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. Some responses were given in writing by PBGC staff and others were given orally by PBGC staff. 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. With the exception of the written responses PBGC staff provided, 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

[Scrivener’s Note: See also item (a) under "Informal Guidance From 2016 Blue Book" at the end of this report for informal guidance on issues relating to PBGC premiums.]

1. 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 and provide a brief summary of the most common problems found.

PBGC’S DISCUSSION RESPONSE:

The two biggest mistakes involving premium payments are forgetting to file the required premium forms, and filing the forms but making a mistake in connection with payment of the premiums. With respect to the latter kinds of situations, there are three common errors:

- The first common error involves failure to enter the required code for payment to PBGC when using the [www.pay.gov](http://www.pay.gov) site to pay PBGC premiums and the company set up a debit block on their account. If the required code is not entered, a debit block will block the payment. The required code for PBGC must be entered in order for the payment to go through. (Note that this is a problem whether the company is using pay.gov or just trying to send money via an ACH transfer.)

- A second common mistake is wiring or mailing the payment to the wrong address. PBGC staff said that it is important to check the wiring or mailing information each year to make sure the information used is up-to-date. PBGC urges practitioners to check the addresses on the PBGC website because the addresses are no longer in the form instructions.

- A third common mistake is filing the premium forms but forgetting to pay the premium. Many plans, especially small plans, file early and wait until the deadline to make the premium payment. Sometimes they forget to make the payment.
Other errors are found as a result of PBGC's checking secondary sources. For example, PBGC may find that the valuation date is incorrect, or that the premium funding target was determined based on the alternative method where the standard method was required, or vice-versa.

PBGC may also find errors during audits. For example, there may be a discrepancy between the plan assets reported in the premium filing and the plan assets reported on the Form 5500. Discrepancies such as this may prompt PBGC to ask follow-up questions.

2. QUESTION: The Pension Protection Act provided PBGC with the authority to pay interest on premium overpayments. What is PBGC’s schedule for implementing this authority? In the past, PBGC has said that it needs to wait for other changes to the automated premium system. Does PBGC anticipate paying interest on a retroactive basis back to 2006, as the Pension Protection Act authorized PBGC to do?

PBGC’S WRITTEN RESPONSE:

The matter is under review and discussion at PBGC.

In response to a follow-up question, PBGC staff said that the need for changes to the automated premium system was no longer an issue.

STANDARD TERMINATIONS

[Scrivener’s Note: See also item (l) under "Informal Guidance From 2016 Blue Book" at the end of this report for informal guidance on issues relating to standard terminations.]

3. QUESTION: What are the most common errors PBGC sees when it reviews a Form 500 filing during its 60-day review period, and how does PBGC address these errors? Please address in particular PBGC’s experience over the past year in reviewing the Notice of Intent to Terminate and Notice of Plan Benefits samples that filers have been required to submit to PBGC as part of the Form 500 filing starting in 2014. Has that review uncovered any significant compliance failures?

PBGC’S WRITTEN RESPONSE:

Most errors found upon review of the standard termination notice (Form 500) were not significant compliance failures warranting issuance of a Notice of Noncompliance. Most errors involved either incomplete filings or filings with erroneous data, and the plan administrator was given an opportunity to correct if appropriate evidence was presented. Errors found included filings sent without original signatures and filings sent either without a copy of the Notice of Intent to Terminate or Notices of Plan Benefits, or with inaccurate dates for the issuance of the required Notices. If fixed timely, the standard termination notice was deemed to have been complete as of the date when originally filed. Filings are noncompliant if the notices to participants are not issued within required timeframes or if the standard termination notice is not filed timely with PBGC.

Review of the Notice of Intent to Terminate and sample Notices of Plan Benefits submitted with the standard termination notice resulted in PBGC’s requiring issuance of supplemental notices in approximately 5 percent of the standard terminations. PBGC issued approx. 20 Notices of Noncompliance of which half related to defective Notices of Intent to Terminate or Notice of
Plan Benefits. Significant defects seen in the Notice of Intent to Terminate were the omission of annuity information and information on the cessation of accruals. The sample Notices of Plan Benefits that were defective lacked the personal data used to calculate the benefit.

What actions PBGC takes upon finding defects depends upon the type and severity of defects that are found. When determining whether a nullification is appropriate, PBGC follows its regulations, which allow consideration of the plan participants’ interests, as well as the correction of good faith errors.

4. **QUESTION:** Please provide an update regarding PBGC’s recent experience in connection with standard termination audits, including statistics for 2015 that track those for 2013 as presented in the following PBGC staff response to Question 13 at the 2014 JCEB-PBGC Meeting:

PBGC audited approximately 235 plan termination filings in fiscal year 2013, of which over 90% were plans with 300 or fewer participants. PBGC is continuing to audit the termination of all plans with more than 300 participants. Of the audited plans, PBGC required corrective action in approximately 30% of the cases. One-third of the errors involved incorrect accrued benefit calculations, a third were a result of inaccurate lump sum calculations, and the balance involved a variety of reasons including attempted election of alternative treatment ("waiver") of benefits by individuals who were not majority owners and missing election and spousal consent forms.

PBGC’S WRITTEN RESPONSE:

PBGC audited approximately 260 plan termination filings in fiscal year 2015, of which over 85% were for plans with 300 or fewer participants. PBGC is continuing to audit the termination of all plans with more than 300 participants. Of the audited plans, PBGC required corrective action in approximately 36% of the cases. One-third of the errors involved incorrect accrued benefit calculations, one-fifth were a result of inaccurate lump sum calculations, and the balance involved a variety of reasons including attempted election of alternative treatment ("waiver") of benefits by individuals who were not majority owners, missing or inadequate election and spousal consent forms, annuity contracts not mirroring plan provisions, deduction of processing fee from participants’ benefits, and failure to correctly calculate and distribute Missing Participants’ benefits.

