

**American Bar Association
Joint Committee on Employee Benefits
Q&A Session with PBGC
May 9, 2012**

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 confirm the PBGC's guidance in [Q&A 2 of the 2012 Blue Book](#), which addressed a number of questions relating to the [policy statement](#) PBGC had issued on December 22, 2011 (76 Fed. Reg. 79714) regarding premium refund requests based on recharacterization of contributions (e.g., re-designating the first two quarterly contributions for a plan year as being for the prior plan year, with a corresponding premium refund request based on greater assets as of the beginning of the plan year). In that policy statement, PBGC stated that, although it "has in practice accepted such amended filings and granted the refunds," it has "concluded that in general, such amendments should be rejected and the associated premium refunds denied." The questions in Q&A 12 of the 2012 Blue Book focused on the particular circumstances in which the new policy would apply and on how to address possible discrepancies between the information reported on the Schedule B (or SB) and on the corresponding premium filing.

[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 www.pbgc.gov/res/other-guidance/blue-books.html. The answers reflect the views of individual staff members and do not represent the official position of PBGC.]

PBGC'S MEETING RESPONSE: In response to [Blue Book Question 2](#), PBGC stated that the new policy would apply to refund requests that were pending on December 22, 2011; that it had no plans to recoup amounts previously refunded or to retroactively revoke credits previously established and used; that the focus of the new policy was on situations where the purpose of the amended filing was to obtain a premium refund (and that PBGC was not prepared to speculate as to how it might treat a premium refund request that was based on a recharacterization of contributions done for some other reason); that PBGC has no plans to challenge the validity of a premium filing solely because the asset value does not match the asset value reported on an amended Schedule B (or SB); that IRS has told PBGC that they have concerns about recharacterized contributions; and that the new policy does not apply to a situation where Schedule SB is amended to report additional contributions that have not previously been reported on a different year's Schedule SB. PBGC confirmed that it continues to agree with the guidance reflected in [Q&A 2 of the 2012 Blue Book](#).

2. **QUESTION:** Please describe the most common errors PBGC has been finding in its initial reviews of premium filings. Please also describe PBGC's current 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.

PBGC'S MEETING RESPONSE: For premium filings, PBGC has seen errors related to ongoing plans and terminating plans.

For ongoing plans, common errors often involve late filings and late payments due to inadvertent oversight. Late payments result from misdirected payments, not notifying the bank to electronically forward the funds, unidentified payments (e.g., EIN/PYC not referenced with the payment), and incorrect unfunded vested benefits date (the UVB date must be within the plan year). As for misdirected payments, PBGC noted that there are only two addresses for sending in payments so there should not be errors.

For plans that terminated in standard terminations, the most common filing error is the failure to make the final premium filing. (The filing and premium payment obligations include the plan year in which plan assets are distributed in satisfaction of all plan benefits or a trustee is appointed under ERISA Section 4042.)

For plans that terminated in distress or involuntary terminations, the most common error is the failure to file the required Form T along with the failure to pay termination premiums for three years after termination. (For certain distress terminations and all involuntary plan terminations, a Form T must be filed and a termination premium must be paid to PBGC annually for three years after plan termination.)

PBGC provided the following filing reminders: (i) send in one payment for each plan; (ii) file timely and respond timely to any notices or inquiries; (iii) maintain a current email address and phone number with PBGC; (iv) My Plan Administration Account "My PAA" will require passwords to change in July/August 2012; (v) keep account information current; and (vi) remove plans from My PAA and deactivate the account when it is no longer needed.

In connection with its premium compliance evaluation program, PBGC said it compares Form 5500 filings and premium filings and looks for discrepancies, for example, in reported assets and participant counts. PBGC explained that they are seeing participant count errors, which may include improper employee coding or failure to keep track of employees. PBGC recommends that employers maintain records for proper participant counts. PBGC also noted that they may need to review employer worksheets as part of an onsite review.

3. **QUESTION:** Please provide an update describing PBGC's collection experience with respect to the \$1,250 per participant termination premium.

PBGC'S MEETING RESPONSE: PBGC staff stated that PBGC continues to assess and collect the termination premium, but because PBGC tends to settle all of its claims against an employer at the same time, it is difficult to break out the portion related to termination premiums. In response to a follow-up question, PBGC staff at the meeting indicated that they

did not have any information as to how subsequent internal analyses allocated recovery amounts among claims.

4. **QUESTION:** Please provide an update on the status of PBGC’s regulatory implementation of the authority PPA gave to PBGC to pay interest on premium overpayments. Does PBGC anticipate that, when this authority is implemented, interest will be paid retroactive to 2006, as is permitted by PPA?

PBGC’S MEETING RESPONSE: PBGC staff reported that this remains a long-term item on PBGC’s regulation agenda. They said that PBGC is still working on this. However, they observed that it is not considered a top issue and as a result, no pronouncement should be expected in the next year.

In response to follow up questions about the delay, it was reported that paying interest presents technological issues (e.g., reprogramming) and PBGC’s budget does not currently include amounts to address those technological problems.

5. **QUESTION:** Please update or confirm the PBGC’s guidance in [Q&A 1 of the 2012 Blue Book](#), which addressed the Administration’s proposal that the PBGC be allowed to set its own premiums based on the financial health of the employer and the circumstances of the individual plan. Please include anything you can share about the issues and options under consideration.

