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 assistance from and informal review by PBGC staff), and it was understood that this report would be made available to the public.

PREMIUMS

[Scrivener’s Note: See also Q&A 35(a) regarding informal guidance in the 2013 “Blue Book” on issues relating to PBGC premiums.]

1. QUESTION: Now that IRS has issued procedures for obtaining church plan rulings can you discuss how PBGC is handling premium refund requests? Is an IRS Private Letter Ruling required before PBGC will act?

PBGC’S MEETING RESPONSE: Yes. PBGC is issuing premium refunds only if the requestor submits a PLR concluding that the plan is a church plan. PBGC noted that it does not issue refunds for premium payments with respect to requests made after the statute of limitations has expired.

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: The most common errors PBGC has been finding in its initial reviews of premium filings are:

- The reported identifying information is not correct (e.g., employer identification number, plan number, date plan year begins).
- The variable rate premium is determined using the standard premium funding target when an election to use the alternative premium funding target is in effect.
- The discount rates reported to have been used to determine the premium funding target are not acceptable given other reported information (e.g., method, UVB valuation date, etc.).
- The reported participant count date is not correct given other reported information (e.g., plan size or date plan year begins).
• The reported UVB valuation date is not acceptable given other reported information (e.g., plan size or date plan year begins).

• In 2013 early estimated flat-rate premium filings for large plans, some plans failed to comply with the new requirement to provide the plan effective date on every filing (including comprehensive premium filings).

Prior to 2013, only new plans were required to provide the plan effective date. PBGC asked that practitioners make sure their clients are aware that plans of all sizes are required to provide this information in their 2013 comprehensive premium filings later this year (or next).

Plans that use PBGC’s software or import filings into MyPAA avoid some of these errors because of internal checks and warning messages.

With regard to its premium compliance evaluation program, PBGC said it continues to perform reviews of premium filings. These reviews may be performed by PBGC employees, or by CPA or actuarial firms under contract to PBGC. No significant changes to the program have occurred in the past year.

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: There has been no change from last year. PBGC continues to assert and collect termination premiums. Because PBGC typically settles all of its claims against an employer at the same time, it is hard to break out the portion related to termination premiums. Note, in Chapter 11, reorganized debtors remain liable for termination premiums, as the claim for those premiums is not a claim in the bankruptcy case, and thus not discharged in bankruptcy.

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: This remains a long-term item on PBGC’s regulatory agenda. PBGC does not expect to publish a proposed rule in the next year. It is premature to anticipate whether interest will be paid retroactively.

PBGC REPORTING

[Scrivener’s Note: See also Q&A 35(h) regarding informal guidance in the 2013 “Blue Book” on issues relating to PBGC reporting.]

5. QUESTION: PBGC recommended, in its Summary 4010 Report to Congress (available at www.pbgc.gov/documents/PBGC-4010-report-harkin.pdf), that Congress consider certain modifications to ERISA Section 4010 requirements, noting that the existing “reporting criteria fail to properly target plans, resulting in both over- and under-inclusiveness.” Among PBGC’s concerns were that “[c]ompanies whose financial soundness is widely recognized are forced to file 4010 reports,” and that “unnecessary reporting requirements
[could] discourage companies from maintaining [voluntary private pension plans].” Pending any legislative changes, would PBGC consider using its existing 4010 waiver authority (29 CFR § 4010.11(b)) to grant either an across-the-board waiver, or a case-by-case waiver, of 4010 reporting in the case of a sufficiently “financially sound” company?

PBGC’S MEETING RESPONSE: PBGC does not have any current plans to modify, or to grant any across-the-board waivers from, the existing 4010 regulatory requirements, which include a waiver for controlled groups maintaining plans with total underfunding not exceeding $15 million, but not for financially sound companies. However, as reflected in its Summary 4010 Report to Congress, PBGC believes that legislative changes to Section 4010 would be appropriate.

In response to a follow-up question, PBGC stated that it uses 4010 reports in a variety of contexts (for example, reports to Congress, PiMS, and PBGC’s early warning program) and that this is one reason why PBGC is not planning to grant any across-the-board waivers.

6. 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 2012:

(a) PBGC received 8 requests for waiver of the entire 4010 filing and one was denied.
(b) PBGC received one request for the waiver of financial information, and it was granted with conditions.
(c) PBGC received 5 requests for extensions of the entire 4010 filing for which two were granted, two were partially granted, and one was denied.
(d) PBGC received 14 requests for extensions to file financial information and all were granted.

PBGC PENALTIES

7. 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: PBGC continues to assess 4071 penalties for various failures to provide information, including post-distribution certifications in standard terminations, reportable events notices, 4010 filings and premium information. PBGC has recently stepped up its premium enforcement efforts, including assessing 4071 penalties in a significant number of cases in which plans have failed to file. Typically, PBGC tells plans that have failed to file that 4071 penalties may be assessed. In most cases, the plan complies without any assessment of 4071 penalties. However if the plan does not comply, PBGC generally assesses a 4071 penalty; if the plan does not pay the penalty, PBGC generally refers the penalty amount to Treasury for collection (see 29 CFR part 4903 for process). PBGC said that in all situations, if a plan may have difficulty complying with filing requirements, it is best to contact PBGC as soon as possible, discuss the situation, and determine if a resolution can be reached that avoids penalty assessment.
8. **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:** In September of 2011 PBGC announced that for 2011 and later plan years, PBGC would waive premium penalties assessed solely because payments are late by not more than seven calendar days (http://www.pbgc.gov/Documents/2011-23692.pdf). Since then, PBGC has waived more than $620,000 on more than 1,000 late payments.

**STANDARD TERMINATIONS**

[Scrivener’s Note: See also Q&A’s 35(b)–(c) regarding informal guidance in the 2013 “Blue Book” on issues relating to standard terminations.]

9. **QUESTION:** Please provide an update regarding PBGC’s recent experience in connection with standard termination audits.