**DISTRESS AND INVOLUNTARY TERMINATIONS**

[Scribner’s Note: See also items (b) and (l) under “Informal Guidance From 2016 Blue Book” at the end of this report for informal guidance on issues relating to distress and involuntary terminations.]

5. **QUESTION:** Please describe PBGC activity involving involuntary terminations initiated by PBGC where the termination action was opposed by the plan administrator of the pension plan or by the employer maintaining the pension plan.

PBGC’S WRITTEN RESPONSE:

PBGC filed a complaint to terminate the Eber Bros. Wine & Liquor Corp. Retirement Plan in the Western District of New York on May 11, 2015. Eber Bros. did not oppose the termination
of the plan but contested PBGC’s requested termination date. After cross-motions for summary judgment, the court agreed with PBGC’s proposed termination date of plan termination and issued an order and judgment on January 19, 2016, terminating the plan, appointing PBGC trustee, and setting the termination date that PBGC requested. Eber has appealed that decision to the 2d Circuit.

6. **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 DISCUSSION RESPONSE:**

PBGC staff said that there are currently no significant fiduciary breach cases in PBGC’s inventory. PBGC staff said that the majority of its fiduciary breach cases involve the transfer of plan assets to the employer or another party in interest, typically in the form of a loan. PBGC also reviews plan investments to determine whether there has been a fiduciary breach—for example, if all plan assets are held in a single investment real estate vehicle, there may be a fiduciary issue. In addition, PBGC has been looking more closely at plan expenses to make sure that plan assets are not being used for settlor functions.

**IRC SECTION 430(K) LIENS**

7. **QUESTION:** Is the determination as to whether the total of missed contributions, including interest, exceeds $1,000,000 such that an IRC Section 430(k) lien arises, always made on a plan-by-plan basis, or are there any circumstances in which the determination may or must be made by aggregating missed contributions with respect to two or more plans maintained by the same controlled group?

**PBGC’S WRITTEN RESPONSE:**

No, determinations are made on a plan-by-plan basis and PBGC is not aware of any basis to aggregate.

**PBGC REPORTING**

[Scrivener’s Note: See also items (c)–(k) under "Informal Guidance From 2016 Blue Book" at the end of this report for informal guidance on issues relating to PBGC reporting.]

8. **QUESTION:** What are PBGC’s plans regarding the issuance of guidance on any questions or issues that have arisen in connection with PBGC’s changes to its reportable events regulations that went into effect on January 1, 2016? In particular, when does PBGC expect to be issuing any such guidance, what topics does PBGC expect to address in its guidance, and in what form (e.g., regulation, policy statement, technical update) does PBGC expect to issue such guidance?

**PBGC’S WRITTEN RESPONSE:**

We are aware of a handful of issues that may require clarification, such as how the single-cause and attrition active participant reduction events work together in a single year. We are considering providing guidance. Given that the regulation has been effective only for a few months, we are not able to provide more information at this time. If a practitioner is unclear
how to handle a particular situation that may require reporting, the practitioner is encouraged to contact PBGC to walk through the facts and circumstances.

9. **QUESTION:** Under PBGC’s reportable events regulation, qualifying for the low-default-risk waiver, which applies to five reportable events, requires that each contributing sponsor of the plan for which the reportable event occurred and the highest-level U.S. parent of each such contributing sponsor be “low-default risk” on the date of the event. One of the criteria that may be used to qualify for low-default-risk status is the "no missed contributions event" criterion. A company meets the no missed contributions event criterion if “during the two-year period ending on the qualifying date, there has not been any failure to make when due any contribution described in § 4043.25(a)(1) or (2) (dealing with failure to make required minimum funding payments), unless reporting was waived under § 4043.25(c)” (§ 4043.9(e)(2)(vii)). In the case of such a failure, the reportable event occurs only with respect to the particular pension plan to which the missed contribution was owed and must be reported only by the plan administrator and the contributing sponsor of that pension plan. Thus, if Plan A and Plan B are maintained by the same controlled group, a missed contributions reportable event does not occur for Plan A where there is a failure to make a required contribution to Plan B.

If a company is determining whether it meets the missed contributions event criterion relating to “low-default-risk” status, must the company take into account a missed contribution to a plan with respect to which it is not a contributing sponsor (or plan administrator) if it is a member of the plan’s controlled group, even though no missed contributions reportable event has occurred that would be reportable by that company?

**PBGC’S WRITTEN RESPONSE:**

Yes.