PBGC’S MEETING RESPONSE: In response to [Blue Book Question 1](#), PBGC stated that the President’s Fiscal Year 2013 federal budget included a proposal to provide the PBGC Board of Directors with the authority to adjust premiums, taking into account the risks that different sponsors pose to their retirees and to PBGC. PBGC noted that the proposal included safeguards that would ensure that reforms are undertaken responsibly, including the requirement for a year of study and public comment before implementation, and the gradual phasing-in of any premium increases. PBGC confirmed that it continues to agree with the response set forth in the Blue Book.

SUBSEQUENT EVENT: On July 6, 2012, President Obama signed into law the Moving Ahead for Progress in the 21st Century Act, Pub. Law 112-141 (“MAP-21”). MAP-21 provides funding “stabilization,” and increases the PBGC variable and flat rate premiums for single-employer plans and the flat rate premium for multiemployer plans (but does not give PBGC authority to adjust premiums). The funding stabilization provisions are effective beginning with 2012 plan years and the premium changes beginning with 2013 plan years.

PBGC GOVERNANCE

6. **QUESTION:** There has been significant discussion about changing PBGC’s corporate governance. Please provide an update on the various proposals and what their aims are.

PBGC’S MEETING RESPONSE: If enacted, the Rebuild America Act (H.R. 5727, DeLauro, CT) would make significant changes in the governance of the PBGC. This bill is similar to a proposal by Senator Kohl during the 111th Congress (S. 1544). Subtitle G of HR 5727 (§§361-64) would make the following changes:

- a. Section 363 would expand the PBGC Board by four Presidential appointees with experience relevant to PBGC operations. The Bill would establish staggered terms and require that no more than two be from the same political party.
- b. Section 363 would require the PBGC Inspector General to report to the Board at least twice each year and codify the PBGC Inspector General's independence.
- c. Section 363 imposes conflict of interest standards with respect to Board deliberations.
- d. Section 363 requires that a Risk Mitigation Officer be appointed.
- e. Section 363 expresses the sense of Congress that Board committees, including audit and investment committees be appointed.
- f. Section 364 requires that a Participant and Plan Sponsor Advocate be appointed to serve in a role something akin to that of a super ombudsman.

PBGC said that, while the Administration has no position on the corporate governance proposals, PBGC has gone on record in support of the principle that it needs more tools to do a better job without having to resort to involuntary plan termination.

SUBSEQUENT EVENT: The MAP-21 legislation includes a number of provisions affecting PBGC corporate governance. Among them are changes regarding board of directors procedures, the establishment of a participant and plan sponsor advocate position and a risk management officer position, and quality control requirements with respect to PBGC's Pension Insurance Modeling System.

STANDARD TERMINATIONS

7. **QUESTION:** Please confirm the PBGC's guidance in [Q&A 8 of the 2012 Blue Book](#), which dealt with a situation where a plan provides for forfeiture of benefits in accordance with Treasury Regulation §1.411(a)-4(b)(6) and the plan administrator has been unable to locate a participant or beneficiary despite having made a diligent effort. The question was how the benefit is to be handled when the plan is undergoing a standard termination.

PBGC'S MEETING RESPONSE: In response to [Blue Book Question 8](#), PBGC stated that the plan administrator must treat the participant or beneficiary as a missing participant under Part 4050 of PBGC's regulations, and provided additional details as to how this is to be done. PBGC confirmed that it continues to agree with the guidance reflected in [Q&A 8 of the 2012 Blue Book](#).

8. **QUESTION:** Please confirm the PBGC's guidance in [Q&A 9 of the 2012 Blue Book](#), which dealt with the question of whether it is permissible in a standard termination to deduct processing fees from participants' benefits.

PBGC'S MEETING RESPONSE: In response to [Blue Book Question 9](#), PBGC stated that such a deduction was not permitted, noting that participants in a standard termination must receive their

full plan benefits. PBGC confirmed that it continues to agree with the guidance reflected in [Q&A 9 of the 2012 Blue Book](#).

9. **QUESTION:** Please confirm the PBGC's guidance in [Q&A 10 of the 2012 Blue Book](#), which dealt with the question of whether a plan administrator of a plan undergoing a standard termination may set up an IRA for the automatic rollover of a cash-out distribution in excess of \$1,000 for a missing participant.

PBGC'S MEETING RESPONSE: In response to [Blue Book Question 10](#), PBGC stated that distribution may only be made in the form of a rollover to an IRA if the plan administrator is able to locate the participant and that, in the case of a missing participant in a standard termination, the plan administrator must comply with the rules in Section 4050 of ERISA and 29 CFR Part 4050. PBGC confirmed that it continues to agree with the guidance reflected in [Q&A 10 of the 2012 Blue Book](#).

10. **QUESTION:** Please explain how the PBGC is dealing with the market rate of interest on plan termination in the absence of final IRS and PBGC rules, both in the context of standard termination audits and when PBGC trustees a plan.

PBGC'S MEETING RESPONSE: Pending finalization of an IRS hybrid plan rule, PBGC is following its interim policy regarding this issue, which is available through FOIA and is consistent with the proposed IRS rule. PBGC's audits of standard terminations of hybrid plans are completed on a case-by-case basis. PBGC will not challenge any plan that follows the guidance set forth in the proposed IRS rule.

11. **QUESTION:** Please provide an update regarding PBGC's recent experience in connection with standard termination audits, including a discussion of common errors found and of how PBGC has dealt with plans that distribute plan assets in satisfaction of plan liabilities before or without filing a standard termination notice with PBGC.