**PBGC’S MEETING RESPONSE:** PBGC audited approximately 250 plan termination filings in fiscal year 2012. PBGC continues to audit the termination of all plans with more than 300 participants. Of the audited plans, PBGC required corrective action in approximately 27% of the cases. The most common errors involved incorrect accrued benefit calculations, inaccurate lump sum calculations, missing participants' benefits not transferred to PBGC, attempted election of alternative treatment ("waiver") of benefits by individuals who were not majority owners, and missing or inadequate election and spousal consent forms.

Accrued benefit calculation errors generally resulted from plans:

- not fully vesting terminated participants who had not incurred a five-year break in service and had not received a distribution of the entire benefit as of the date of plan termination;

- in the case of a restated plan, not protecting benefits accrued under prior plan provisions until the later of the effective date or the adoption date of the restated plan;

- retroactively applying an amendment that reduces benefits; or

- taking into account incorrect service (for e.g., using Years of Participation instead of Years of Service) or compensation in the calculation of the benefit.

Mistakes in lump sum valuations often resulted from plans using the wrong interest rate or mortality assumptions. In many cases benefits based on prior applicable interest rates were not protected when the plan was amended post-termination to adopt the PPA segment rates. A few plans contained look back months that did not comply with the Code (e.g., the first day of the Plan Year is not a permissible look back month under the Code). PBGC said that it would be helpful if plans clearly define the "Stability Period" and "Look back Month" in their plan documents. In addition, in FY 2012, PBGC pursued enforcement action in plans that changed the stability period and/or look back month for the purpose of lump sum calculations and did not protect benefits based on the prior timing when distributions were made within a year of the change.
PBGC continues to see plans that roll over missing participants' benefits to Individual Retirement Accounts instead of either purchasing irrevocable commitments (and submitting the information to PBGC) or transferring the designated benefit to PBGC. Occasionally, PBGC finds that designated benefits have not been calculated in accordance with PBGC's Missing Participants regulation, or that interest is not paid to the extent designated benefits are sent to PBGC more than 90 days after the distribution deadline.

Other errors noted include reducing participants’ benefits by administrative fees or check processing fees; failure to include all benefit form options in annuity contracts; annuity contract not reflecting the correct plan provisions; and failure to issue a 204(h) notice for significant reduction of benefits.

In addition, PBGC has concerns that plans are not maintaining and providing accurate plan documents and records. PBGC said that the audit process becomes complicated when plan documents provided are incomplete. Providing a complete set of executed plan documents and amendments at the onset of the audit will facilitate a smooth review of the plan termination.

DISTRESS AND INVOLUNTARY TERMINATIONS

[Scrivener’s Note: See also Q&A’s 35(d)–(g) regarding informal guidance in the 2013 “Blue Book” on issues relating to distress and involuntary terminations.]

10. QUESTION: PBGC relies on the deliberations of its Trusteeship Working Group regarding such matters as whether to approve a distress termination, whether to initiate an involuntary termination, and what the termination date should be in a distress or involuntary termination. Please provide a brief description of how this group operates.

PBGC’S MEETING RESPONSE: The Trusteeship Working Group (TWG) is an intra-agency group that reviews staff termination recommendations for completeness and recommends to the appropriate PBGC decision maker whether the criteria for termination under sections 4041 and 4042 of ERISA are met. TWG members include professionals from departments throughout the agency, including actuaries, auditors, financial analysts, and attorneys.

The TWG’s responsibilities are set forth in PBGC Directive TR 00-2, which is available to the public via a Freedom of Information Request.

11. QUESTION: PBGC has had several cases in the past few years in which a pension plan remained ongoing throughout and after a bankruptcy proceeding. What does PBGC see as the key drivers that lead debtors to maintain plans during and after a bankruptcy rather than to attempt to terminate them?

PBGC’S MEETING RESPONSE: The reason behind why companies emerge from bankruptcy with their plans ongoing depends on the facts and circumstances of each case. A key driver in many cases in determining whether the plan is maintained is whether the minimum funding contributions are affordable and able to be made by the reorganized company. A termination premium which becomes the obligation of the reorganized entity is also a driver to keep the plan ongoing, and workers’ morale may also be boosted by plan continuation.
12. QUESTION: Please describe PBGC activity regarding potential or actual fiduciary breach claims involving plans that PBGC has become trustee of following the alleged fiduciary breach.

PBGC’S MEETING RESPONSE: As trustee of a terminated pension plan, PBGC actively looks for potential fiduciary breaches and investigates as appropriate. PBGC has identified many such breaches involving loans to plan sponsors, and has been very successful in getting settlements in such cases. The settlements usually take the form of complete or partial benefit waivers, sometimes accompanied by payments.

PBGC recently filed a complaint that includes a fiduciary breach claim based on the fiduciaries’ failure to collect minimum funding contributions owed the plan. The case, Embee Sunshade, was filed in the Eastern District of New York. By failing to collect the contributions, the trustees, in effect, made a prohibited loan to the plan sponsor.

In the Morgan Stanley fiduciary breach case involving the Saint Vincent Catholic Medical Centers pension plan, the administrator, prior to the plan’s termination, filed suit seeking to recover losses attributable to investment decisions made by Morgan Stanley. After termination and PBGC trusteeship of the plan, PBGC pursued the appeal of the district court’s dismissal of the complaint. The Second Circuit affirmed the dismissal, but there was a very strong dissent. PBGC is evaluating its options with respect to the case. **Update:** On May 17, 2013, PBGC filed a petition for rehearing. On August 1, 2013, the Second Circuit denied the petition.

In response to follow-up questions, PBGC stated that it keeps DOL abreast of its litigation efforts, and that there is a significant amount of informal coordination between the agencies. In cases in which DOL has already investigated fiduciary breaches when PBGC becomes trustee of a plan, PBGC uses the results of the DOL investigation. PBGC generally does not become involved in fiduciary breach cases involving multiemployer plans; the plan trustees have authority and responsibility to pursue such claims if appropriate.

13. QUESTION: One of the criteria for initiation of an involuntary termination is that the plan “will be unable” to pay benefits when due. Under what circumstances does PBGC believe this criterion is met? What if the plan has assets sufficient to pay benefits for at least the next several years and may, depending on future experience (e.g., interest rates, investment returns) be able to pay all benefits when due, but the ability of the employer to satisfy future minimum funding obligations is at best uncertain?

