA) would be 12.5% to P's surviving spouse and 37.5% to AP, which together adds up to the maximum 50% QPSA the plan would otherwise pay and then the alternative calculations available under Treasury Regulation §1.401(a)-13(g)(4)(C) could be utilized.

Once P reaches the earliest retirement age, Plan A could end up paying more than it otherwise would if AP commences payments and then P dies but this is solely because of the statutory requirement to allow AP to begin payments at that time. This result would also occur in a plan that allows commencement of payments to AP prior to the earliest retirement age (which is common under defined contribution plans). The requirement to allow commencement of payments at the earliest retirement age should not be interpreted as vesting in AP the right to a benefit even if P dies prior to AP's commencement of the payments. Treasury Regulation §1.401(a)-13(g)(4)(iii)(A) states as follows: "(A) A plan is not required to provide additional vesting or benefits because of a QDRO."

This is not to say that a plan cannot permit the separate interest to stay with AP if P dies prior to the earliest retirement age. Rather it should not be required.

For an AP's interest to be protected in the event P dies before the earliest retirement age, the DRO could name the AP as the surviving spouse as to all or a portion of P's benefits.

The fact that a state court issues a domestic relations order characterizing AP's award as a separate interest cannot change the benefits payable under the plan where the plan chooses not to allow it. The only circumstances where a plan is required to pay more because of a DRO is when AP begins payments at or after the earliest retirement age and before P commences payments, or if the AP former spouse is designated as the current spouse for purposes of the QPSA and QJSA, both of which are statutorily imposed protections. Other than those two protections, interpretation of the QDRO provisions of the IRC and ERISA should not result in the requirement for a plan to provide greater benefits than it would pay otherwise.

It follows that the model DROs and DRO provisions issued by the DOL and IRS should provide an alternative for designating the AP as the surviving spouse for the QPSA as to AP's share (which can be in addition to a QPSA based on P's remaining share if any) and for forfeiting AP's separate interest if P dies prior to the earliest retirement age in a DRO where AP is not designated as the surviving spouse for AP's share in connection with a plan that chooses not to permit payment to AP prior to the earliest retirement age and not to recognize the separate interest prior to the earliest retirement age. The PBGC has chosen to allow the separate interest to be protected at all times, but could consider making a change in the future if it chooses to adopt this approach.

**RESPONSE:** PBGC declined to answer this question, noting that it is a question that would more appropriately be directed to IRS or DOL. [Scrivener's Note: The IRS and the DOL also declined to answer this question.]

## LITIGATION AND GENERAL MATTERS

**34. QUESTION:** Please describe PBGC litigation in the past year that has established precedent that would be of interest to attorneys who are not primarily litigators.

**PROPOSED RESPONSE:**

**RESPONSE:**

*PBGC v. Oneida Ltd.*, 2009 WL 929528 (2d Cir. Apr. 8, 2009): The U.S. Court of Appeals for the Second Circuit upheld PBGC's position that a reorganizing debtor's obligation for ERISA termination premiums is not a claim, and therefore is not discharged in bankruptcy. Reversing the New York bankruptcy court, the Second Circuit held that the unambiguous statutory language -- providing that termination premiums for a plan terminated during bankruptcy reorganization are not a liability until the debtor emerges from bankruptcy -- reflected Congress's stated intent to relieve financial pressure on PBGC. The court recognized that treating the liability as a bankruptcy claim would "directly thwart Congress's aim," and stated that the "obvious purpose of this rule is to prevent employers from evading the Termination Premium while seeking reorganization in bankruptcy."

*Paulsen v. CNF, Inc.*, 559 F.3d 1061 (9th Cir. 2009): The U.S. Court of Appeals for the Ninth Circuit Court affirmed the dismissal of PBGC from this complex suit that participants brought against private plan fiduciaries and professionals after the 1996 spinoff of the Consolidated Freightways pension plan. Later, the participants also asserted that PBGC breached fiduciary duties in failing to sue the entities responsible for the spinoff. The district court dismissed the claim against PBGC. The Ninth Circuit upheld the lower court's ruling that PBGC's discretionary decision whether to pursue such claims is within its enforcement discretion, and is unreviewable in court. The appellate court focused on PBGC's "unique role in the ERISA statutory scheme," and its varied statutory duties to different stakeholders. An unrelated section of the opinion discussed the standing of participants in a terminated pension plan trusted by PBGC to assert ERISA claims against private fiduciaries. There, the Ninth Circuit expressly agreed with PBGC's view that any proceeds of such a suit would go first to PBGC, and not directly the participants. As a result, it concluded that the participants lacked standing under Article III to bring those claims.

*Koehler v. PBGC*, 2008 WL 1751732, 273 Fed. Appx. 523 (6th Cir. Apr. 16, 2008): Participants brought suit against PBGC, claiming that they were entitled to disability pensions, which had been denied them by the former plan sponsor and then by PBGC. The participants asserted that PBGC had breached its fiduciary duty by failing to pay the claimed benefits. Because the participants had not appealed their benefit determinations to PBGC's Appeals Board, the district court dismissed the complaint for failure to exhaust administrative remedies. The Sixth Circuit affirmed.

***Davis v. PBGC***, 596 F. Supp. 2d 1 (D.D.C. 2008): A large group of retired pilots challenged PBGC's determination of their pension benefits under the terminated US Airways pilots plan. The district 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 that decision to the D.C. Circuit. The district court granted in part and denied in part PBGC's motion to dismiss certain claims and requests for relief.