PBGC'S MEETING RESPONSE: Common errors include reducing participants' benefits by administrative fees; failure to include all benefit form options in annuity contracts; errors in benefit calculations (*e.g.*, mistakes regarding service, compensation, vesting percentages); PPA lump sum assumptions adopted after the plan termination date without appropriate protection for participants' benefits; distributions to missing participants made by deposits to IRAs rather than by purchase of an annuity or payment to PBGC; failure to follow requirements of PBGC's missing participants regulation, 29 CFR Part 4050, in calculating benefits of missing participants; failure to submit funds for missing participants' benefits within the applicable 90-day time frame; and failure to include interest on benefits.

PBGC audits all plans that distribute plan assets in satisfaction of plan liabilities either before or without filing a standard termination notice with PBGC. In all such cases, PBGC's audit is more extensive than usual in order to ensure that participants are receiving their proper benefits. PBGC is considering imposing penalties in appropriate cases.

In response to a follow-up question regarding whether standard termination audits could be expedited when the plan sponsor is in bankruptcy, staff said that PBGC tries to expedite audits in such cases, and that anyone in such a situation should reach out to PBGC to make sure that the agency is aware of the circumstances.

DISTRESS AND INVOLUNTARY TERMINATIONS

12. QUESTION: Please confirm the PBGC’s guidance in [Q&A 14 of the 2012 Blue Book](#), which dealt with the question of whether a plan administrator that reduces a participant’s benefit to estimated Title IV levels pursuant to PBGC’s regulations at §4022.61–.63 in a distress termination proceeding must provide the affected participant with a right to appeal.

PBGC’S MEETING RESPONSE: In response to [Blue Book Question 14](#), PBGC stated that this is a DOL issue, and noted that it was addressed in Q&A 7 of the 2010 Green Book (which contains the Employee Benefits Security Administration Q&A Session and can be obtained from the Conference of Consulting Actuaries). (The response to Q&A 7 of the 2010 Green Book stated that the view of EBSA staff was that such a benefit reduction does not constitute an “adverse benefit determination” under DOL’s claims procedure regulation at 29 CFR 2560.503-1.) PBGC confirmed that it continues to agree with the guidance reflected in [Q&A 14 of the 2012 Blue Book](#).

13. QUESTION: When a plan terminates in a distress or involuntary termination, PBGC, in its role as statutory trustee under ERISA Section 4042, will generally have a claim against the employer for due and unpaid minimum funding contributions (the “DUEC Claim”), as well as a claim against the employer for certain shortfall amortization charges and installments (and, where applicable, for certain waiver amortization charges and installments) under ERISA Section 4062(c) (the “4062(c) Claim”).

(a) The amounts of the DUEC Claim and 4062(c) Claim may overlap with one another and, if PBGC determines its claim against the employer for unfunded benefit liabilities under ERISA Section 4062(b) (the “UBL Claim”) without making any adjustment relating to either of these claims, there will be overlap between each of these claims and the UBL Claim. When PBGC finalizes the amounts of its DUEC Claim, 4062(c) Claim, and UBL Claim (*e.g.*, for purposes of making benefit determinations), how does PBGC make adjustments for any such overlap?

(b) ERISA Section 4044(f) provides generally for the use of an historical recovery ratio, in lieu of use of the recovery ratio in a particular case, to determine the value of PBGC’s recovery on its Section 4062(c) Claim that is allocable as a plan asset under ERISA Section 4044 for purposes of determining the amount of benefits payable by PBGC. Does PBGC use this or any other historical recovery ratio to determine the value of PBGC’s recovery on its DUEC Claim for any purpose, or is PBGC continuing, as it did in the pre-PPA context, to determine the value of its recovery on its DUEC Claim for all purposes based solely on its experience in the particular case in which it had that claim?

PBGC’S MEETING RESPONSE: PBGC declined to answer this question.

14. QUESTION: Please provide an update regarding PBGC’s recent experience in connection with any requests that have been made to PBGC or (to the extent PBGC is aware of such requests) to the plan administrator or contributing sponsor for information in accordance with PPA Section 506 (“Disclosure of Termination Information to Plan Participants”).

PBGC’S MEETING RESPONSE: PBGC has not received a request under this provision in over two years.

- 15. QUESTION:** Please provide an update regarding PBGC's recent experience 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").

PBGC'S MEETING RESPONSE: During FY 2012 (up to the May 9, 2012, meeting date), PBGC has received a total of 10 distress termination applications. Three involved employers in bankruptcy; 7 involved employers who were not in bankruptcy. PBGC has not received any Distress Test 4 applications during this period. During FY 2011, PBGC received a total of 22 distress termination applications. Of these, 16 involved employers not in bankruptcy and were based either just on Distress Test 3 (14 employers) or on both Distress Test 2 and Distress Test 3 (2 employers), and 6 involved employers in bankruptcy and were based on either Distress Test 1 or Distress Test 2. There were no Distress Test 4 applications. The staff was unable to answer the question of whether there has ever been a termination under Distress Test 4.

- 16. QUESTION:** When the PBGC trustees a plan that made lump sum distributions despite the fact such distributions were restricted by Code §436, does PBGC try to recover the lump sum payments? Even if it cannot recover such payments, how does PBGC treat such payments in determining benefit entitlements under ERISA Title IV?

