

**American Bar Association  
Joint Committee on Employee Benefits  
Report Regarding May 10, 2017, Session with PBGC**

*For over 20 years, private-sector representatives of the JCEB and PBGC staff members have met annually for informal discussions of matters of mutual concern. In previous sessions, the JCEB submitted questions to PBGC in advance, and PBGC staff members responded to those questions orally or in writing at the meeting. JCEB representatives then prepared a summary of the questions and answers, which was [placed on the ABA website \(www.americanbar.org/groups/committees/employee\\_benefits/events\\_cle/practitioner\\_q\\_as1/pbgc\\_qas.html\)](http://www.americanbar.org/groups/committees/employee_benefits/events_cle/practitioner_q_as1/pbgc_qas.html). This year, rather than following a Q&A format, the meeting format provided for an informal discussion of a number of broad topics that were agreed upon in advance. As was the case in prior JCEB-PBGC meetings, statements made by PBGC staff at the meeting 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, and it was understood that this report would be made available to the public. PBGC staff neither approve nor endorse the contents of this report.*

**REGULATORY REVIEW/REFORM DEVELOPMENTS: PBGC IMPACT**

Two new Executive Orders issued by the new Administration are having a significant impact on PBGC's regulatory activity.

- [EO 13771, "Reducing Regulation and Controlling Regulatory Costs,"](http://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs) (available at [www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs](http://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs)) provides generally that (1) whenever an executive department or agency proposes or promulgates a new regulation, it shall identify at least two existing regulations to be repealed; (2) for fiscal year 2017, the total incremental cost of all new regulations finalized during the year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (OMB); and (3) any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.
- [EO 13777, "Enforcing the Regulatory Reform Agenda,"](http://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda) (available at [www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda](http://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda)) sets forth requirements regarding the implementation of EO 13771.

PBGC staff stated that the agency's semiannual regulatory agenda, which will be published in the near future, will reflect the impact of the new Executive Orders, and that each item on PBGC's semiannual regulatory agenda will be identified as either "regulatory" or "deregulatory."

**SUBSEQUENT EVENT:** On July 20, 2017, PBGC issued its semiannual regulatory agenda. See [www.pbgc.gov/prac/pg/other/guidance/regulatory-agendasplans](http://www.pbgc.gov/prac/pg/other/guidance/regulatory-agendasplans).

In brief, an EO 13771 regulatory action is a significant regulatory action or significant guidance document that has been finalized and that imposes total costs greater than zero. An EO 13771 deregulatory action is an action that has been finalized and has total costs less than zero. (See [OMB Memorandum Implementing EO 13771](#) ("OMB Memorandum") (available at [www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation](http://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation)), Q2 (defining "EO 13771 regulatory action"), Q3 (defining "significant guidance document"), and Q4 (defining "EO 13771 deregulatory action"); see also [EO 12866](#) (available at [www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf](http://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf)), Section 3(f) (defining "significant regulatory action"). The OMB Memorandum states that [EO 12866](#) remains the primary governing EO regarding regulatory planning and review, and that agencies generally "must continue to assess and consider both the benefits and costs of regulatory actions . . . and issue regulations only upon a reasoned determination that benefits justify costs." (See OMB Memorandum, Section II, General Requirements, and Q32 (addressing how EO 13771 affects the consideration of regulatory benefits and other requirements under EO 12866.) The OMB Memorandum states that costs generally should be estimated using the methods and concepts set forth in [OMB Circular A-4](#) (available at [www.whitehouse.gov/omb/circulars\\_a004\\_a-4](http://www.whitehouse.gov/omb/circulars_a004_a-4)). (See OMB Memorandum, Q21 (addressing how costs and cost savings should be measured.)