10. **QUESTION:** To determine whether and, if so, when an active participant reduction reportable event has occurred, it is necessary to determine the number of “active participants” in a plan as of various dates. PBGC’s reportable events regulation provides a definition of “active participant” that explains when a “participant” is to be treated as “active,” but there is no definition of “participant” in the regulation.

a) What is the definition of a “participant” for this purpose? In this connection, please note that the definition of “participant” differs depending on the purpose for which it is used (e.g., PBGC flat-rate premiums, Form 5500 reporting, standard or distress termination notices). See also the useful guidance PBGC had provided in response to Question 8 of the 2001 Blue Book regarding some reasons why the Form 5500 participant count may not match the PBGC flat-rate premium participant count (e.g., an individual who is earning or retaining credited service but with respect to whom the plan has no benefit liabilities is considered to be a participant for Form 5500 reporting purposes but not for PBGC flat-rate premium purposes).

b) Could PBGC provide guidance on the key reasons why a “participant” (under whatever definition applies for this purpose) would be treated as “active” for Form 5500 purposes but not for purposes of an active participant reduction reportable event, or vice-versa?
PBGC’S DISCUSSION RESPONSE:

a) Although PBGC's reportable events regulation does not contain a definition of "participant," PBGC's intention was to use the same definition that is used for premium payment purposes. However, if a filer has a different interpretation that is reasonable and is used consistently, PBGC would not challenge its use. For example, the consistent use of the participant definition used for purposes of the Form 5500 participant count would certainly be reasonable.

b) Whether a participant is treated as an "active" participant is a question of the facts and circumstances of a particular case. PBGC will consider providing additional guidance that would clarify this issue.

11. QUESTION: Under 29 CFR § 4043.23(c), when determining whether and, if so, when a "single cause" active participant reduction reportable event has occurred, a reduction in the number of active participants is to be disregarded to the extent that it is attributable to an event described in ERISA Section 4062(e) or 4063(a), and is timely reported to PBGC under ERISA Section 4063(a). In some cases, particularly given the three-year look-back rule under ERISA Section 4062(e)(6)(B), an event described in ERISA Section 4062(e) may not need to be reported to PBGC under ERISA Section 4063(a) until months or even years after a reduction tied to the event has occurred. Does the ability to disregard a reduction under 29 CFR § 4043.23(c) apply regardless of when the ERISA Section 4063(a) report is due, provided that the ERISA Section 4063(a) report is timely made?

For example, assume that a plan's active participant count drops from 1,000 on January 1, 2016, to 790 on July 1, 2016, as a result of a mass layoff at multiple different locations; that of this reduction of 210 active participants, 20 relate to (and are included in the three-year look-back for) a cessation of operations at a facility in any location that occurs two years later in 2018; and that the 2018 cessation is timely reported to PBGC under ERISA Section 4063(a) within 60 days after the cessation occurs. Is it appropriate to disregard these 20 active participants in determining whether a "single-cause" active participant reduction event occurred on July 1, 2016?

PBGC’S WRITTEN RESPONSE:

In the example provided, since the ERISA Section 4063 report is made in 2018 and the active participant reduction event would have been required to be reported on Form 10 in 2016, there is nothing to disregard.

The disregard provision in § 4043.23(c) was included in the recent final Reportable Events rule to help filers avoid duplicative reporting under ERISA Section 4043. PBGC limited the active participant reduction event by excluding from consideration—in determining whether a reportable active-participant-reduction event has occurred—active participant reductions to the extent that they (1) fall within the provisions of section 4062(e) or 4063(a) and (2) are timely reported to PBGC as required under ERISA section 4063(a). PBGC intended that this provision would apply when the 4063(a) report had already been filed. However, due to the changes to ERISA section 4062(e), PBGC staff believe that the issue is largely moot as we expect few
4062(e) reports to be filed and thus, PBGC expects there will be only few occasions to apply the disregard provision.

12. QUESTION: Under 29 CFR § 4043.29, “[a] reportable event occurs for a plan when there is a transaction that results, or will result, in one or more persons ceasing to be members of the plan’s controlled group (other than by merger involving members of the same controlled group).” A waiver from reporting this reportable event applies “if each post-event contributing sponsor of the plan and the highest level U.S. parent of each post-event contributing sponsor are low-default-risk on the date of the event” (emphasis added).

Assume that a reportable event occurs for Plan A, which is maintained by Company X (which in turn is not a member of any controlled group), based on an asset sale transaction that will result in the sponsorship of Plan A being transferred from Company X to Company Y (which also is not a member of any controlled group). Company X and Company Y sign an agreement on the transaction with Company Y taking ownership of the assets and assuming the plan upon closing at a later date. Assume that Company X is low-default-risk on all relevant dates, and that Company Y is not low-default risk on any relevant date. Who is the “post-event” contributing sponsor for purposes of determining whether the low-default risk waiver is available for this event?

PBGC’S WRITTEN RESPONSE:

Because the reportable event is triggered by the signing of the agreement, Company X is considered to be the “post-event” contributing sponsor in this case even though Company Y will eventually be the contributing sponsor of the plan upon closing. Under the low-default-risk waiver, low-default risk status must be maintained by the contributing sponsor on the date the event occurs (in this case, the date the agreement is executed). Who the post-event contributing sponsor is may depend on the facts and circumstances of the transaction, however. For example, if Company X and Company Y completed the above transaction in a sign-and-close structure where the parties execute an agreement and consummate the transaction simultaneously, Company Y would be the “post-event” contributing sponsor.

13. QUESTION: A “liquidation” reportable event occurs “when a member of the plan’s controlled group: (1) [i]s involved in any transaction to implement its complete liquidation (including liquidation into another controlled group member); (2) [i]stitutes or has instituted against it a proceeding to be dissolved or is dissolved, whichever occurs first; or (3) [l]iquidates in a case under the Bankruptcy Code, or under any similar law” (§ 4043.30(a)).

a) As a result of a change that was made by the new reportable events rule, a “change in contributing sponsor or controlled group” reportable event no longer occurs where a controlled group member merges into another controlled group member. However, if a controlled group member is involved in any transaction to implement its complete liquidation “including liquidation into another controlled group member,” a liquidation reportable event does occur.