PBGC'S MEETING RESPONSE: PBGC declined to answer this question.

- 17. QUESTION:** In Revenue Ruling 2012-4, dealing with individuals using their DC account balances to purchase annuities from their employer's DB plans, IRS states that PBGC will address Title IV consequences. Pending development of that guidance, can you address some of the issues being considered? For example, the Revenue Ruling says that the rollover is treated as employee mandatory contributions for purposes of Code §415. Does this automatically mean that the amounts are in PC-2? Are there issues relating to whether the amounts should be treated as pre-tax vs. post-tax money? In determining Title IV treatment, will PBGC taken into account the administrative difficulty in determining what part of an annuity is derived from prior rolled over amounts? Can you address some of the administrative difficulties PBGC has seen in PBGC-trusted plans?

PBGC'S MEETING RESPONSE: PBGC declined to answer this question.

PBGC REPORTING

- 18. QUESTION:** Please confirm PBGC's guidance in [Q&A 16 of the 2012 Blue Book](#), which addressed issues regarding the rules under [Technical Update 11-1 \("Reportable Events; Funding-Related Determinations; Missed Quarterly Contributions; Guidance for 2012 Plan Years"\)](#). Those rules provide, among other things, for a one-year look-back to determine whether a funding-related waiver test is met under the reportable events regulation. The question was whether, in the case of a plan that was spun off from another plan at the beginning of the 2012 plan year and that experiences a reportable event during the 2012 plan year, it is reasonable to read Technical Update 11-1 as being consistent with a look-back to the funding level of the transferor plan to determine whether a funding-related waiver applied.

PBGC'S MEETING RESPONSE: In its response to [Blue Book Question 16](#), PBGC stated that it would not be reasonable to read Technical Update 11-1 in the manner suggested, and

noted that the transferor plan was not the plan involved in the reportable event. PBGC confirmed that it continues to agree with the guidance reflected in [Q&A 16 of the 2012 Blue Book](#).

- 19. QUESTION:** Please provide an update regarding PBGC's experience in connection with requests for waivers or extensions under ERISA section 4010.

PBGC'S MEETING RESPONSE: For the information year ending in 2011: (a) PBGC received 6 requests for waiver of the entire 4010 filing and denied 3 of these requests; (b) PBGC did not receive any requests for the waiver of financial information only; (c) PBGC received 2 requests for extensions of the entire 4010 filing and partially denied one of these requests; and (d) PBGC received 16 requests for extensions to file financial information only and denied one of these requests.

PENALTIES

- 20. QUESTION:** Please provide an update regarding PBGC's recent experience in connection with assessment, waiver, and/or collection of late information penalties under ERISA Section 4071.

PBGC'S MEETING RESPONSE: (a) In the past 12 months PBGC has assessed and waived one penalty with respect to a late premium filing; (b) in the past 12 months, PBGC has assessed and collected two penalties for failure to file a post-distribution certification in a standard termination; and (c) PBGC is reviewing a few cases in connection with the possible assessment of penalties, and PBGC staff will make recommendations regarding whether penalties should be assessed.

- 21. QUESTION:** Please provide an update regarding PBGC's recent experience in connection with waiver and/or collection of late premium payment penalties under ERISA Section 4007.

PBGC'S MEETING RESPONSE: PBGC has granted waivers for reasonable cause such as medical emergencies. In general, a showing must be made that the event that resulted in the late filing was beyond the plan administrator's control and the late filing could not have been avoided by the exercise of ordinary business care and prudence.

ERISA SECTIONS 4062(e), 4063, AND 4064

- 22. 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 provide an update regarding PBGC's experience and enforcement plans in connection with finding out about 4062(e) events and pursuing and resolving 4062(e) liability.

PBGC'S MEETING RESPONSE: PBGC monitors industries and companies. PBGC learns of 4062(e) downsizing liability events through such monitoring, or through the filing of Form 10s or reports under ERISA Section 4063. PBGC urges practitioners to contact PBGC in advance of potential 4062(e) events and believes that doing so is in the best interest of the companies involved. In FY 2011, PBGC reached 40 downsizing liability settlements totaling

more than \$370 million in protection for the plans and participants involved. A notable settlement was that involving [Bendix](#) (May 2, 2012).

In response to follow-up questions regarding the proposed 4062(e) regulation that PBGC published in August 2010 and which it has said it will be re-proposing, PBGC staff indicated that PBGC has not established an updated target date regarding a 4062(e) regulation.

- 23. QUESTION:** PBGC has been evaluating the financial condition of employers when deciding how to resolve liabilities under ERISA Section 4062(e). Please provide guidance on the criteria PBGC uses in evaluating an employer's financial condition and on what kind of treatment employers can expect based on the results of that evaluation.

PBGC'S MEETING RESPONSE: PBGC is in the process of developing working criteria regarding financial condition that will be used when deciding how to resolve an employer's liability under ERISA Section 4062(e). In the meantime, PBGC is evaluating an employer's financial condition on a case-by-case basis. PBGC recently has issued three no action letters to employers based on their financial strength.

Like many federal agencies, PBGC is grappling with issues regarding appropriate measures to use in assessing a company's financial soundness. PBGC anticipates issuing guidance regarding financial criteria, but is not yet prepared to address what form that guidance will take or the anticipated timing of its issuance.