PBGC staff noted that agencies have been required to engage in a cost/benefit analysis of a contemplated regulatory action since EO 12866 was issued in 1996. Pointing out that a range of interests may be affected by a regulatory action, PBGC staff expressed the view that a regulatory action under EO 13771 is one that, on a *net* basis, imposes costs. PBGC staff indicated that, in determining whether a regulatory action is considered regulatory or deregulatory, the benefits and burdens are considered on an aggregate basis. If, on an aggregate basis, the burdens outweigh the benefits, the action is considered to be regulatory; if the benefits outweigh the burdens, the action is considered to be deregulatory. PBGC staff stated that the expansion of choices available to the regulated community provided by a particular action constitutes a benefit that could lead to a conclusion that the action is deregulatory in nature.

PBGC staff said that, if an agency takes a new regulatory action that is classified as regulatory, it must identify a deregulatory action that will be used to "pay" for the new regulatory action, and also noted that, if a particular action is deregulatory, it can be banked and used to offset a future action that is regulatory. However, because EO 13771 does not reach back, no rollover of credit for actions that pre-dated it is permitted.

PBGC staff noted that, because of the nature of Title IV of ERISA, the need for regulatory action won't go away, but that PBGC will be focusing on the analysis of burdens more than ever before. PBGC will seek to take those actions that will be most beneficial to the largest number of stakeholders. PBGC staff also said that PBGC anticipates reaching out to stakeholders to request feedback regarding the areas the agency should focus on in its efforts to improve the regulatory environment (for example, by reducing uncertainty and its corresponding costs by introducing new regulatory safe harbors). PBGC staff indicated that PBGC is considering instituting a Request For Information (RFI) project whereby RFIs to request input from stakeholders would be issued on a regular basis.

**SUBSEQUENT EVENT:** On July 26, 2017, PBGC published an RFI "asking for input on what regulatory and deregulatory actions it should be considering as part of its regulatory program." See [s3.amazonaws.com/public-inspection.federalregister.gov/2017-15551.pdf](https://www.federalregister.gov/2017-15551.pdf).

PBGC staff said that its draft final rule on missing participants is currently in interagency review with the Departments of Labor, Treasury, and Commerce, and noted that public comments on the proposed rule were uniformly positive. Because the final missing participants rule is expected to expand choices for both employers and participants, PBGC's view is that the final rule will be deregulatory in nature. After the interagency review is complete, the rule will be reviewed by OMB. PBGC hopes that the final rule will be published and effective in time for plans terminating as of and after January 1, 2018, to be able to use it.

PBGC also views its proposed rule to facilitate mergers of multiemployer plans as deregulatory in nature.

In response to a question about PBGC's plans with respect to its 1995 penalty policy, PBGC staff said that, particularly in the new environment, PBGC would not be able to get to everything, and would have to carefully prioritize projects. PBGC staff also said that there would probably be fewer but more significant regulatory actions.

PBGC staff said that there are many unanswered questions at this point, but that the agency is committed to implementing and harmonizing the various aspects of the new Executive Orders and associated guidance. The semiannual regulatory agenda will be used to address issues raised by the new Executive Orders. (See OMB Memorandum, Q37 (regarding contents of agencies' Unified Agenda of Regulatory and Deregulatory Actions).) PBGC staff anticipates that greater clarity will gradually emerge as the agencies move toward implementing the new guidance.

## **PBGC EARLY WARNING PROGRAM**

Turning to a discussion of PBGC's Early Warning Program, PBGC staff noted that PBGC had issued guidance on the Program in December 2016. The December guidance had indicated, for the first time, that a company's credit deterioration or downward trend in financial metrics could trigger an inquiry under the Early Warning Program.

PBGC staff noted during the meeting that PBGC had on that day (May 10, 2017) issued [new guidance](http://www.pbgc.gov/prac/risk-mitigation) (available at [www.pbgc.gov/prac/risk-mitigation](http://www.pbgc.gov/prac/risk-mitigation)) that, among other things, clarifies that PBGC does *not* open an Early Warning Program case based on a company's credit deterioration or downward trend in financial metrics. PBGC opens an Early Warning Program case only if there is a transaction of concern. Once a case is opened, PBGC will look at relevant financial information, including credit ratings, to assess PBGC's risk and determine whether additional protection for the plan(s) or PBGC may be appropriate.