Is the intent of the change in PBGC’s rules for the merger of one controlled group member into another controlled group member to eliminate reporting under the “change in
contributing sponsor or controlled group” reportable event but to continue to require it in all cases under the “liquidation” reportable event?

b) If the response to (a) is “no”, how is the liquidation of a controlled group member into another controlled group member different from an event in which a controlled group member merges into another controlled group member?

PBGC’S WRITTEN RESPONSE:

a) No.

b) A liquidation event is different because it is designed to discontinue the business, sell off assets, and extinguish all debts. In PBGC’s experience, the liquidation of a controlled group member into another controlled group member often indicates financial difficulties and a pension plan at risk.

PBGC’S DISCUSSION RESPONSE:

In response to discussion, PBGC staff said that where a controlled group member is involved in a transaction to implement its complete liquidation, but at the time the reportable event notice is due it is clear that a complete liquidation will not occur (e.g., the controlled group member has decided to use the proceeds of an asset sale to begin a new business activity), there is no liquidation reportable event and, thus, no liquidation reportable event notice is due.

14. QUESTION: A “loan default” reportable event occurs when, with respect to a loan with an outstanding balance of $10 million or more to a member of the plan’s controlled group, “[t]here is an acceleration of payment or a default under the loan agreement.” (The event also occurs when “[t]he lender waives or agrees to an amendment of any covenant in the loan agreement the effect of which is to cure or avoid a breach that would trigger a default”; see the response to Question 20(b) of the 2016 Blue Book for guidance relating thereto.)

Assume that a loan agreement provides that a “default” occurs when there is a failure to comply with a requirement to provide information to a lender, but that there is a 10-day grace period within which to comply with this requirement. Assume further that the information is timely provided within the ten-day grace period and that, as a result, no “default” occurs.

Has a loan default reportable event occurred?

PBGC’S WRITTEN RESPONSE:

No. If the default does not occur unless the information is not provided within the 10-day grace period and the information is timely provided, a reportable event has not occurred.

In answer to a follow-up question, PBGC said that it wants to know about all defaults because they are indications of a potential problem at the borrower company. If the borrower cures an event of default quickly or the borrower believes there is no reason PBGC should be concerned about the situation based on the facts and circumstances, the plan administrator or contributing sponsor is always welcome to call PBGC and discuss the possibility of a facts and circumstances waiver of reporting requirements. PBGC also encouraged plan administrators and employers to call PBGC if
they have any questions about reporting requirements, for example, if they feel they are in a gray area.

15. QUESTION: Under PBGC’s reportable events regulations before they were amended by the final rule published on September 11, 2015, a post-event reporting extension applied to various reportable events involving a foreign direct or indirect parent of a contributing sponsor or a “foreign-linked entity” (i.e., an entity that is neither a foreign entity nor a contributing sponsor of a plan, and that is a member of the plan’s controlled group only because of ownership interests in or by foreign entities). Where this reporting extension applied, the reportable events filing was not due until 30 days after the plan’s first Form 5500 due date after the person required to notify the PBGC had “actual knowledge” of the event and of the controlled group relationship (§§ 4043.29(d)(2), .30(d)(2), .31(d)(2), .34(d)(4) (2015)). The new regulation eliminates these reporting extensions, and requires reporting within 30 days after the person required to report “knows or has reason to know” [emphasis added] that the reportable event has occurred (§ 4043.20).

Please provide guidance on the due diligence steps that would be sufficient for a plan administrator or contributing sponsor to take, in an effort to monitor events involving foreign direct or indirect parents or foreign-linked entities, so as to avoid § 4071 penalties for non-reporting or late reporting as a result of a lack of “actual knowledge” (whether of the event, of the controlled group relationship, or of both), despite the implementation of such steps.

PBGC’S DISCUSSION RESPONSE:

PBGC expressed its expectation that US plan administrators and contributing sponsors will perform appropriate due diligence in monitoring transactions involving foreign affiliates that might generate reportable events, but declined to provide guidance regarding specific due diligence steps that should be followed so as to avoid § 4071 penalties.

16. QUESTION: In its final rule amending its regulation on annual financial and actuarial information reporting under ERISA Section 4010 (81 Fed. Reg. 15432, March 23, 2016), PBGC added a new reporting waiver from reporting, where reporting would otherwise be required based solely on the 80% Gateway Test, if the aggregate number of “participants” in all plans maintained by the controlled group is fewer than 500. PBGC regulations do not contain any definition of “participant” to be used for this purpose.

a) Could PBGC provide guidance on how to determine whether a particular individual is to be treated as a “participant” for this purpose? In this connection, please note that the definition of “participant” differs depending on the purpose for which it is used (e.g., PBGC flat-rate premiums, Form 5500 reporting, standard or distress termination notices). See also the useful guidance PBGC had provided in response to Question 8 of the 2001 Blue Book regarding some reasons why the Form 5500 participant count may not match the PBGC flat-rate premium participant count (e.g., an individual who is earning or retaining credited service but with respect to whom the plan has no benefit liabilities is considered to be a participant for Form 5500 reporting purposes but not for PBGC flat-rate premium purposes).

b) If an individual is a “participant” (under whatever definition applies) in two or more plans maintained by the controlled group, is the individual to be counted only once, or two or more times, when determining whether the aggregate participant count is fewer than 500?
PBGC’S DISCUSSION RESPONSE:

a) PBGC will accept the filer's definition of "participant" for 4010 purposes as long as the definition is reasonable and used consistently among all plans. For example, the consistent use of the participant definition used for purposes of the Form 5500 participant count would certainly be reasonable.