- 24. QUESTION:** PBGC has taken the position that a going-concern asset sale in which operations and employment cease with the seller and immediately continue with the buyer can trigger a liability under ERISA Section 4062(e). Please describe PBGC's experience in dealing with such situations, including cases in which the asserted resulting 4062(e) liability was settled. If PBGC has taken the same kind of position vis-à-vis stock sales, please provide the same kind of information.

PBGC'S MEETING RESPONSE: This situation is not very common. Most asset sale situations PBGC sees are liquidations. PBGC has settled at least one case involving a going-concern asset sale, Elkem Metals. The settlement is described in a [PBGC press release](#) (July 24, 2008). PBGC staff is unaware of any assertions of 4062(e) liability relating to stock sales.

- 25. QUESTION:** Can a multiple employer plan provide that a significant reduction in a contributing employer's contributions constitutes a withdrawal for purposes of ERISA Section 4063? If so, how is the liability calculated?

PROPOSED RESPONSE: Plan sponsors should have the ability to contractually agree that a significant reduction in a contributing employer's contributions constitutes a withdrawal that triggers the liability rules under ERISA Section 4063. This position is consistent with the purposes of Title IV of ERISA because (1) it encourages the continuation and maintenance of voluntary private pension plans for the benefit of their participants by giving plan sponsors flexibility in designing pension plans and (2) it ensures the viability of pension plans and the timely payment of pension benefits to participants and beneficiaries in the event of significant reductions in employer contributions. The liability should be calculated as provided under ERISA § 4063(b) except that the total liability of a "withdrawn" employer should be multiplied

by the percentage reduction in that employer's plan contributions over the last five years ending prior to the withdrawal.

PBGC'S MEETING RESPONSE: PBGC declined to answer this question.

MINIMUM FUNDING WAIVERS

26. QUESTION: Please provide an update regarding PBGC's role and recent experience in connection with minimum funding waiver requests involving amounts in excess of \$1 million, including any steps taken by PBGC and/or IRS to streamline or otherwise improve the process for applying for these waivers.

PBGC'S MEETING RESPONSE: PBGC staff indicated that they had nothing new to add to last year's response, but also observed that funding waiver requests often fail to include necessary financial information and that such failures can result in unnecessary delays. Essentially, PBGC assesses whether a company is experiencing a significant temporary business hardship and if the waiver were granted, whether the employer would be able to pay the ongoing minimum contributions as well as the waived funding contributions. To do this assessment, PBGC needs projections and underlying assumptions, identification of possible collateral, and the like. PBGC has a good pipeline with IRS and if a company submits a well-prepared, complete application, the waiver process can be quick.

EARLY WARNING PROGRAM

27. QUESTION: Please provide an update regarding the cases PBGC has been involved in over the past year under its Early Warning Program, along with a discussion of the types of transactions that are of concern to PBGC and of what PBGC does when it learns of a transaction of concern.

PBGC'S MEETING RESPONSE: Under the Early Warning Program, PBGC proactively monitors business transactions and looks for transactions that may jeopardize pension plans. In appropriate cases, PBGC negotiates for protections. PBGC has the flexibility to negotiate those protections within the context of an employer's existing business plan. PBGC encourages employers to contact PBGC so that planned transactions can be discussed in advance. PBGC can accept different protections, including accelerated contributions, liens on assets, letters of credit, surety bonds, and guarantees. Recent cases include [Motorola Solutions](#) (Jan. 4, 2011), where in connection with a corporate spinoff in January 2011, the sponsor agreed to contribute \$100 million toward the pension plan. In [AIG](#) (Feb. 3, 2011), the company sold its commercial lending business to a private equity group and agreed to contribute \$4 million to the plan.

MISSING PARTICIPANTS PROGRAM

28. QUESTION: PPA expanded the missing participants program to cover (among other things) terminating defined contribution plans. When does PBGC intend to issue regulations to implement this program? Are there any issues of particular concern that could complicate the implementation or administration of this program?

PBGC'S MEETING RESPONSE: PBGC staff said that they were unable to discuss specific provisions or the timing of the issuance of regulations. Staff also stated that it was unclear whether there was a need for the program, and said that they welcomed feedback from stakeholders.

MULTIEMPLOYER PLAN ISSUES

29. QUESTION: If by the time of the PBGC-JCEB meeting, PBGC has issued either of the two pending multiemployer plan reports, please summarize any key findings or recommendations and the bases for them.

PBGC'S MEETING RESPONSE: The reports have not yet been issued; they are still in the clearance process.

EDITOR'S NOTE: As of [add current date], the reports have not been issued.

30. QUESTION: Please provide an update on situations under the multiemployer program that may be of interest to employee benefits attorneys, such as withdrawal liability formulas or plan mergers that have been approved or disapproved, or significant litigation in which the PBGC has been involved.

PBGC'S MEETING RESPONSE: PBGC has given approval of alternative withdrawal liability allocation methods in several cases; PBGC hopes that these approvals will encourage other plans to apply. The allocation methods involved splitting unfunded vested benefits between old and new employers for purposes of withdrawal liability. (The split is not for funding purposes; there is still only one funding standard account.) PBGC has also approved mergers. PBGC filed an amicus brief with the U.S. Court of Appeals for the Second Circuit regarding ERISA §4204 in the HOP Energy LLC v. Local 553 Pension Fund, I.B.T., No. 10-3889, 2012 U.S. App. LEXIS 9088 (2d Cir. May 3, 2012). (See PBGC's Response to Question 33 below, for a discussion of the Second Circuit's Hop Energy decision.) PBGC also filed a statement regarding the application of the mass withdrawal rules (Document No. 514) in In re Hostess Brands, Inc., No. 12-2205 (Bankr. S.D. NY May 14, 2012).