The guidance also makes clear that: (1) in determining whether the plans at issue have 5,000 or more participants or \$50 million or more in underfunding, PBGC aggregates all plans in the relevant controlled group; and (2) although PBGC does not use 4010 information to open an Early Warning Program case, once a case is open, if PBGC has 4010 information, it may use that information rather than ask an employer to provide it again.

PBGC staff said that the agency generally limits the Early Warning Program to a universe of about 1,500 employer that collectively represent the agency's greatest exposure, and that the Program ends up affecting a small number of employers. PBGC staff said that the agency is often able to close a matter after getting information on its own. When PBGC does need additional information, it reaches out to the employer and, in many such cases, it is able to satisfy itself that there is no need for additional action. PBGC said that in a very small number of cases—just a handful—PBGC pursues and reaches a settlement agreement with the employer.

A questioner who asked about PBGC liens on foreign controlled group entities noted that plan sponsors may be surprised by PBGC's assertion of claims against such entities and that there were questions regarding PBGC's authority to do so. PBGC staff referenced PBGC CLE material that discusses issues regarding foreign controlled group members, and said that there have been a number of settlements in such cases.

## **MULTIEMPLOYER PROGRAM UPDATE**

**SEIU Plan Amendment.** PBGC staff noted that PBGC recently issued final approval of the Service Employees International Union (SEIU) plan amendment providing for special withdrawal liability rules with respect to a plan covering the commercial building cleaning and security industries in the greater Cleveland area ([82 FR 18165, April 17, 2017](#)). Staff noted that key elements leading to PBGC approval were: (1) the plan is well-funded (the plan's funding percentage and other tests of financial health placed it in the Green zone), (2) as one employer leaves the plan, another employer takes the place of the departing employer, and (3) the new employer has a contribution obligation that is substantially similar to that of the departing employer. Under these circumstances, the special withdrawal liability rules provided by the plan amendment had no material impact on the plan, and the plan presented a low risk of loss to the insurance system. Consequently, PBGC approved the plan amendment.

**Arbitration.** PBGC staff noted that the application of the American Arbitration Association (AAA) for approval of a fee increase (available at [www.pbgc.gov/sites/default/files/legacy/docs/AmericanArbitrationAssociation4221Application.pdf](http://www.pbgc.gov/sites/default/files/legacy/docs/AmericanArbitrationAssociation4221Application.pdf)) is pending with PBGC. *See also* [www.pbgc.gov/prac/pg/other/guidance/multiemployer-notices](http://www.pbgc.gov/prac/pg/other/guidance/multiemployer-notices) (PBGC Notice of Pendency of AAA Request, Comments on AAA Request, and AAA Response to Comments). PBGC is in the process of reviewing the AAA application.

PBGC staff also mentioned the 7<sup>th</sup> Circuit's decision in the Bulk Transport Corp. case (*Central States v. Bulk Transport Corp.*, 820 F.3d 884 (7<sup>th</sup> Cir. 2016), *cert. denied*), in which the Court of Appeals held that PBGC approval of the 2013 AAA fee schedule is not required in order for the new fees to be charged.

In response to a question, PBGC staff said that, in lieu of the procedures set forth in PBGC's arbitration regulation (29 CFR Part 4221, "Arbitration of Disputes in Multiemployer Plans"), an arbitration may be conducted in accordance with alternative procedures if such procedures have been approved by PBGC.