PBGC’S MEETING RESPONSE: Historically, the “will be unable to pay benefits when due” involuntary termination criterion of Section 4042(a)(2) of ERISA has meant one of two things: either the plan is underfunded on a termination basis and is unlikely to be able to pay benefits at some point in the future, taking into consideration the plan sponsor’s ability to fund the plan; or the plan is or will be abandoned and thus there will be no one to administer the plan.

PBGC evaluates each case based on its facts and circumstances. Two examples of cases in which PBGC initiated termination based on the “will be unable to pay benefits when due” criterion are: (1) the plan sponsor sold the bulk of its operations and the limited business that remained was unable to fund the plan, and (2) the plan sponsor was liquidating and there was a small window of time during which the plan would continue to be administered.
More than half of PBGC’s annual terminations involve companies that have gone out of business and liquidated outside of bankruptcy. In such cases, distress terminations are less common than PBGC-initiated terminations. A recurring problem for PBGC is not finding out about such cases until after the liquidation has been completed, and then having difficulty locating records and effectuating a smooth transition to PBGC trusteeship.

PBGC encourages all employers who are under financial pressure that may affect their ability to fund their pension plans to contact PBGC as early as possible before the situation deteriorates and excise taxes or liens are triggered. PBGC will work with the employer to find solutions; for example, PBGC may be able to assist with the funding waiver process. PBGC welcomes suggestions as to further outreach to let its customers know of the importance of contacting PBGC early.

In response to a follow-up question regarding PBGC’s termination liability lien (which is limited to 30% of the employer’s net worth), PBGC stated that, unlike the lien for missed minimum funding contributions in excess of $1 million, PBGC’s lien for termination liability does not arise automatically; rather, it is triggered by a PBGC demand. PBGC stated that it does not typically make such a demand unless its attempts to resolve the liability consensually are unsuccessful.

14. QUESTION: To qualify for a distress termination of a plan, each member of the controlled group maintaining the plan must qualify for at least one of the four distress tests. Under what circumstances will PBGC approve a distress termination where there is a controlled group member that does not qualify for any of the distress tests, but is essentially a shell (i.e., it has no or only minimal assets, no employees, and no ongoing business), and thus clearly cannot assist in maintaining an ongoing plan? Assume that each of the other controlled group members clearly qualifies for at least one of the four distress tests.

PBGC’S MEETING RESPONSE: PBGC usually finds that shell entities have a de minimis value. Thus, PBGC typically disregards shell corporations that are part of a plan sponsor controlled group for purposes of determining whether a plan meets the distress termination criteria. PBGC’s makes such findings on a case-by-case basis.

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: To date, during FY 2013, PBGC has received 30 distress termination applications. Almost all were associated with Distress Test 3. A small number of these applicants also asserted Distress Test 4 termination grounds; however, processing of those applications did not proceed under Test 4. During FY 2012, PBGC received 40 distress termination applications. Of these, more than half were associated with Distress Test 3.

16. 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 last received a request in 2008, and has no information on whether requests have been made to plan administrators or contributing sponsors.

ERISA SECTIONS 4062(e), 4063, AND 4064

[Scrivener’s Note: See also Q&A’s 35(i)–(j) regarding informal guidance in the 2013 “Blue Book” on issues relating to ERISA Section 4062(e).]

17. QUESTION: On November 2, 2012, PBGC announced (www.pbgc.gov/news/press/releases/pr12-32.html) that it was implementing a 4062(e) Enforcement Pilot Program under which it will generally not enforce the liability against “financially sound” or “creditworthy” companies, or in small plan situations based on a 100-participant threshold. Please provide an update on PBGC’s experience under this program, including a discussion of the numbers and kinds of cases in which companies have qualified for relief or have been denied relief.

PBGC’S MEETING RESPONSE: PBGC has published the staff guidelines for assessing creditworthiness under the pilot enforcement program on its website http://pbgc.gov/Documents/4062(e)-enforcement-of-guidelines.pdf. Under the pilot program, PBGC didn't enforce pension liabilities of about $475 million on over 30 companies that were financially sound. Additionally, the agency ended pre-existing enforcement agreements originally valued at $450 million with 17 companies because they met the tests for financial soundness.

18. QUESTION: On April 3, 2013, PBGC issued a notice of proposed rulemaking (78 Fed. Reg. 20039), available at http://www.pbgc.gov/Documents/2013-07664.pdf that proposed significant changes to its reportable events regulation, including the use of a “financial soundness” test for companies that would serve as the basis for a waiver of certain reportable events. Does PBGC believe that the same test for financial soundness, or a different test for financial soundness (whatever the test ends up being), should apply for reportable event waiver purposes vs. for purposes of the 4062(e) Enforcement Pilot Program?

PBGC’S MEETING RESPONSE: PBGC anticipates using similar criteria for measuring the financial soundness of a plan sponsor (and its controlled group) for purposes relating to reportable event waivers and enforcement of ERISA section 4062(e) liability. See http://www.pbgc.gov/Documents/4062(e)-enforcement-of-guidelines.pdf.

19. 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 learns about most 4062(e) events from the required notices filed under section 4063 and from Form 10 filings under section 4043 reporting active participant reductions. In addition, PBGC learns of other cases through its routine monitoring of industries as well as individual sponsors. That monitoring includes reviewing SEC filings, ratings agency reports, the financial press, and other sources. PBGC said that, in any case, it urges sponsors
or their representatives to contact PBGC about events under section 4062(e). In fact, substantive
discussions can begin before any report is due.

In November 2012, PBGC announced a pilot enforcement program whereby PBGC would
forbear from enforcing 4062(e) liability where it judges companies to be financially sound,
using common methods of analysis, as long as they remained financially sound. Further
information about the program and the criteria PBGC uses is on its website.

20. QUESTION: Please provide an update regarding PBGC’s experience with multiple-employer
plans, in particular regarding mergers, spinoffs, withdrawals, partitions, or terminations.