***Sara Lee Corp. v. American Bakers Ass'n***, 252 F.R.D. 31 (D.D.C. 2008), 512 F. Supp. 2d 32 (D.D.C. 2007): 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. In 2007, the court held that the deferential "arbitrary and capricious" standard applies to PBGC's reclassification of the plan, but held in abeyance its decision on 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. In 2008, 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, to be "clear on its face."

***Adey v. PBGC***, 2008 WL 4724314 (N.D. W. Va. Oct. 24, 2008): Participants in the terminated Weirton Steel Corporation Retirement Plan challenged their benefit determinations, asserting that PBGC incorrectly determined that they failed to meet the service requirement for a 30-year pension. 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.

***Stephens v. US Airways Group, Inc.***, 555 F.Supp.2d 112 (D.D.C. 2008): A group of pilots sued US Airways for paying their lump sum pension benefits 45 days after their retirement date, and without interest. The pension plan was terminated during the litigation, and the pilots named PBGC as a defendant. They sought interest from PBGC, asserting that delay deprived them of the actuarial equivalent of their benefit, and that PBGC committed a fiduciary breach by failing to compensate them for the benefit they claimed was due. Granting PBGC's motion to dismiss in part, the court agreed that the pilots cannot maintain a fiduciary breach claim arising from an alleged failure to pay benefits. The court held that PBGC was not liable for the alleged breach of a prior fiduciary, and that the pilots were 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 a participant regarding his years of continuous service.

*United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Int’l Union v. PBGC*, 2009 WL 649696 (D. Minn. Mar. 11, 2009): The union formerly known as the United Steelworkers of America sued PBGC to challenge the benefit determinations of about 250 participants who were denied shutdown benefits under the Thunderbird Mining Company Pension Plan, which terminated in 2003. PBGC moved to dismiss or transfer the case to the District of Columbia because under ERISA’s venue provision, the “appropriate court” for an action against PBGC is either where termination proceedings are taking place, where the plan has its principal office, or D.C. Because the Thunderbird plan terminated and closed its principal office years ago, the court agreed with PBGC that D.C. was the only court in which the action could have been brought. The court emphasized its duty to uphold the plain language of ERISA.

*Montgomery v PBGC*, 2009 WL 504654 (D.D.C. Mar. 2, 2009): A participant challenged PBGC’s determination of his Title IV benefit. The court applied the deferential “arbitrary and capricious” standard, and upheld PBGC’s determination.

- 35. QUESTION:** Have there been any situations within the last year in which PBGC invoked the prohibition under ERISA section 4069(a) that the principal purpose of a transaction was to evade liability? Please include matters that were settled in advance of litigation.

**PROPOSED RESPONSE:**

**RESPONSE:** There have been no such situations within the last year.

- 36. QUESTION:** Please describe any PBGC administrative, regulatory, or compliance activities, initiatives, etc., in the past year that would be of general interest to employee benefit attorneys, service providers, employers, and participants.

**PROPOSED RESPONSE:**

**RESPONSE:** The PBGC is continuing its prior compliance and audit initiatives, including its early warning program and its premium collection audits, standard termination audits, and audits of premature distributions related to plan terminations.

- 37. QUESTION:** What are the PBGC’s plans and priorities for issuing regulations and other guidance on the various PPA changes that fall under PBGC’s jurisdiction? As part of the response, please address any issues that are likely to cause difficulty or generate controversy in connection with PPA rulemakings.

**PROPOSED RESPONSE:**

**RESPONSE:** In the near future, PBGC hopes to issue four more sets of proposed regulations related to PPA, including ones with respect to reportable events , cash balance plans , missing participants for defined contribution plans , and shutdown benefits , and also final regulations regarding deemed termination dates in bankruptcy situations. A number of these items are in clearance.

PBGC declined to comment with respect to any issues that are likely to cause difficulty or generate controversy in connection with PPA rulemakings.

Beyond PPA issues, PBGC is considering further guidance with respect to a number of issues, including proposed regulations under section 4062(e) and a technical update regarding the purchase of irrevocable commitments before a standard termination (both of which may be issued later this year).

- 38. QUESTION:** Please provide an update on PBGC’s implementation of and experience under OMB’s “good guidance” initiative.

**PROPOSED RESPONSE:**

**RESPONSE:** PBGC adopted procedures for significant guidance in 2007, in accordance with the good guidance final bulletin and the related amendments to Executive Order 12866 of September 30, 1993 made by Executive Orders 13258 of February 26, 2002, and 13422 of January 18, 2007. The amendments made by Executive Orders 13258 and 13422 were revoked on January 30, 2009. Thus, agencies are not required to have a regulatory policy officer be involved in all guidance or to send all significant guidance to OMB for review, although in practice OMB continues to review significant guidance.

- 39. QUESTION:** 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 and PBGC’s experience under it.

**PROPOSED RESPONSE:**

**RESPONSE:** In 2008, the PBGC analyzed the financial condition of a number of companies that were sponsors of plans taken over by the PBGC to determine whether they were financially healthy enough to take back and maintain their prior plans. This analysis is now its current operating procedure, but since this process was adopted, the PBGC has not sought to restore any plan to an employer.

[Scrivener's note: The following paragraph describing the procedure is set forth in PBGC's FY 2008 Annual Report (page 5), which is available at [http://www.pbgc.gov/docs/2008\\_annual\\_report.pdf](http://www.pbgc.gov/docs/2008_annual_report.pdf).]

In 2008, PBGC initiated a process to analyze the financial condition of former sponsors of trusteed 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.]

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

**PROPOSED 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.

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 33 of the 2009 Blue Book.

**41. QUESTION:** What is the address for sending a copy of the Annual Funding Notice to PBGC?

**PROPOSED 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

**RESPONSE:** The PBGC agrees with the proposed response as reflected in Q&A 34 of the 2009 Blue Book.