31. QUESTION: Question 13 of Schedule R to the Form 5500 asks for employers that made 5% of more of the contributions. Please confirm that in identifying those employers, withdrawal liability is ignored in both the numerator and the denominator.

PBGC'S MEETING RESPONSE: Because it pertains to the Form 5500, this issue involves other agencies. PBGC staff's view is that withdrawal liability payments are not intended to be included in item 13 of Form 5500. The involved agencies are aware of this issue and it is being considered in connection with a possible revision to the Form 5500, but no decisions have been made.

32. QUESTION: The follow questions address the multiemployer guarantee cutbacks in various situations.

- (a) Please confirm, if that is the case, that the PBGC multiemployer guarantee cutbacks apply to the monthly amount of the benefit and not the present value.

(b) Is the guarantee applied against the single life normal retirement benefit or the form that is elected?

(c) Does that differ if the participant is in pay status in an optional form before the guarantee limit applies?

(d) What happens with respect to a survivor benefit in the following cases: If the participant dies after electing a QJSA but before the cutback? If the participant dies after electing a QJSA and after the cutback? If the survivor is receiving a QPSA before the cutback? If the survivor is receiving a QPSA as a result of a participant dying after the cutback and before electing a payment form?

(e) If the participant is already collecting a Social Security Leveling Option when the cutback occurs, how does the cutback work (assuming the monthly guarantee is below the monthly single life annuity equivalent and below the monthly amount of payment before Social Security Age but greater than the monthly payment after Social Security Age)?

PBGC'S MEETING RESPONSE: PBGC guarantees 100% of the first \$11 of an effective accrual rate, 75% of the next \$33 of the effective accrual rate and 0% of the effective accrual rate to the extent it is in excess of \$44. The participant's effective accrual rate is determined by looking at the amount the plan would have paid (after taking into account all adjustments for optional form, early retirement, etc.) and dividing it by the participant's years of service to get an effective accrual rate. From that, calculate the guarantee by adding 100% of the first \$11 of the effective accrual rate to 75% of the next \$33 of the effective accrual rate. That sum is then multiplied by the participant's service to determine the benefit level guaranteed.

(a) Yes, the cutbacks apply to the monthly amount.

(b) The guarantee limit is applied to the benefit form that is elected.

(c) The analysis is the same whether the participant is in pay status before or after the guarantee limit becomes applicable.

(d) If the participant dies after electing a 50% QJSA (regardless of when the participant dies), then the amount guaranteed is based on the monthly 50% amount, and the effective accrual rate and guarantee is determined using that amount. A similar rule applies if the participant dies before electing a benefit form and PBGC guarantees have not yet become applicable. The monthly QPSA becomes the relevant amount. If the participant dies before commencing benefits but after PBGC guarantees come into play, the survivor's benefit is not guaranteed because the law does not provide for QPSAs.

LITIGATION AND GENERAL MATTERS

33. QUESTION: Please describe PBGC litigation in the past year that has established precedent that would be of interest to employee benefits attorneys.

PBGC'S MEETING RESPONSE: PBGC provided the following handout summarizing litigation matters.

PBGC v. Bendix Commercial Vehicle Systems, 2012 WL 629928 (N.D. Ohio Feb. 24, 2012) – This was PBGC's first lawsuit under ERISA section 4062(e), which imposes contingent liability when a company ceases operations at a facility, resulting in a separation from employment of more than 20% of employees who are participants in its pension plan. PBGC filed the administrative record supporting the agency's determination of liability, and Bendix sought extra-record discovery. The court rejected all three bases for discovery that the company asserted, emphasizing that a presumption of regularity is accorded to an agency's submission and certification of the administrative record.

PBGC v. Asahi Tec Corp., 2012 WL 843937 (D.D.C. Mar. 14, 2012) – In this case of first impression, the court agreed with PBGC that it had jurisdiction over a foreign member of a plan sponsor's controlled group for purposes of enforcing termination liability. A foreign auto parts manufacturer had bought a U.S. manufacturer. When the U.S. company sold its assets under Chapter 11, its pension plan was terminated. The court held that because ERISA bases liability on the fact of ownership alone, Asahi's deliberate and knowing decision to acquire a U.S. company and subject itself to ERISA is a sufficient minimum contact for specific jurisdiction in this context.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union v. PBGC, 2012 WL 917554 (D.D.C. Mar. 20, 2012) – The court upheld PBGC's determination that 250 participants were not entitled to shutdown benefits based on a mining company's idling of operations. Applying the deferential arbitrary and capricious standard of review, the court found ample support in the administrative record for PBGC's determination that there had been no permanent shutdown of the mine prior to pension plan termination.

Deppenbrook v. PBGC, No. 11-600 (RBW) (D.D.C. Mar. 12, 2012) – A group of participants challenging PBGC's denial of shutdown benefits sought to supplement the agency's administrative record with declarations and other documents. The court denied the motion, holding that the documents were not considered by the agency and could shed no light on the determination.