PBGC’S MEETING RESPONSE: This past year PBGC has worked with several multiple-
employer plan sponsors on various issues. PBGC assesses each case based on its facts and
circumstances. Some examples include:

Two cases where PBGC was asked for an opinion that a spin-off of a portion of a multiple-
employer plan would not result in withdrawal liability. PBGC reviewed each case, based on
facts and circumstances, to determine if the spin-off could be treated as a qualifying indemnity
arrangement.

PBGC is also reviewing another case in which it has been asked whether it will assess
withdrawal liability where a plan proposes to substitute a healthy foreign company for a
liquidating U.S. company currently contributing to the plan.

In another case, PBGC advised the contributing sponsors to the multiple-employer plan that the
assumption of the pension plan by the entity that purchased the contributing sponsors’ assets
constituted a satisfactory indemnity agreement under 4063(e). PBGC relied largely on Op. Ltr.
78-3, which advises that a “commitment to fund all of the plan’s liabilities in a responsible
manner” may satisfy the requirements of 4063(e).

MINIMUM FUNDING WAIVERS

21. 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. Please also provide information on the time it typically takes to
go through the waiver process.

PBGC’S MEETING RESPONSE: PBGC’s recommendation process begins with a review of
the sponsor-provided minimum funding waiver application package to determine whether the
sponsor provided a complete application by submitting all required materials. Many applications
PBGC receives are incomplete. If the application is missing required documentation such as
projected financial statements or projected minimum funding requirements, PBGC contacts the plan
sponsor with a detailed information request. Case processing begins when all the required
information is received. The time to go through the process is adversely impacted by incomplete
applications, poor quality of information submitted, and the responsiveness of sponsors to follow-up
data requests. Companies should understand that the analytical work performed in reviewing a
minimum funding waiver application is similar to that performed by credit analysts assessing a loan
application.
EARLY WARNING PROGRAM

[Scrivener’s Note: See also Q&A’s 35(l) regarding informal guidance in the 2013 “Blue Book” on issues relating to PBGC’s Early Warning Program.]

22. 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: The types of transactions of concern and what PBGC does is generally explained by Technical Update 00-3 and the Early Warning Program fact sheet, both of which are on PBGC’s website. The most recent Early Warning Program case of interest was the agency’s protective action to terminate the Saint Gobain pension plan because of the impending transfer of the plan to a far weaker entity. Further information is on a press release on PBGC’s website.

PBGC is currently working on updated guidance for the Early Warning Program. Issuing this guidance is a priority for PBGC’s Corporate Finance and Restructuring Department.

23. QUESTION: Does PBGC’s Early Warning Program include multiemployer plan matters? If not, does PBGC have a similar program for multiemployer plans? Will PBGC get involved if a major contributor to a multiemployer plan enters into a transaction or if two multiemployer plans are merging? If so, what remedies does PBGC have? Are there specific kinds of employer or plan transactions that concern the PBGC under the multiemployer plan program?

PBGC’S MEETING RESPONSE: The Early Warning Program does not include multiemployer plan matters. PBGC looks at multiemployer plan transactions on a case-by-case basis. ERISA requires that PBGC be notified of various types of transactions involving multiemployer plans, including mergers of multiemployer plans. When requested, PBGC can consider issuing a compliance determination that a merger is not a prohibited transaction. PBGC’s involvement in disputes in significant cases involving multiemployer plans often takes the form of filing amicus briefs.

24. QUESTION: Please provide an update on situations under the multiemployer program that may be of interest to employee benefits attorneys, such as alternative 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 was sued by an employer who seeks a reversal of PBGC’s determination that the employer’s permanent cessation of contributions to a trucking industry multiemployer plan resulted in substantial damage to the fund’s contribution base. The case, Quality Automotive Services, LLC v. PBGC, is currently pending in federal court in the District of Columbia.

PBGC filed an amicus brief with the U.S. Court of Appeals for the First Circuit in the Sun Capital Partners case, discussed in Question 29, below. The case involves the issue whether a private equity fund and affiliated entities may be a controlled group for Title IV withdrawal
liability purposes. The Court endorsed PBGC’s view that a private equity fund could be held jointly and severally liable for withdrawal liability.

PBGC is interested in situations in which multiemployer plans use alternative withdrawal liability allocation formulas. A straightforward situation is one where a plan wants to attract new employers, and sets up a new employer pool. A more complex situation is where there is an old and a new employer pool, and an old employer wants to be moved to the new employer pool. Upon the old employer’s “withdrawal” from the old employer pool, there would be a settlement of its liability with respect to the old pool (for which PBGC approval would be needed), and then the old employer could move to the new employer pool. PBGC is concerned about the impact on other old employers and is considering procedures in connection with such situations. PBGC is mindful of the need for both the agency and for multiemployer plan trustees to be flexible, especially given the financial stresses on these plans.

**Update:** PBGC recently approved a special withdrawal liability rule for the I.A.M. National Pension Fund National Pension Plan whereby certain employers governed by the Service Contract Act are subject to the building and construction industry withdrawal liability rules.

**LITIGATION AND GENERAL MATTERS**

**25. 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 v. Bendix Commercial Vehicle Sys., 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 percent 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.