***Call Henry v. United States.*** Call Henry, a NASA contractor that contributed to a Teamsters multiemployer plan, provided inspection, maintenance, and testing services to NASA, subject to contractual provisions that included requirements of the Service Contract Act and the Federal Acquisition Regulation. When Call Henry's employees voted to associate with a new union, the decertification of the Teamsters served as an event of withdrawal and the Teamsters plan assessed withdrawal liability against Call Henry. Call Henry attempted to pass the cost on to NASA. In *Call Henry v. United States*, the U.S. Court of Appeals for the Federal Circuit affirmed a Court of Federal Claims holding that the United States/NASA had no contractual obligation to reimburse Call Henry for its withdrawal liability. 2017 WL 15278 (Fed. Circuit, April 28, 2017).

**PBGC Audits Of Plans Terminating By Mass Withdrawal.** In response to a question, PBGC discussed issues regarding PBGC audits of plans terminating by mass withdrawal. The questioner noted that some plans had received PBGC audit inquiries years after the plans thought the matter was resolved, and asked that PBGC give practitioners a sense of the process that such an audit follows.

PBGC staff stated that, as PBGC financial assistance is provided for the life of the plan, issues may arise from time to time. PBGC staff indicated that, in cases like the one described by the questioner, it seemed likely that, at the time of the auditor's site visit, the plan did not have all of the data needed to conduct the audit; thus, follow-up inquiries were necessary.

PBGC staff also indicated that questions regarding specific cases should be directed to Rossi Marcellin, Manager of the PBGC Multiemployer Program Division, who is in charge of the operational program.

**Two-Pool Withdrawal Liability Method Request For Information.** PBGC staff discussed PBGC's Request for Information regarding issues arising from arrangements between employers and multiemployer plans involving an alternative "two-pool" withdrawal liability method ([82 FR 1376, January 5, 2017](#)).

PBGC must approve any alternative method for allocating withdrawal liability before a plan can adopt it. See 29 CFR § 4211.23. One such method is the two-pool liability method. Under that method, there are two separate liability pools relating to the liabilities of different groups of employers, an "old" pool and a "new" pool. The new pool would be a separate liability pool for employers who join the plan after the new pool is created. Existing employers would remain in the old pool, but would be allowed to move to the new pool if they settle their potential liability (as of a date certain) in the old pool. The method is intended to extend the life of the plan by increasing cash flow, attracting new employers to the plan, and encouraging existing employers

to remain in the plan. Since 2011, PBGC has received about twenty requests to approve two-pool alternative withdrawal liability arrangements.

PBGC staff said that PBGC received letters from 13 organizations and individuals in response to the RFI, and noted that all comments are available on PBGC's website (*see* [www.pbgc.gov/prac/pg/other/guidance/other-federal-register-documents](http://www.pbgc.gov/prac/pg/other/guidance/other-federal-register-documents).) In general, participants are concerned about the practice and its implications with respect to a fund's ability to provide benefits. Employers also have concerns but tend to think this approach may be a positive one.

PBGC staff said that the agency is trying to get information from plans that have actually adopted this approach to see how it has worked, and whether the plans are better or worse off after having adopted the two-pool liability method. Staff also noted that PBGC is processing cases requesting approval for the two-pool method, and that a great deal of data and analysis is required. Both the short-term and the long-term impact on the fund are relevant to the analysis.

There was a question as to why PBGC is second-guessing trustees' judgment as to whether to adopt the two-pool liability method. PBGC staff said that PBGC is not second-guessing the trustees' judgment, nor does PBGC substitute its own judgment for that of the trustees. Rather, PBGC's review is to make sure that the trustees have followed appropriate procedures, that they have considered the relevant factors, and that their assumptions are reasonable and not based on wishful thinking. The trustees must show that their analysis has been rigorous and that they considered alternatives.

PBGC staff also noted that, in order for PBGC to approve a two-pool liability method that involves the settlement of withdrawal liability, it must determine that adoption of the method would not significantly increase the risk of loss to plan participants and beneficiaries or to PBGC. (*See* [29 CFR § 4211.23\(a\)](#).) PBGC staff said that, while the trustees should be in a position to make the showing with respect to plan participants and beneficiaries, trustees have a harder time evaluating the statutory criterion as to the risk of loss to PBGC. PBGC staff stated that PBGC therefore believes it needs to play a more active role in evaluating that criterion and that it may want to place conditions on such settlements.