PBGC’S WRITTEN RESPONSE:

b) Each plan counts all its own participants. Thus a participant in two plans would be counted twice (once by each plan).

17. QUESTION: Under 29 CFR § 4043.4(d), a waiver from filing a reportable event notice (whether on Form 10 or Form 10-A) or a Form 200 applies where the filing is due on or after the date on which all of the plan’s assets (other than any excess assets) are distributed pursuant to a termination under PBGC’s regulations governing standard and distress terminations, or on which a trustee is appointed for the plan in a distress or involuntary termination under ERISA Section 4042. Is there a similar rule that PBGC would apply in the context of the annual financial and actuarial information reporting requirement under ERISA Section 4010? If so, what is that rule?

PBGC’S DISCUSSION RESPONSE:

There is no automatic waiver with respect to the required reporting of financial and actuarial information under ERISA Section 4010. If a plan sponsor believes that a reporting waiver would be appropriate, the plan sponsor may file a waiver request with PBGC based on the facts and circumstances.

18. QUESTION: What are the most common reporting delinquencies (regarding, e.g., reportable events, Form 200 filings, or ERISA Section 4010 filings) that PBGC encounters, and how does PBGC generally address such delinquencies? Can PBGC offer any guidance to practitioners that may help to reduce the incidence of PBGC reporting delinquencies?

PBGC’S WRITTEN RESPONSE:

Delinquencies for Reportable Events and Form 200:

The most common reporting delinquencies under reportable events and Form 200 are as follows:

- Filing was submitted late
- Filing was submitted on the old form (new forms are on PBGC’s website or on the e-filing portal)
- Filing was incomplete due to missing attachments
- Filing was not signed
• Filing was submitted by regular mail (mandatory e-filing)

For all of the above situations, PBGC contacts the filers or their advisors, informs them of the problem with the filing and shows them how to find the rules and instructions on PBGC’s website.

*Delinquencies for ERISA 4010:*

The most common reporting delinquency under ERISA 4010 is reporting required under PBGC Regulation 4010.6(a)(2). Under this rule, a filer who is not required to file for the year immediately following the year a full ERISA 4010 filing was required must submit information demonstrating why the filing is not required. Although this is the most common delinquency, it’s worth noting that it happens only about 10-12 times per year. When we discover this error, PBGC notifies the filer by e-mail.

In response to a follow-up question, PBGC staff noted that PBGC Regulation 4010.11(d) requires that a waiver be requested at least 15 days in advance of the reporting deadline. PBGC staff said that, although PBGC generally will not deny a waiver request based solely on failure to comply with the 15-day requirement, filers should nonetheless make every effort to comply with that requirement.

**ERISA SECTIONS 4062(e), 4063, AND 4064**

*[Scrivener’s Note: See also item (m) under "Informal Guidance From 2016 Blue Book" at the end of this report for informal guidance on issues relating to ERISA Sections 4062(e), 4063, and 4064.]*

19. **QUESTION:** What are PBGC’s plans regarding the issuance of guidance on the December 2014 legislative changes to ERISA Section 4062(e)? In particular, when does PBGC expect to be issuing such guidance, what topics does PBGC expect to address in its guidance, and in what form (e.g., regulation, policy statement, technical update) does PBGC expect to issue such guidance?

**PBGC’S WRITTEN RESPONSE:**

In light of the smaller scale of the program following the 2014 amendments to sec. 4062(e), we are evaluating the need for and utility of additional guidance. In the interim, sponsors and practitioners should contact 4062e@pbgc.gov with any questions.

**EARLY WARNING PROGRAM**

20. **QUESTION:** Under its Early Warning Program, PBGC proactively monitors certain employers to identify events that may pose a risk to the pension insurance system. In response to Question 22 of the 2013 Blue Book (and previously in its response to Question 19 of the 2011 Blue Book), PBGC staff indicated that PBGC generally monitors employers with pension plans that in the aggregate had $50 million or more in underfunding or 5,000 or more participants. PBGC also indicated that it monitors employers for other reasons as appropriate.
a) In its response to Question 30 at the 2015 JCEB-PBGC Meeting, PBGC staff stated that it had changed the plan underfunding threshold for Early Warning Program monitoring from $50 million to $25 million in the summer of 2014, but that it may change the threshold again. Has PBGC changed the plan underfunding threshold since then, and what is it now?

b) Does the mere fact that an employer is subject to the annual financial and actuarial information reporting requirement under ERISA Section 4010 constitute one of the “other reasons as appropriate” that may be a basis for PBGC monitoring the employer under the Early Warning Program?

PBGC’S WRITTEN RESPONSE:

a) PBGC is updating its guidance on the Early Warning Program. In the interim, our process remains unchanged. However, PBGC has shifted back to $50M from $25M.

b) PBGC does not use the fact that an employer is a 4010 filer as a basis for Early Warning program monitoring.

21. QUESTION: In its response to Question 31 at the 2009 JCEB-PBGC Meeting, PBGC provided the following statistics regarding its Early Warning Program activities in 2008:

In 2008, the PBGC reviewed 480 transactions that satisfied the criteria set forth in Technical Update 00-3 and investigated 100 of those transactions. (PBGC noted that this Technical Release will have to be updated for the PPA.) In seven of those transactions, PBGC sought protections. It obtained economic protection in four (in the aggregate, $122 million), and in some of the three others it received other protections, such as additional financial disclosure. The number of transactions reviewed in 2008 was about the same as in 2007.

Could PBGC provide the same kind of statistics for 2015?