Davis v. PBGC, 864 F. Supp. 2d 148 (2012), appeal docketed, No. 12-5274 (D.C. Cir. Aug. 30, 2012); previous decisions at 596 F. Supp. 2d 1 (D.D.C. 2008), aff’d 571 F.3d 1288 (D.C. Cir. 2009); No. 08-1064 (D.D.C. Mar. 17, 2009); 815 F. Supp. 2d 283 (2011) – A group of retired participants of a terminated pension plan sued PBGC, asserting that the agency erred in making benefit determinations and breached its fiduciary duty. The court initially denied participants’ motion for a preliminary injunction prohibiting PBGC from recouping benefit overpayments from them while the suit was pending. The D.C. Circuit affirmed that denial, holding that PBGC’s interpretations of ERISA are entitled to deference. On the merits, the district court ruled in PBGC’s favor on all counts regarding PBGC’s benefit determinations. The court held that the agency is entitled to broad deference in interpreting the statute and plan provisions, and rejected the participants’ argument that PBGC functions under a conflict of interest. The participants’ appeal is pending in the D.C. Circuit. The participants’ fiduciary duty claim was dismissed in January 2013.
Deppenbrook v. PBGC, No. 11-600 (D.D.C. Mar. 12, 2012); previous decision at 2011 WL 1045765 (W.D. Pa. Mar. 17, 2011); – A group of participants challenged PBGC’s denial of shutdown benefits. The Pennsylvania district court transferred the case to the District of Columbia, the only proper venue under section 4003(f) of ERISA. The participants then sought to supplement the agency’s administrative record with declarations and other documents. The District of Columbia court denied the motion, holding that the documents were not considered by PBGC and could shed no light on the determination.

PBGC v. Asahi Tec Corp., 839 F. Supp. 2d 118 (D.D.C. 2012); No. 12-8007 (D.C. Cir. July 16, 2012) – In this case of first impression, the district 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 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, the foreign manufacturer’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. The circuit court subsequently denied the foreign manufacturer’s petition for interlocutory appeal.

PBGC v. Town & Country Bank and Trust Co., 2012 WL 4753352 (W.D. Ky. Oct. 4, 2012) – A plan sponsor informed participants that their plan would perform a standard termination on a given date. Two days after that date, a Saturday, the sponsor amended the plan to change the assumptions for valuing lump sums, and later paid benefits using the amended assumptions, resulting in reduced lump sums in violation of ERISA regulations. After an audit, PBGC informed the plan sponsor of the violation and its need to pay additional benefits. The plan sponsor refused to comply, and PBGC sued to enforce its audit findings. The district court rejected the plan sponsor’s arguments, holding that PBGC is entitled to deference on its interpretation of its regulations, and that the agency’s determination was reasonable.

Stephens v. US Airways Group, Inc., No. 07-1264 (RMC) (D.D.C. Dec. 7, 2012) (denying class certification after remand); previous decisions at 555 F. Supp. 2d 112 (D.D.C. 2008) (initial decision); 696 F. Supp. 2d 84 (2010), aff’d in part, rev’d in part and remanded, 644 F.3d 437 (D.C. Cir. 2011) – 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 from PBGC. On remand, the district court denied the participants’ two motions for class certification because only one of the participants had exhausted the plan’s administrative remedies. The court rejected the participants’ arguments that a statutory violation was at issue, and that exhaustion was excused due to futility.

and capricious standard applies to PBGC’s determination of whether a “permanent shutdown occurred, and emphasized that weighing the evidence is not the court’s function when reviewing agency action. Accordingly, the court concluded that PBGC’s record contained sufficient support for its determination, and thus should be upheld.

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

**PBGC’S MEETING RESPONSE:** PBGC Appeals Board decisions are available on PBGC’s Website at http://www.pbgc.gov/practitioners/law-regulations-informalguidance/contenuPage15626.html. There is a search feature that can be used to find decisions that address topics and issues that may be of interest.

There are 2 decisions of particular note from 2012.


The Board’s decision addressed the “divorce pop-up” feature of the Delphi Hourly Plan’s normal form of benefit for married participants. The Delphi Hourly Plan’s normal form of benefit for a married participant included a Joint and 65% Survivor Annuity with a “popup” provision allowing the benefit to increase to the Straight Life Annuity amount upon the death of the spouse or following a divorce, if a domestic relations order so provides or a notarized written consent of the former spouse is obtained. PBGC determined that a cancellation of the surviving spouse’s benefit in the event of a divorce would not be allowed after the Plan’s termination date because it was a change in the form of benefit, not permitted under PBGC regulations. In a 14-page decision the Appeals Board upheld PBGC’s determination.

The second decision is at http://www.pbgc.gov/Documents/apbletter/Decision--Bethlehem-Steel-Corp-2012-12-18.pdf

In 1998, a Lukens Steel salaried employee was laid off and was entitled under the terms of his employment contract to a severance payment. To mitigate tax liabilities, a portion of the severance payment ($400,000) was paid from the qualified Plan which was amended on June 1, 1998 to provide a new Cash Balance Benefit for the employee in addition to the benefit the Plan already provided. The June 1st amendment provided for distribution of the Cash Balance on July 1, 1998. The participant elected, with his spouse’s consent, to receive his $400K lump sum payment in lieu of an annuity that would have started at the same time, his actual retirement date (“ARD”). The Luken’s Plan later merged into the Bethlehem Steel Plan. The rather complicated facts of this case are outlined in the Board’s 13-page decision. The Appeals Board determined that PBGC had failed to fully account for the lump-sum payment when determining PBGC's maximum guaranteed benefit limit. Thus, the Board determined no benefit remained to be paid under PBGC’s guarantee to this participant.

27. QUESTION: Please discuss any situations within the last year (such as the lawsuit PBGC filed against The Renco Group Inc. and its affiliates) 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: On January 28, 2013, PBGC sued The Renco Group, Inc. ("Renco") and six subsidiaries in the U.S. District Court for Southern District of New York. PBGC alleges that Renco engaged in a transaction with an affiliate of Cerberus Capital Management, LP ("Cerberus") with a principal purpose of evading its subsidiaries’ pension liabilities. PBGC also alleges common law claims against Renco for fraud, fraudulent concealment, and negligent misrepresentation. PBGC seeks damages of more than $97 million. Renco has indicated that it will move to dismiss PBGC’s common law claims.

As background, in March 2011, Renco acquired RG Steel. In December 2011, RG Steel notified PBGC that Renco was considering investment proposals for RG Steel that would likely result in Renco no longer owning 80% of RG Steel – thereby removing RG Steel from Renco’s controlled group. After informing Renco that PBGC was moving to terminate RG Steel’s pension plans, Renco told PBGC that no transaction was imminent, and that no transaction currently under consideration involved an equity transfer. On the next business day, Renco closed on a transaction that removed RG Steel from Renco’s controlled group. RG Steel filed for bankruptcy less than five months later and commenced liquidation. PBGC has terminated RG Steel’s pension plans.