In response to a question regarding PBGC's experience with a two-pool withdrawal liability method, PBGC staff said that there have only been a few approved so far, and that PBGC is currently analyzing the available data. PBGC said that it appears that the plans that have done this have been severely underfunded, and that generally there does not appear to have been a material impact on solvency. PBGC staff said that it would share additional data when the agency has it.

**PBGC Informal Assistance Regarding Merger and Partitions.** PBGC staff said that PBGC encourages plans to informally consult with PBGC before filing a formal application regarding partition or merger, and gave a brief overview of PBGC's informal program where PBGC actuaries and attorneys meet with multiemployer plans and offer guidance regarding plans' ability to meet statutory requirements.

PBGC staff said that PBGC has met with about three dozen plans, most of which are critical and declining. The conversation usually focuses on the parameters of the law and the PBGC process. PBGC staff emphasized that the agency encourages plans to seek informal guidance before submitting a financially facilitated merger or partition request, including the submission of assumptions (with evidence-based support that plan experience validates assumptions).

If the plan is interested in an informal partition analysis, PBGC asks the plan to submit basic actuarial information relevant to the non-impairment requirement under the Multiemployer Pension Reform Act of 2014 (MPRA). PBGC actuaries then perform a preliminary risk assessment as to whether the statutory criteria are met (relevant factors include post-suspension cash flow, the percentage of terminated vested and retirees included in the liabilities that will be partitioned, and whether solvency is extended).

PBGC staff said that PBGC closely coordinates with the Department of Treasury, which must approve the suspension of benefits (a suspension is required before a plan may seek a partition except in the rare case where no participant or beneficiary is entitled to a benefit above 110 percent of the applicable PBGC guarantee). See [www.pbgc.gov/prac/pg/mpra/partition-faqs-for-practitioners](http://www.pbgc.gov/prac/pg/mpra/partition-faqs-for-practitioners). PBGC staff said that the key issue is solvency, and that the plan needs to show that, using the suspension-level cash flows, it will stay solvent throughout an extended period of at least 30 years. If PBGC concludes that a partition would work, it then discusses the solvency outlook with Treasury.

There were questions regarding the restoration of suspended benefits, both in the case of a plan that suspended benefits and then merged with another plan and in the case of a partition. PBGC staff said that in both cases, if the suspension is no longer needed, Treasury regulations provide for an automatic future restoration of benefits. In the case of partition, PBGC staff also noted that the statute and PBGC regulations impose a “benefit improvement premium” that must be paid to PBGC if the original plan restores a suspended benefit, increases a benefit, or otherwise provides a benefit improvement post-partition. The original plan must pay the benefit improvement premium to PBGC for each of the 10 years following the partition effective date.

## **REPORTABLE EVENTS: RECENT PBGC EXPERIENCE**

PBGC staff noted that, effective January 1, 2016, PBGC made a number of significant changes to its reportable events regulation. PBGC staff distributed a handout prepared by PBGC staff (copy attached) regarding PBGC's recent reportable events experience, noting:

- Overall, there has been a decline in filings: in the past few years the total number of filings per year has been in the 700s, whereas in prior years it was over 1,000.
- Most of the reports PBGC receives are Form 10s (reportable events) for missed contributions not exceeding \$1M, followed by Form 10s for active participant reductions, and then Form 200s (which technically are not “reportable event” notices but are often viewed as such) for missed contributions exceeding \$1M and therefor triggering a statutory lien;

- There has been a decrease in the number of reports regarding:
  - Failure to make required contributions not exceeding \$1M;
  - Extraordinary dividends or stock redemption; and
  - Change in contributing sponsor or controlled group.

PBGC staff said that it is difficult to say whether the decreases in the referenced reports are due to external market conditions, a change in reportable events regulation, or a combination of both.