PBGC’S WRITTEN RESPONSE:

Over the past several years, PBGC’s monitoring efforts have identified approximately 300 relevant corporate events each year. Of the 300, we opened an average of 100 cases and entered into an average of 5 settlements (including modifications) each year—less than 2% of identified events.

MULTIEMPLOYER PLAN ISSUES

[Scrivener’s Note: See also item (n) under "Informal Guidance From 2016 Blue Book" at the end of this report for informal guidance on issues relating to multiemployer plans.]

22. QUESTION: Please provide an update regarding recent and expected PBGC activities under its multiemployer program.

PBGC WRITTEN RESPONSE:

On December 23, 2015, PBGC published a final rule on partitions under section 122 of the Multiemployer Pension Reform Act of 2014 (MPRA). PBGC is evaluating an application under this rule and consulting with Treasury on its pending applications for benefit suspensions under
MPRA. A proposed rule on facilitated mergers under section 121 of MPRA is under review at OMB.

UPDATE:

On June 6, 2016, PBGC proposed a rule on facilitated mergers under section 121 of MPRA. The comment period for the proposed rule ended on August 5, 2016. PBGC received 10 comment letters and is reviewing them. On June 10, 2016, PBGC issued a determination on one partition application. As of October 14, 2016, PBGC has two formal partition applications pending.

23. QUESTION: The MPRA merger rules provide that, for PBGC to facilitate a merger, the PBGC must certify “that its ability to meet existing financial assistance obligations to other plans will not be impaired by such financial assistance.” ERISA Section 4231(e)(2)(C). Can PBGC discuss how it is interpreting that standard?

PBGC’S WRITTEN RESPONSE:

As noted above in the answer to question 24, a proposed rule to provide guidance on facilitated mergers under MPRA is at OMB for review. Given that PBGC expects to issue the proposed rule in the near future, and because it has not yet received any applications for a facilitated merger, PBGC staff does not believe this is the appropriate forum in which to answer the question.

See update to Q&A 22.

LITIGATION AND GENERAL MATTERS

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

PBGC’S WRITTEN RESPONSE:

Cox Enterprises v. News-Journal Corp., 794 F.3d 1259 (11th Cir. 2015): The Eleventh Circuit affirmed a district court order requiring Cox Enterprises to return $13.9 million of News-Journal’s assets to pay PBGC’s claim for News-Journal’s pension underfunding. The court held that its 2012 decision prohibiting any payment to shareholder Cox Enterprises if it rendered News-Journal insolvent was the law of the case. Because the record was clear that Cox had always remained a shareholder, the court affirmed that PBGC claims were senior to shareholder interests in the case of an insolvent corporation.

Durango Georgia Paper Co. v. PBGC, No. 15-02009 (Bankr. S.D. Ga. Oct. 5, 2015): The bankruptcy court rejected the company’s attempt to equitably subordinate PBGC’s claims. Durango’s subordination complaint was premised on PBGC’s decision not to join a lawsuit that Durango brought against its former owners for attempting to evade pension liability. PBGC moved to dismiss, asserting that it had not acted inequitably, and that its discretionary enforcement decisions are unreviewable. The court ruled for PBGC, holding that PBGC had not acted inequitably toward other creditors.
**Lewis v. PBGC**, 2015 WL 5577377 (N.D. Ga. Aug. 11, 2015): PBGC moved to transfer a participant suit challenging agency benefit determinations from Georgia to DC. The court agreed with PBGC that a terminated plan does not have a principal office, and therefore, under 29 U.S.C. § 1303(f), the only proper venue for an action against PBGC relating to a terminated plan is the District of Columbia. The court also found that even if a terminated plan could have a principal office, DC would be the proper venue for this suit because PBGC had made the major decisions with respect to the terminated plan in DC.

**PBGC v. Eber Bros. Wine & Liquor Corp.**, No. 6:15-cv-06283 (MAT) (W.D.N.Y. Jan. 19, 2016): The court upheld PBGC’s choice of plan termination date, holding that the company’s cessation of operations provided constructive notice to participants of the plan’s termination, and a later date would minimize PBGC’s collection of termination liability because of a controlled group break-up. The court declined to “plac[e] undue control over a plan termination date into the hands of plan sponsors and their controlled groups’ members.”

**PBGC v. Evans Tempcon**, 60 Fed. Appx. 410 (6th Cir. Nov. 2, 2015): The Sixth Circuit affirmed the district court’s appointment of a receiver to manage and operate Evans Tempcon, a manufacturing company owned by the estate of Victor Posner. PBGC sought the receiver because the estate was the contributing sponsor of a pension plan, and Evans was improperly transferring out large sums of money after receiving notice of PBGC’s liens.

**US Airline Pilots Ass’n v. PBGC**, 603 Fed. Appx. 6 (D.C. Cir. Apr. 28, 2015): The D.C. Circuit affirmed the district court’s order finding that PBGC had committed no breach of fiduciary duty after becoming plan trustee, as the pilots’ union had identified no pre-termination malfeasance by the airline that needed investigating. The court of appeals held that the district court did not commit any legal error or reach any factual conclusions that were clearly erroneous.

25. **QUESTION:** Please describe any decisions of PBGC’s Appeals Board in the past year that would be of interest to employee benefits attorneys.