There have been no other situations within the last year in which PBGC invoked the prohibition under ERISA section 4069(a).


PBGC'S MEETING RESPONSE: In PBGC v. Asahi Tec Corp., 839 F. Supp. 2d 118 (D.D.C. 2012), the district court held, on Asahi Tec’s motion to dismiss, 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. Since this decision, the parties have engaged in extensive discovery and, on March 4, 2013, PBGC filed a motion for partial summary judgment on jurisdiction and liability.

Note: PBGC does not consider Asahi Tec to be a case implicating ERISA’s extraterritorial reach. Asahi Tec’s minimum contacts with the U.S. make the exercise of jurisdiction consistent with the Due Process clause of the Constitution.

There is no other new information to provide on this topic.

29. 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, including a discussion of the implications of Sun Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund, Civil Action No. 10-10921-DPW (D. Mass. Oct. 18, 2012).
PBGC’S MEETING RESPONSE: PBGC’s position is that if a private equity fund has control over the plan sponsor’s management team and day-to-day operations, then the fund is a trade or business for Title IV purposes, not a passive investment vehicle. The PBGC Appeals Board has so held in the context of liability under the single-employer program, and PBGC has collected such liability from private equity funds.

In the Sun Capital case, which involved multiemployer withdrawal liability, the Massachusetts district court concluded that a private equity fund is not a trade or business. PBGC believes that the decision, which ignored 20 years of withdrawal liability decisions, is wrong. PBGC filed an amicus brief regarding the definition of “trade or business” under section 4001(b)(1) of ERISA in the pending appeal (Sun Capital Partners III, et al. v. New England Teamsters & Trucking Industry Pension Fund case, Appellate Case No. 12-2312).

In Sun Capital, two private equity funds owned only 70% of the relevant companies, with another fund owning the remaining 30%; the district court had rejected the argument that the decision of the funds to split ownership in this manner constituted a transaction to “evade or avoid” withdrawal liability for purposes of 29 U.S.C. § 1392(c). PBGC did not address this issue in its amicus brief.

On July 24, 2013, the Court of Appeals for the First Circuit endorsed PBGC’s view that a private equity fund can be held jointly and severally liable for withdrawal liability. The Court focused on the active role of the management company affiliated with a Sun Capital fund and held that it was engaged in a trade or business. The Court emphasized that an investment coupled with other factors (“investment plus”) led to its trade or business holding.

Update: Sun Capital requested a panel hearing or rehearing en banc. The request was denied.

30. QUESTION: PBGC issued a final rule in 2010 (75 Fed. Reg. 68203 (Nov. 5, 2010)) to “revise[] the procedures for the collection of non-tax debts owed to PBGC by employers (e.g., unpaid premium, penalty and interest under part 4007, information penalties under part 4071, and employer liability under part 4062) and to the recovery of overpayments to participants in cases where PBGC does not recoup the overpayment under part 4022.” The preamble to the final rule noted that, “[a]s with PBGC’s current debt collection regulation, the final regulation applies to collection of debts to PBGC by employers (e.g., unpaid premium, penalty and interest under part 4007, information penalties under part 4071, and employer liability under part 4062) and to the recovery of benefit overpayments to participants in cases where PBGC does not recoup the overpayment under part 4022.” The preamble does not state whether or not PBGC believes that ERISA Section 4062(e) liability may be collected through administrative or tax-refund offset. What is PBGC’s position on this issue? In addition, please provide an update on PBGC’s experience with administrative offset and tax refund offset, including a discussion of the kinds of cases in which PBGC has used offset and how successful PBGC’s efforts have been.

PBGC’S MEETING RESPONSE: To date, PBGC has not had a case that warranted consideration of collecting section 4062(e) liability by means of administrative or tax-refund offset. PBGC will decide whether to consider this option if an appropriate case arises.
PBGC currently refers to Treasury debts primarily related to premiums, 4071, or benefit overpayments. Occasionally due and unpaid employer contributions (DUEC), unfunded benefit liabilities (UBL) or other pension plan debt has been referred. These latter types, while few in number, are likely for larger amounts.

31. QUESTION: The Administration has proposed 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 and that the financial health of the employer be taken into account on contexts other than premiums (e.g., 4010 reporting criteria). Please provide an update on where these and similar proposals stand and on any PBGC policies in place (or under consideration) that take (or that would take) into account the financial health of the employer.

PBGC’S MEETING RESPONSE: The Administration’s proposal that PBGC be allowed to set its own premiums addresses two major problems with the current premium structure. First, even though Congress has raised premiums from time to time since ERISA’s enactment, they remain too low to cover PBGC obligations. Second, like other types of insurance premiums, PBGC premiums currently are unrelated to the risk that an insurable event will occur. PBGC believes that premium levels should be business-like: employers that present little or no risk should pay lower premiums than those that present significant risk.

Currently, the risk measurement that triggers the variable rate premium obligation is the plan’s funding level. But the funding level is a poor measure of risk: when times are bad, funding goes down for virtually all plans, yet only a tiny fraction of those plans present significant risk to PBGC. The greatest risk to PBGC is not a plan’s underfunding but rather the employer’s bankruptcy.

The Administration’s proposal would empower PBGC to set premiums based on the financial health of the employer and the circumstances of the individual plan.

To set premiums, PBGC would use measurements that correlate to actual risk. While Dodd-Frank essentially prohibits the use of credit ratings absent unusual circumstances, it clearly distinguishes credit scores. Because credit scores are well-established, universally available commercial measures of financial soundness, PBGC currently is using them in connection with its 4062(e) Enforcement Pilot Program and has proposed to use them under its reportable events regulation. PBGC anticipates using credit scores for purposes of setting premiums as well if legislation allowing that is enacted.

PBGC has been rethinking its other business practices and taking steps to modify them in order to focus its resources on the areas where there is the greatest risk. PBGC’s 4062(e) Enforcement Pilot Program, which provides that PBGC will focus its resources on cases in which the liable employer is not financially sound, is an example of such a step.