- There has been an increase in reports regarding:
  - Active participant reductions (PBGC staff noted that PBGC is still receiving reports regarding events in 2015, and that there are a number of new events as a result of changes made by the amended regulation);
  - Loan defaults (PBGC staff indicated that the increase is a result of the changes made by the amended regulation); and
  - Failure to make required contributions exceeding \$1 million.

PBGC staff said that there are few filings regarding inability to pay benefits when due, distributions to substantial owners, and applications for minimum funding waivers.

PBGC staff also said that the liquidation event is the event that is most often not reported at all, and that PBGC often finds out about such an event only after the company has discontinued operations. Such cases typically involve small plans.

PBGC staff said that common filing issues include:

- Use of outdated forms (a filer must use *either* the form on PBGC's website, which has an expiration date of November 2018, *or* the PBGC's e-filing portal);
- Incomplete forms (mostly missing attachments and skipped questions);
- Incorrect financial information (the required financial information must be regarding the plan sponsor's controlled group, not regarding the pension plan);
- Incomplete controlled group information (failure to provide information on all entities in the controlled group, particularly when foreign entities are involved);
- Late filings;

- Missing filings; and
- Filings that are not signed.

One JCEB participant noted that a common difficulty for employers involves foreign entities. PBGC staff acknowledged that the controlled group rules are not necessarily straightforward. PBGC tries to help employers work through the rules, but needs the employer to supply the relevant factual information in order to do so. PBGC staff also noted that, in general, PBGC sees these issues with smaller companies, and that the larger companies generally are well-represented and do not have the same difficulty with controlled group issues.

With respect to missing filings, PBGC staff said that some practitioners don't realize that filings continue to be due until a plan is *trusteed* by PBGC, even if a reportable event notice has previously been filed and even if the plan is in touch with PBGC (*e.g.*, in connection with a pending distress termination application).

PBGC staff emphasized that many mistakes could be avoided, and the process could move more quickly, if filers read and follow the instructions to the forms and fill out the forms completely.

In response to a statement by PBGC staff that PBGC is looking for ideas as to how it might improve the reportable events process, one JCEB participant noted that the advisor community generally knows the reportable event rules, but may not have the facts regarding the occurrence of an event that is reportable, and suggested that it would be helpful if PBGC developed an information sheet aimed at the HR and finance communities that alerts HR and finance professionals to consult with their advisors if certain things happen.

PBGC staff said that PBGC is working on guidance, and noted that such guidance would work for the plan sponsor's HR and finance professionals, for third party administrators (TPAs), and for the actuarial community. Staff noted that plan sponsors often rely on TPAs to alert them to potential reporting issues, but that, particularly with respect to smaller plans, TPAs may not know the applicable rules. PBGC staff said that the agency is considering putting together a webinar to address these issues.

PBGC staff said that, because PBGC has access to 5500 filings, it generally will know if a required quarterly contribution has not been made. PBGC staff said that the agency follows up with plan sponsors if required quarterly payments are routinely missed (unless the plan is subject to the small plan waiver set forth in 29 CFR § 4043.25(c)(1)).

PBGC staff said that once a required report has been filed with respect to a "single cause" active participant reduction, the plan sponsor should call PBGC before doing a second active participant reduction report if the sponsor believes that second report would be redundant, and said that PBGC is working on guidance regarding that issue.

In response to a question about how the criteria with respect to the "low-default risk" waiver will be applied when the highest controlled group member is a shell corporation, PBGC staff indicated that the criteria may be met based on financial information about its subsidiaries where

the holding company consolidates its financials with those of its operating subsidiaries, and that the criteria may also be met where the holding company does not do so. (See Q&A 21 of the [2016 Blue Book](http://www.pbgc.gov/sites/default/files/legacy/docs/2016bluebook.pdf), available at [www.pbgc.gov/sites/default/files/legacy/docs/2016bluebook.pdf](http://www.pbgc.gov/sites/default/files/legacy/docs/2016bluebook.pdf).)