**PBGC’S WRITTEN RESPONSE:**

On January 6, 2016, the Appeals Board, by a 2-1 majority, granted an appeal brought by the spouse of a deceased participant. The spouse claimed that she was entitled to a survivor benefit because she did not consent to the participant’s waiver of the plan’s qualified joint and survivor annuity. The majority found that although the spouse appeared before a notary, the consent was not witnessed as required by ERISA § 205(c)(2), because the notary’s signature was dated subsequent to the date of the spouse’s signature. The dissent found that the consent was properly witnessed because the notary verified the signature in the spouse’s presence. The majority and dissenting opinions can be found at: [http://pbgc.gov/Documents/apbletter/Decision--Milacron%20Retirement%20Plan%202016-01-06.pdf](http://pbgc.gov/Documents/apbletter/Decision--Milacron%20Retirement%20Plan%202016-01-06.pdf).

26. **QUESTION:** Please discuss any situations in the past year in which PBGC invoked ERISA Section 4069(a) and asserted that the principal purpose of a transaction was to evade liability. Please include matters that were settled in advance of litigation.
PBGC’S WRITTEN RESPONSE:

On January 28, 2013, PBGC filed a lawsuit against The Renco Group, Inc. (“Renco”) and six subsidiaries in the Southern District of New York. PBGC’s lawsuit was based on events arising from a January 2012 transaction between Renco, affiliates of Cerberus Capital Management L.P. (“Cerberus”), and RG Steel, LLC (“RG Steel”). PBGC alleged that Renco engaged in the transaction with a principal purpose of evading the pension liabilities of its subsidiary, RG Steel. (The transaction removed Renco from the controlled group of its struggling subsidiary.) PBGC also alleged claims against Renco for state-law fraud, fraudulent concealment, and negligent misrepresentation.

In December 2015, PBGC attorneys conducted a week-long trial in the case.

On March 2, 2016, PBGC and Renco entered into a settlement agreement resolving the litigation. The settlement agreement restores both of the RG Steel pension plans, with Renco assuming responsibility for future benefit payments. Renco agreed to take the plans back as of June 1, 2016, pay all future benefits promised to the former RG Steel employees, and make back payments for benefits not guaranteed by PBGC. Renco also agreed to reimburse the agency for $15 million in benefits that it paid to RG Steel retirees since PBGC took over the plans. Additionally, the company will pay about $35 million in shutdown benefits that would have gone unpaid absent the restoration of the pension plans.

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

27. QUESTION: Please provide an update regarding PBGC’s recent experience in connection with its assertions relating to ERISA’s extraterritorial reach. In particular, has PBGC been actively seeking to enforce judgments in foreign jurisdictions and, if not, does it plan to do so?

PBGC’S WRITTEN RESPONSE:

To date, PBGC has not had cause to pursue judgments in foreign jurisdictions. PBGC continues to examine cases for which extraterritorial enforcement may be appropriate.

28. QUESTION: The Pension Protection Act of 2006 authorized PBGC to establish a missing participant program for terminating defined contribution plans. PBGC’s most recently published semiannual regulatory agenda (for Fall 2015) projects that PBGC will publish a proposed rule relating to the implementation of this program in April 2016. What are PBGC’s current expectations as to when such a proposed rule will be published? What are some of the key issues and potential problem areas that PBGC is considering as part of its development of such a proposed rule?

PBGC’S WRITTEN RESPONSE:

The dramatic expansion of the missing participants program has involved many challenging issues and has engaged PBGC in a very fruitful collaboration with IRS and EBSA. Possibly the most difficult issue has been the relevance of IRC section 401(a)(31)(B) (required rollovers) to
the missing participants program. PBGC hopes to publish a proposed rule by sometime this summer.

29. **QUESTION:** What has been PBGC’s experience in connection with cases in which participants have purchased DB benefits from their DC plan? In particular, has PBGC encountered administrative challenges in tracking DC money in such cases and, if so, how has PBGC addressed those challenges?

**PBGC’S WRITTEN RESPONSE:**

At this time, PBGC has not yet encountered a trusteed plan in which participants have rolled over benefits from their defined contribution plan to the defined benefit plan.

**INFORMAL GUIDANCE FROM 2016 BLUE BOOK**

Below are Q&A’s from “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) which the Committee believes would be helpful to JCEB members and other practitioners. The 2016 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. The answers in the Blue Book reflect the views of individual staff members and do not represent the official position of PBGC.

a) 2016 Blue Book Q&A 2 (“Premiums: Short Plan Year Created by a Mid-Year Spinoff”). PBGC staff addressed a number of questions that pertained to premium payment obligations in a scenario where a new Plan B is created as a result of a mid-plan year spinoff from Plan A. PBGC staff said, inter alia, that Plan B owes premiums for its first year of coverage, but that the premium obligation is prorated because its first plan year is a short plan year, and that Plan A would not be entitled to a refund for any premiums it had paid, for the plan year in which the spinoff occurred, for the spun-off participants.

b) 2016 Blue Book Q&A 4 (“Distress or Involuntary Terminations: Form 5500 Filings after PBGC Trusteeship”). In response to a question regarding the final Form 5500 filing(s) for a terminated plan for which PBGC has been appointed as trustee under ERISA Section 4042. PBGC staff said that PBGC does not make Form 5500 filings on behalf of trusteed plans and that a plan administrator in this situation may contact PBGCTrustedPlan@dol.gov for further information.

c) 2016 Blue Book Q&A 8 (“Reportable Events: U.S. Entity Definition”). This question pertained to the low-default-risk waiver under PBGC's new reportable events regulation, which requires that each contributing sponsor and the highest-level U.S. parent of each contributing sponsor be "low default risk" on the date of the event. PBGC staff said that an entity is treated as "subject to the personal jurisdiction of the U.S. district court" within the meaning of the regulation's definition of "U.S. entity" only if the entity is subject to the general jurisdiction of the U.S. district court.