Similarly, PBGC’s proposed amendments to its reportable events regulation would eliminate or reduce reporting requirements where there is little or no risk to the insurance program. PBGC believes that plan sponsors that do not pose a risk should not be subject to the same reporting requirements and level of scrutiny as those that do.
PBGC’s review of its business practices is a work in progress. PBGC recognizes that a defined benefit plan imposes much greater obligations on an employer than do other types of retirement programs. Particularly in an era when there are only 29,000 defined benefit plans and employers are reluctant to offer those plans, PBGC believes that it is important to differentiate based on risk and remove disincentives to the establishment and continuation of defined benefit plans.

PBGC is committed to changing the way it does business to be more responsive and responsible to its customers. PBGC expects and is planning to make more changes in the future. PBGC welcomes its customers’ comments and suggestions regarding how to make things easier for them.

32. QUESTION: Please provide guidance on which PBGC offices (e.g., Office of General Counsel, Office of Chief Counsel, Corporate Finance and Restructuring Department) to contact on particular issues.

The Director of the Corporate Finance and Restructuring Department (CFRD), Kristina Archeval, may be contacted at (202) 326-4000, ext. 3516, or archeval.kristina@pbgc.gov for questions relating to corporate transactions that may be of interest to PBGC, reportable events or distress or involuntary terminations.

Senior Policy Actuary Amy Viener of the Policy and Research Analysis Division may be contacted at (202) 326-4080, ext. 3919, or viener.amy@pbgc.gov for questions relating to actuarial matters (not related to corporate transactions).

Assistant General Counsel Catherine B. Klion of the Regulatory Affairs Group within the Office of the General Counsel may be contacted at (202) 326-4400, ext. 3041, or klion.catherine@pbgc.gov for questions relating to PBGC regulations.

The Office of the Chief Counsel (OCC) has an attorney available to discuss general inquiry questions; call (202) 326-4020. In addition, OCC maintains an online “ask an attorney” site at askanatty@pbgc.gov where questions may be emailed.

The Benefits Administration and Payment Department (BAPD) generally handles questions relating to PBGC guaranteed benefits under plans that have been (or are in the process of being) terminated and trusted by PBGC. Contact BAPD via the Customer Service Center telephone number listed below.

PBGC’s website lists telephone numbers for each of its departments. In addition, PBGC’s Customer Service Center (1-800-400-7242) can direct calls to the appropriate PBGC department. Finally, to reach an individual, you can call 202-326-4000, dial 7099, and follow the instructions.

PBGC’s customer service guidelines provide that telephone calls and emails should be responded to within 24 hours.

33. QUESTION: PBGC has announced (64 Fed. Reg. 17696 (Apr. 12, 1999)) that its policy is “to use alternative dispute resolution for resolving appropriate disputes,” noting that “the voluntary
use of alternative dispute resolution, such as mediation, fact-finding, neutral evaluation, and arbitration, often can provide faster, less expensive, and more effective resolution of disputes that arise with employees, contractors, the regulated community and others with whom the agency does business.” Please provide an update on the kinds of disputes in which PBGC has used ADR and what its experience has been.

**PBGC’S MEETING RESPONSE:** PBGC has used alternative dispute resolution in various contexts. For example, in 2011, PBGC used mediation in a fiduciary breach case; the case settled. Similarly, in the FBOP Corporation case (an action to collect termination liability) and in the Bendix case (an action to collect 4062(e) liability), PBGC participated in mediations. Both cases settled. PBGC has used arbitration only in the internal labor relations context. PBGC has not used alternative dispute resolution in an early warning context.

34. 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 has not fully analyzed the 2011 5500 data. PBGC, however, has some statistics about the frequency of hybrid plans based on the 2010 5500 data.

According to data reported in the 2010 Form 5500, there were 12.3 million active participants in single-employer PBGC-insured plans as of the end of the 2010 plan year. Of those 12.3 million active participants, 5.1 million (i.e., 42%) were in hybrid plans. PBGC based the determination of whether a plan is a hybrid plan on the reported characteristic code in item 8a. Plans that are partially hybrid and partially something else generally report that code.

PBGC has also analyzed the accrual and participant freeze information for single-employer plans reported on 2012 premium filings received as of November 1, 2012. Those plans represent over 80% of the single-employer population. For purposes of this analysis, if 2012 data was not available, PBGC assumed there was no change since 2011. The results of that plan freeze analysis were presented at the Enrolled Actuaries Meeting in April 2013. The relevant slides are posted on the PBGC website at [http://www.pbgc.gov/Documents/Plan-Freeze-2013-EA-meeting.pdf](http://www.pbgc.gov/Documents/Plan-Freeze-2013-EA-meeting.pdf).

**INFORMAL GUIDANCE FROM 2013 BLUE BOOK**

35. QUESTION: Please provide a brief summary of any informal guidance in the 2013 Blue Book that may be of particular interest to employee benefits attorneys.

*[Scrivener’s Note: Each year, considerable informal guidance on a variety of PBGC-related issues is included in a “Summary of Discussions between the Enrolled Actuaries Program Committee and Staff of the Pension Benefit Guaranty Corporation” (generally referred to as the annual “Blue Book”). The 2013 Blue Book (as well as all prior Blue Books) (copyright ©, Enrolled Actuaries Meeting), can be found on the PBGC’s website at [www.pbgc.gov/res/other-guidance/blue-books.html](http://www.pbgc.gov/res/other-guidance/blue-books.html). The answers in the Blue Book reflect the views of individual staff members and do not represent the official position of PBGC.]*

**PBGC’S MEETING RESPONSE:** Please refer to the 2013 Blue Book answers cited below.
a) 2013 Blue Book Q&A 2 (“Premiums: Use of Plan Assets to Pay Premiums for Plan Year in Which Distress or Involuntary Termination is Initiated”). This question related to § 4007.12(b) of PBGC’s premium payments regulation, which provides that, for any plan year in which a plan administrator issues a notice of intent to terminate in a distress termination or PBGC initiates a termination under ERISA section 4042, and for each plan year thereafter, the obligation to pay PBGC premiums is solely that of the employer (i.e., the plan has no such obligation). PBGC stated that, if premium payments are made for a plan year at a time when neither a distress nor involuntary termination has yet been initiated, but later in the plan year such a termination is initiated, PBGC should be contacted for assistance in resolving the issue.