## **STANDARD TERMINATIONS: RECENT PBGC EXPERIENCE**

PBGC staff said that PBGC has not made any changes in its practices governing the selection of plans for standard termination audit, and that PBGC continues to audit all plans with a participant count of more than 300. For plans with a participant count of 300 or fewer, PBGC randomly selects plans to audit. In addition, PBGC may audit plans if it has some basis for concern, *e.g.*, if the agency receives a participant complaint. PBGC also audits all plans that distribute plan assets in satisfaction of plan liabilities before or without filing a Standard Termination Notice. (For [PBGC's FAQs about standard terminations](http://www.pbgc.gov/prac/terminations/standard-terminations), *see* [www.pbgc.gov/prac/terminations/standard-terminations](http://www.pbgc.gov/prac/terminations/standard-terminations).)

PBGC said that about 25% of audited plans are found not to be in compliance with all applicable requirements. Common errors include:

- Errors in calculating accrued benefits;
- Errors in valuation of lump sums, including use of incorrect mortality or interest assumptions, failure to adopt certain PPA amendments on or before the plan's termination date, and use of an incorrect stability period;
- Use of incorrect service or compensation when calculating benefits;
- Not fully vesting participants who terminated within five years of plan termination (unless there is a deemed zero cashout provision);
- Plans that have been amended without fully protecting accrued benefits;
- Failure to pay top heavy benefits that are greater than the accrued benefit;
- Failure to obtain required spousal consent when required;
- Not using proper election forms;
- Not including all forms of benefits in the annuity contract;
- Providing for rollover of missing participants' benefits rather than using one of the two acceptable methods for distribution to missing participants (*i.e.*, transfer of benefit to PBGC or purchase of annuity); and
- Improperly deducting processing fees from designated benefits for missing participants.

One JCEB participant suggested that this list of common mistakes should be included in the instructions regarding standard terminations.

## **PBGC WEBSITE PROJECT: Q&A PRESENTING INFORMAL VIEWS**

PBGC staff noted that [PBGC's website](#) has recently been redesigned, updated, and improved (including to make content more easily searchable), and said that PBGC welcomes practitioner feedback regarding the website. Staff urged practitioners to use the updated search function, which has been significantly improved.

PBGC staff said that PBGC is working on an addition to its website of a compilation of frequently asked questions (including interpretative questions) with PBGC's informal answers to the questions. PBGC staff referred to as a model the SEC's [Compliance and Disclosure Interpretations](#) website (*see* [www.sec.gov/divisions/corpfin/cfguidance.shtml](http://www.sec.gov/divisions/corpfin/cfguidance.shtml)), which contains a compilation of common issues and sets forth staff views along with a statement that the Commission has neither approved nor disapproved of those interpretations.

PBGC staff said that the anticipated compilation is expected to have an extensive index, and would be a live document that will be universally searchable. Searching will be more efficient than it is now. For example, there will be less of a need to review old Blue Books (available at [www.pbgc.gov/prac/other-guidance/blue-books](http://www.pbgc.gov/prac/other-guidance/blue-books)) to find answers to particular questions because old Blue Books will be a source for the questions that will be included on the Q&A site. The site will include the same kinds of caveats that are included in past Blue Books and JCEB/PBGC Q&A reports (*i.e.*, that the answers reflect the unofficial, individual views of PBGC staff, and do not necessarily represent the official position of PBGC).

PBGC staff gave the following examples of the kinds of questions that were expected to be asked and answered on the Q&A site:

- What do you do if you represent an employer that participates in a multiple employer plan and is considering withdrawing?
- In the context of a majority owner alternative treatment in a standard termination, as of what date is majority owner status determined? (PBGC staff stated their belief that the answer given in Q&A 5 of the [2004 Blue Book](#) (available at [www.pbgc.gov/sites/default/files/legacy/docs/2004bluebook.pdf](http://www.pbgc.gov/sites/default/files/legacy/docs/2004bluebook.pdf)) (*i.e.*, that majority owner status is determined as of the time of the election of alternative treatment) remains accurate.)
- What is the statute of limitations applicable to PBGC's statutory liens?
- How does the special phase-in for shutdown benefits work, and what can participants expect?