d) 2016 Blue Book Q&A 9 (“Reportable Events: ‘As of’ Date(s) for ‘Low-Default Risk’ Determination”). This question related to the low-default risk standard in PBGC's new
reportable events regulation. PBGC staff said, inter alia, that where the regulation requires that a
corporation must use the supporting financial information associated with the "qualifying date,"
which in turn relates to a fiscal year that virtually always will have ended before (and generally
months before) the qualifying date, information that relates to the period between the end of the
applicable fiscal year and the qualifying date could not be used.

e) 2016 Blue Book Q&A 10 (“Reportable Events: Commercial Measures Criterion”). This
question related to the commercial measures criterion under PBGC's new reportable events
regulation, which provides that a company meets that criterion if the probability of default does
not exceed either of two specified thresholds. PBGC staff said, inter alia, that the probability of
default must be determined by a third party, and that a change in credit rating or commercial
credit score published after the financial information date does not affect the determination of
whether the low-default-risk waiver is available as of the qualifying date.

f) 2016 Blue Book Q&A 11 (“Reportable Events: Secured Debt Criterion”). This
question related to the secured debt criterion under PBGC's new reportable events
regulation, which requires that the company's secured debt not exceed 10 percent of the company's total assets,
subject to a carve-out for secured debt incurred to acquire or improve property and secured only
by that property. PBGC staff said that the secured debt to be taken into account for this purpose
is only the amount of secured debt that is drawn (not the full amount available) under a secured
line of credit, and that the full amount of the secured loan would be taken into account, even if
the loan is under-secured. PBGC staff also provided guidance on how to determine whether the
carve-out applies when the original loan has been paid down and a new loan secured by the
same property is incurred.

g) 2016 Blue Book Q&A 12 (“Reportable Events: No Loan Default Event Criterion”). This
question related to the no loan default event criterion under PBGC's new reportable events
regulation. PBGC staff said, inter alia, that when a contributing sponsor or its highest level U.S.
person is determining whether it meets the no loan default event criterion, there is no need to
take into account any loan default reportable event that relates to a loan that was made solely to
a member of the plan's controlled group other than itself.

h) 2016 Blue Book Q&A 15 (“Reportable Events: Public Company Waiver”). This question
related to the reporting waiver that applies for various reportable events "if any contributing
sponsor of the plan before the transaction is a public company and the contributing sponsor
timely files a SEC Form 8-K disclosing the event under an item of the Form 8-K other than
under Item 2.02 (Results of Operations and Financial Condition) or in financial statements
under Item 9.01 (Financial Statements and Exhibits)." PBGC staff addressed several questions
regarding this waiver and also specified, for each reportable event for which this waiver may
apply, the information that should be included in the Form 8-K to qualify as "disclosing the
event."

i) 2016 Blue Book Q&A 18 (“Reportable Events: Inability to Pay Benefits When Due”). This
question related to the "inability to pay benefits when due" reportable event. PBGC staff said
that it did not intend for a plan to be treated as having a "current inability" to pay benefits when
due where the failure is caused solely by the need to verify a person's eligibility for benefits,
notwithstanding that the delay exceeds a two month (or two full benefit period) time limit
specified in the regulation. PBGC staff said that it was considering the appropriate method of
providing relief from reporting in such circumstances. PBGC staff also said that a situation in which a plan with fully adequate assets miscalculates a benefit and later corrects it three months (or three years) later with a supplemental payment does not constitute a "current inability" to pay benefits when due.

j) 2016 Blue Book Q&A 20 (“Reportable Events: Loan Default”). This question related to the "loan default" reportable event under PBGC's new reportable events regulation. PBGC staff said, inter alia, that whether a reportable "default" occurs depends on the terms of the loan agreement. PBGC staff also said, with respect to whether a loan default reportable event occurs based on the lender "waiv[ing] or agree[ing] to an amendment of any covenant in the loan agreement the effect of which is to cure or avoid a breach that would trigger a default," PBGC's intent is that such a reportable event occurs in situations where the avoidance of a default was a direct and proximate result of the waiver or amendment, rather than a waiver or amendment that may, in the future, result in the avoidance of a default.

k) 2016 Blue Book Q&A 21 (“Reportable Events: Low Default Risk”). This question addressed the new reportable event regulation's low default risk waiver. PBGC said that the contributing sponsor and the highest U.S. level parent may use different criteria to meet this waiver. PBGC also discussed issues regarding how the low default risk analysis is performed in situations in which the highest-level U.S. parent is a holding company with no operations or separate financials of its own.

l) 2016 Blue Book Q&A 25 (“Other: Missing Participants and Default IRAs”). This question pertained to a plan's ability to execute default rollover transactions after the date of proposed plan termination. PBGC staff said that a terminating single-employer plan may execute a default rollover transaction with respect to a participant only if the participant is not a "missing participant" under ERISA section 4050 and 29 CFR Part 4050. If the participant is a missing participant, the plan administrator must either pay the participant's designated benefit to the PBGC or purchase an irrevocable commitment for the participant from an insurer.

m) 2016 Blue Book Q&A 28 (“Other: Complete Withdrawal from a Multiemployer Plan after a Partial Withdrawal”). This question pertained to a situation in which an employer participating in a multiemployer plan has a partial withdrawal in Year 1 and then has a complete withdrawal in Year 2, where the withdrawals were not part of a mass withdrawal. PBGC staff provided guidance on how the employer's withdrawal liability would be calculated.