b) 2013 Blue Book Q&A 4 (“Standard Terminations: Offering a Second Election to Current Retirees”). This question asked whether a plan terminating in a standard termination may offer current retirees in pay status a second election with one of the optional forms being a lump sum to the extent permitted under the Code, provided appropriate information is provided. In response, PBGC stated that the plan could do so, but emphasized the importance of giving retirees sufficient information about any such election.

c) 2013 Blue Book Q&A 5 (“Standard Terminations: New Definition of Majority Owner”). This question concerned PPA’s change to ERISA section 4022(b)(5), which provides for guarantee limits with respect to individuals who meet certain ownership criteria. PBGC stated that the PPA definition of “majority owner,” which provides for a 60-month look-back, did not change the definition of majority owner for purposes of § 4041.21(b)(2) of PBGC’s regulation on termination of single-employer plans. Under the regulatory provision, a participant must be a majority owner at the time of a benefit waiver in order for the waiver to be valid; there is no look-back.

d) 2013 Blue Book Q&A 7 (“Distress or Involuntary Terminations: Allocation of Combined PBGC Recoveries”). This question asked for an update regarding the status of PBGC’s review of its policy for allocating recoveries among various claims and plans. PBGC stated that its policy on valuation and allocation of recoveries was revised on October 1, 2012; among other things, the revision clarifies PBGC’s treatment of termination premiums and post-termination plan contributions, and PBGC’s interpretation of section 4062(c) as amended by PPA. (See also paragraph (e) below regarding section 4062(c) as amended.)

e) 2013 Blue Book Q&A 8 (“Distress or Involuntary Terminations: Allocation of Combined PBGC Recoveries”). This question related to PBGC’s claims for due and unpaid minimum funding contributions and for the amounts described under section 4062(c) of ERISA. PBGC stated that (as reflected in its October 2012 revised recovery and allocation policy, discussed in paragraph (d) above), PBGC interprets the PPA 2006 amendments to ERISA section 4062(c) to refer to liability for due and unpaid minimum required contributions (as it did prior to the PPA amendments). PBGC also stated that, for “small” plans, PBGC uses a historical recovery ratio to determine the amount of its claim under section 4062(c) for purposes of determining the amount of benefits payable by PBGC; for “large” plans, PBGC determines benefits based on its actual recoveries for the plan.

f) 2013 Blue Book Q&A 9 (“Distress or Involuntary Terminations: Guaranteed Benefit for High 25 HCE”). This question related to the distribution restrictions applicable to lump-sums payable to certain highly compensated employees. PBGC stated that, if a plan terminates before
the full amount of a lump-sum distribution has become unrestricted, PBGC will demand repayment of the restricted amount in accordance with the terms of the applicable escrow agreement. PBGC will treat the benefit as a term-certain benefit, subject to the 4044 allocation rules and PBGC’s guarantee limits, and will generally use the interest rate method that was used under the plan when the payment was made.

**g)** 2013 Blue Book Q&A 11 (“ERISA Section 4010 Reporting: Compliance Regarding Reporting Triggers”). This question related to PBGC’s statement in its plan for regulatory review that it was considering waiving 4010 reporting with respect to certain triggers. PBGC stated that it is continuing to enforce the referenced reporting triggers at this time, and that it has recommended that Congress modify 4010 in ways that would significantly reduce the 4010 reporting burden.

**h)** 2013 Blue Book Q&A 13 (“ERISA Section 4062(e): Enforcement Pilot Program (Creditworthiness Standard)”; 2013 Blue Book Q&A 14 (“ERISA Section 4062(e): Enforcement Pilot Program (Small Plan Threshold)”; and 2013 Blue Book Q&A 15 (“ERISA Section 4062(e): Enforcement Pilot Program (Pending or Settled Cases”)”). These questions pertained to the 4062(e) Enforcement Pilot Program that PBGC announced last fall. Under the Pilot Program, PBGC generally will not enforce 4062(e) liability if a company is financially sound. PBGC discussed the standards it is using to assess whether an employer is financially sound for purposes of the Pilot Program; provided additional guidance regarding relief with respect to plans with fewer than 100 participants; and stated that the Pilot Program applies to pending cases. With respect to settled cases, PBGC stated that it will offer to suspend enforcement of future obligations under an agreement on the condition that the obligations will be reinstated if the employer ceases to be financially sound. PBGC also stated that it will release an employer from its obligations under a 4062(e) settlement agreement with respect to a plan that has fewer than 100 participants.

**i)** 2013 Blue Book Q&A 16 (“ERISA Section 4062(e): Liable Parties and Liability Period”). This question related to the five-year period during which 4062(e) liability serves to protect a plan. PBGC stated that its historical practice has been to treat the cessation of operations date as the start of the five-year liability period.

**j)** 2013 Blue Book Q&A 17 (“Multiemployer Plans: Mass Withdrawal”). This question related to the mass withdrawal rules of ERISA section 4219(c)(1)(B), and in particular, to the 20-year cap on withdrawal liability payments. PBGC confirmed that its opinion remains the same as reflected in PBGC Opinion Letter 94-3, which states that when a plan terminates by mass withdrawal, all employers lose the benefit of the 20-year cap limitation.

**k)** 2013 Blue Book Q&A 22 (“Other: “Risk Mitigation Program”). This question related to the screening criteria used by PBGC in connection with monitoring employers under its Risk Mitigation Program (also known as the Early Warning Program). PBGC stated that the screening criteria in Technical Update 00-3 are no longer applicable given the enactment of PPA. PBGC also provided additional guidance regarding the circumstances under which it would monitor an employer, including its “$50M or more in underfunding” test and its “5,000 or more participants” test. PBGC stated that it is currently working on updated guidance for the Early Warning Program.