- What do I do if I discover that a few years ago there was a calculation mistake, and correction of the mistake reveals that there was a prior reportable event that wasn't reported?
- Can I file a reportable event notice in advance if I know that contributions will be missed in the future?
- If a new member joins the controlled group, must that be reported?
- What kind of information has to be reported in the relevant documents in order for the "public company" waivers to apply? (PBGC's reportable events regulation provides such waivers with respect to five reportable events.)
- What are the reportable event implications of particular transactions?

PBGC staff said they also expect the site to address questions regarding "single cause" reduction in active participant reportable events, and regarding how various processes play out in a standard termination context.

PBGC staff said that PBGC's focus will not be on hypothetical questions; rather, the agency is trying to come up with very practical questions that people often have and provide useful guidance. PBGC staff welcomed feedback from JCEB members as to what guidance would be useful.

The web project is still under development. PBGC staff said that PBGC is hopeful that the Q&A material will be online later this year. However, its implementation date will depend on other priorities that PBGC may have to address.

## **PBGC PREMIUMS IN THE CONTEXT OF DE-RISKING, AND DE-RISKING TRENDS**

PBGC staff said that the agency annually issues a Projections Report that provides 10-year projections of the financial condition of PBGC's single-employer and multiemployer insurance programs. (FAQs about PBGC's Projections Reports are available at [www.pbgc.gov/about/projections-report/projections-report-faq](http://www.pbgc.gov/about/projections-report/projections-report-faq); PBGC's FY 2015 Projections Report is available at [www.pbgc.gov/sites/default/files/legacy/docs/Projections-Report-2015.pdf](http://www.pbgc.gov/sites/default/files/legacy/docs/Projections-Report-2015.pdf).)

In the near term, staff said, PBGC is expecting more premiums than claims under its single-employer plan program. Because premiums have gone up, PBGC is expecting the financial condition of the single-employer plan program to improve significantly, and the 2015 Projections Report shows a projected surplus for 2025. (*See* 2015 Projections Report, p. 26.)

**SUBSEQUENT EVENT:** On August 3, 2017, PBGC issued its FY 2016 Projections Report, which is available at [www.pbgc.gov/sites/default/files/fy-2016-projections-report-signed.pdf](http://www.pbgc.gov/sites/default/files/fy-2016-projections-report-signed.pdf).

PBGC is seeing employers take steps to increase funding to their plans since the incentives to fund now have gone up significantly (including increases in the variable-rate premium and an expectation of lower future corporate tax rates). PBGC staff said that it was not unexpected to see employers taking steps to fund up their plans as premium rates rise, and that PBGC generally views this as a positive development.

PBGC staff also said that, because of regulatory changes in premium payment requirements, premium overpayments have declined and the volume of overpayments is smaller. In response to a question regarding whether the regulatory project regarding payment of interest on premium overpayments is still open, PBGC staff said that PBGC data shows that such overpayments are rarely happening and indicated that there appeared to be little need for such a regulation.

One participant asked to what extent PBGC projections take into account plans taking participants out of the PBGC system through the purchase of annuities or other methods. PBGC staff said that PBGC had looked at the impact of the decrease in participation in the defined benefit system five years ago and is the process of updating that analysis. Thus far, PBGC has not seen a dramatic difference in what the PBGC had projected and what the current data suggests. PBGC staff also noted that the decrease in participation in the defined benefit system reduces claims against PBGC.

PBGC staff noted that PBGC keeps information regarding frozen plans and other data points, and publishes data tables annually. (See [www.pbgc.gov/prac/data-books](http://www.pbgc.gov/prac/data-books).)