Carter v. Pension Plan of A. Finkl & Sons Co. For Eligible Office Emps., 654 F.3d 719 (7th Cir. 2011), aff'd 2010 WL 1930133 (N.D. Ill. May 12, 2010) – A plan sponsor gave notice to participants and PBGC of its intent to complete a standard termination of its pension plan, and amended the plan to allow participants, upon plan termination, to receive their pension benefits before retiring. The sponsor subsequently withdrew its standard termination application and adopted a second plan amendment nullifying the first amendment. Participants demanded immediate distribution of the plan's assets and sued the sponsor under ERISA's anti-cutback provision, section 204(g). The district court granted summary judgment to the sponsor, holding that the second plan amendment did not violate the anti-cutback provision, and that, because the pension plan did not terminate, active participants were not entitled to immediate payment of their benefits. The court of appeals agreed with PBGC, appearing as *amicus curiae*, and

affirmed the district court's decision, reaffirming the longstanding principle that Title IV of ERISA provides the exclusive means by which an employer can voluntarily terminate its plan.

Cox Enterprises, Inc. v. Pension Ben. Guar. Corp., 2012 WL 11015 (11th Cir. Jan. 4, 2012) – The Eleventh Circuit confirmed that debt comes before equity, and that PBGC's claim for pension underfunding was therefore senior to a former shareholder's statutory right to a buyout. The court agreed with PBGC that the Florida corporations statute prohibits distribution to a shareholder if it would render the corporation insolvent, even where the shareholder is entitled to a buyout and has been awarded that relief. Cox Enterprises, a minority stockholder in a newspaper company, won a judgment against the company's directors and officers for corporate waste. Under state law, Cox was entitled to a buyout, but the newspaper defaulted on the buyout and the court appointed a receiver to oversee its liquidation. PBGC terminated the newspaper's pension plan, and sought recovery of its underfunding. The receiver recommended that Cox receive all of the company's assets and the district court approved. PBGC appealed, and prevailed in the court of appeals.

Davis v. PBGC, 2011 WL 4536888 (D.D.C. Sept. 30, 2011) – A group of participants brought a 12-count suit challenging two PBGC Appeals Board decisions regarding their benefits. They moved for summary judgment on one of their claims, relying on documents that they filed with the court but had not submitted to PBGC. PBGC filed a cross-motion for summary judgment, relying on its administrative record. The court denied both motions, holding that it could not fairly adjudicate them because the participants had improperly relied on extra-record material. The court also rejected the participants' argument that PBGC functions under a conflict of interest, affecting the standard of review, and affirmed the presumption that the agency properly designated the administrative record. The court invited the parties to re-file motions citing only to the administrative record.

FBOP Corp. v. PBGC, No. 11-C-2782 (N.D. Ill. Oct. 5, 2011) – PBGC issued to a plan sponsor notice of the agency's determination that the plan should be terminated under section 4042 of ERISA. PBGC also issued a notice indicating that it intended to set off the plan's unfunded benefit liabilities against the sponsor's anticipated income tax refund. PBGC withdrew the setoff notice after learning that the refund would be delayed. The sponsor refused to terminate consensually, and instead sued PBGC for a judgment declaring that the plan should not be terminated and an injunction against any setoff. PBGC, in turn, sued the sponsor for an order terminating the plan, and moved to dismiss the sponsor's suit. The court granted the motion to dismiss, holding that the sponsor's suit for declaratory judgment was duplicative of PBGC's termination suit, and that, because PBGC had withdrawn the setoff notice, the court lacked subject-matter jurisdiction over it.

National Shopmen Pension Fund v. DISA Indus., Inc., 653 F.3d 573 (7th Cir. 2011) – The Seventh Circuit reinforced the MPPAA principle that an employer must arbitrate any dispute it has about a plan's assessment of withdrawal liability before the employer can challenge the assessment in court. The court held that this principle applies even where the disputed withdrawal liability assessment was a revision of a previously undisputed assessment. PBGC filed a brief as *amicus curiae* at the court's invitation.

PBGC v. Ferfolia Funeral Homes, Inc., 2011 WL 2971043 (N.D. Ohio July 20, 2011) – PBGC received a post-distribution certification from the sponsor of a pension plan stating that it had completed a standard termination and made distributions to the participants. PBGC selected the pension plan for post-distribution audit, and determined that the lump-sum distributions were not calculated in accordance with applicable law. The plan sponsor disputed the determination. PBGC filed suit under section 4003(e)(1) of ERISA to enforce the determination and to recover the additional distributions allegedly owed the plan participants and beneficiaries. The sponsor moved to dismiss the complaint, arguing that PBGC’s suit was barred by the statute of limitations under section 4003(e)(6)(A)(i) of ERISA, as the complaint was dated more than six years from the plan termination date. The court denied the motion, agreeing with PBGC that the statute of limitations begins to run when a company commits a noncompliant act – like making deficient distributions – and not on the plan termination date.

Stephens v. US Airways Group, Inc., 644 F.3d 437 (D.C. Cir. 2011), *cert. denied* (Apr. 2, 2012) – A group of retirees brought suit while the plan was ongoing, asserting that the company’s payment of lump sum benefits without interest up to 45 days after the benefit commencement date specified in the plan violated both the plan’s benefit commencement provision and ERISA’s actuarial equivalence provision. After the plan terminated, PBGC assumed defense of the case. The district court ruled for PBGC on all grounds. The D.C. Circuit held that the participants’ lump sum benefits were the actuarial equivalent of their annuitized benefits under their pension plan, but that they may be entitled to interest to the extent of any unreasonable delay in paying their lump sum benefits. The court also held that the participants were not entitled to attorneys’ fees against PBGC. The case was remanded to the district court for further proceedings.

US Airline Pilots Association v. PBGC, No. 1:09-cv-01675 (FJS) (D.D.C. Mar. 14, 2011) – The court denied USAPA’s renewed motion for preliminary injunction. USAPA, a union representing participants in a terminated pension plan, sued PBGC alleging that the agency had failed to investigate and to rectify possible wrongdoings by former plan fiduciaries. USAPA moved in 2009 for a preliminary injunction to have a “special trustee” appointed to fulfill the duties that PBGC allegedly refused to perform. The court denied that motion. USAPA filed a renewed motion for preliminary injunction, asserting that discovery had provided further evidence to support its claims. In again ruling for PBGC, the court held that USAPA had failed to show a substantial likelihood of success on the merits, given that an agency’s enforcement decisions are presumptively unreviewable. The court also found no irreparable harm, noting that the first \$510 million of any litigation recovery would accrue to PBGC rather than the plan. Finally, the court held that appointing a special trustee would unduly disrupt the agency’s operations and would not be in the public interest.

In re Wolverine Proctor & Schwartz, LLC, No. 10-1334 (1st Cir. Apr. 20, 2011), *aff’g* 436 B.R. 253 (D. Mass. 2010), *aff’g* 2009 WL 1271953 (Bankr. D. Mass. May 5, 2009) – The First Circuit affirmed the lower courts’ decisions upholding PBGC’s settlement of its claims for termination liability with the plan sponsor’s liquidating trustee. A creditor objected to the settlement, arguing that the so-called “prudent investor” rate should have been used to calculate PBGC’s claim for unfunded benefit liabilities. Following Raleigh v. Illinois Dep’t of Rev., the bankruptcy court held that the substantive non-bankruptcy law – here, ERISA and PBGC’s regulations – controlled the amount of liability. Rejecting the argument that PBGC could not

recover more than its original proof of claim, the court found that PBGC had reserved the right to amend it. The district court and the court of appeals affirmed, holding that the bankruptcy court did not abuse its discretion in approving the settlement agreement, but rather, correctly applied the relevant legal standard.

Hop Energy, L.L.C. v. Local 553 Pension Fund, No. 10-3889 (2d Cir. May 3, 2012) – In a multiemployer case, the Second Circuit held that a seller owed withdrawal liability, despite the buyer’s agreement to contribute to the plan at the same rate as the seller. In an asset sale, ERISA § 4204 exempts a seller from liability if the buyer is obligated to contribute to the plan for substantially the same number of contribution base units, typically hours of work, as the seller. Congress enacted this exemption to protect plans while not impeding normal business transactions, but as an exemption from liability, it is strictly construed. At the court’s request, PBGC filed an *amicus* brief clarifying that the time for meeting the § 4204 requirements is the time of the sale. In agreeing and ruling for the plan, the court reasoned that although the buyer had an obligation to contribute at the same rate as had the seller, it did not have an obligation to maintain the same number of covered hours of work.

34. QUESTION: Please describe any decisions of PBGC’s Appeals Board that would be of interest to employee benefits attorneys.

PBGC’S MEETING RESPONSE: Significant Appeals Board decisions are posted on [PBGC's website](#). There are two recent significant decisions: one involving [Bendix](#) and one involving a participant in the [Rockford Product Corporation](#) pension plan.

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.

PBGC’S MEETING RESPONSE: There have been no such matters.

36. QUESTION: Please provide an update regarding PBGC’s recent experience in connection with its assertions relating to ERISA’s extraterritorial reach.

PBGC’S MEETING RESPONSE: In [PBGC v. Asahi Tec Corp., No. 10-1936, 2012 WL 843937 \(D.D.C. March 14, 2012\)](#), the district court held that it had personal jurisdiction over a nonresident foreign controlled group member as a consequence of that entity’s stock ownership of a plan sponsor on the plan’s termination date.

37. QUESTION: Please provide an update regarding PBGC’s recent experience in connection with its claims that a private equity fund may qualify as a “trade or business” and thus be jointly-and-severally liable under ERISA for various pension-related debts of a portfolio company that it owns at least 80 percent of.

PBGC’S MEETING RESPONSE: There is no new information regarding this topic.

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

PBGC’S MEETING RESPONSE: PBGC gets its information from the Form 5500. Plans

self-identify as cash balance plans, so the information is not exact. The Form 5500 shows an increase from the previous year in the number of active participants in cash balance plans from 35% to 40%. However, if frozen cash balance plans are excluded from the data base, the percentage of actives for the two years are about the same.

Based on premium data (PBGC Form 1), the number of active participants in all single-employer plans (not just cash balance plans) was 14.5 million in 2008, 13.7 million in 2009, 13.6 million in 2010, and an estimated 12.9 million in 2011. The respective numbers for active participants in plans that were not frozen are 12 million, 11.1 million, 10.4 million, and 9.9 million. In each of the years, approximately 1.4 million of the active, non-frozen participants were in closed plans (i.e., no new participants allowed), leaving 10.6 million, 9.7 million, 9 million, and 8.5 million, respectively, active participants in non-frozen, non-closed plans.

About 67% of plans and 77% of participants are in plans that are not frozen. If small plans are excluded, the 67% of plans falls to 60%, but the number of participants remains at 77%. PBGC interpreted this data as meaning that plan size makes less of a difference than one might expect.