American Bar Association
Joint Committee on Employee Benefits
Q&A Session with PBGC
May 6, 2015

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 PBGC 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 PBGC 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 that 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

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 relating to PBGC premiums, including recent activity, flat-rate and variable-rate premium audit findings and results (along with a brief summary of the most common problems found), and plans for future audits.

   **PBGC’S WRITTEN RESPONSE:**

   The most common error that we have in CCD is premium payments that are not identified with an Employer Identification Number (EIN), Plan Number (PN), and Plan Year Commencement (PYC). We also receive a number of Comprehensive Premium Filings with improperly reported EIN/PNs, (typo, unreported EIN/PN change, different # on Form 5500 etc.) and with errors related to first year filings not providing the effective, adoption, coverage and UVB valuation dates.

   CCRD continues to select premium filings for further assessment. These reviews focus on the accuracy of reported flat-rate premiums and variable-rate premiums as well as other compliance issues. One area of recent focus has been performing electronic comparisons of Form 5500 and premium filing data to identify discrepancies (e.g., differences in reported assets).

2. **QUESTION**: In 2006, the Pension Protection Act provided PBGC with the authority to pay interest on premium overpayments. In previous years, PBGC has stated that it could not implement this program until PBGC implemented certain upgrades to its automated systems. When does PBGC anticipate completing these upgrades, and what is PBGC’s schedule for implementing its authority to pay interest on premium overpayments? Does PBGC believe that it cannot pay such interest until it has a final regulation in place providing for such payments? Does PBGC anticipate paying interest on a retroactive basis back to 2006, as the Pension Protection Act authorized PBGC to do?
PBGC’S DISCUSSION RESPONSE:

PBGC said that the necessary upgrades to PBGC’s automated systems were largely completed by December 2014. However, when the Multiemployer Pension Reform Act of 2014 (MPRA) was enacted, the regulatory project regarding the payment of interest on premium overpayments was set aside in order to focus on MPRA implementation. After MPRA implementation is completed (likely 2016), PBGC will turn its consideration to this project, including doing a cost-benefit analysis, taking into account the number of plans that would be affected.

PBGC COVERAGE

[Scrivener’s Note: See also Q&A 43(a) regarding informal guidance in the 2015 “Blue Book” on issues relating to PBGC coverage.]

3. QUESTION: How is PBGC dealing with plans that may or may not be church plans in light of the recent litigation relating to church plan status? In particular, how is PBGC determining whether such a plan is covered by Title IV of ERISA for purposes of premium payments and refunds and for purposes of PBGC trusteeship and payment of guaranteed benefits?

PBGC’S WRITTEN RESPONSE:

PBGC is closely monitoring the ten lawsuits involving church plans. The district courts that have considered these issues have been divided, and there are appeals pending in several cases. It is too early to know how the issues will ultimately be resolved. For a plan that stops paying premiums and/or requests a refund of premiums on the basis that it is a church plan, PBGC’s longstanding policy is that for such a plan to be determined to be a church plan under Title IV, the plan must first obtain a letter ruling from the IRS determining that the plan meets the definition of a church plan under the Internal Revenue Code. PBGC continues to follow this policy.

4. QUESTION: Is PBGC issuing coverage rulings on whether particular plans are government plans? If not, when and under what circumstances does PBGC expect to resume issuing such rulings?

PBGC’S DISCUSSION RESPONSE:

PBGC declined to answer this question.

STANDARD TERMINATIONS

[Scrivener’s Note: See also Q&A 43(b) regarding informal guidance in the 2015 “Blue Book” on issues relating to standard terminations.]

5. QUESTION: PBGC’s standard termination regulations require (at 29 CFR § 4041.24(c)(4)) that a notice of plan benefits include the personal data (or best available data) used to calculate an affected party’s benefit “[e]xcept in the case of an affected party in pay status for more than one year as of the proposed termination date.” Assume that a participant was placed in pay status more than one year before the proposed termination date and dies during the one-year
period preceding the proposed termination date; that the benefit was in the form of a J&S 50% benefit; and that the participant’s spouse, as the participant’s beneficiary, enters pay status during that one-year period preceding the proposed termination date and begins receiving a monthly benefit that is 50% of the previously-calculated J&S 50% benefit that had been paid to the participant. Does the exception apply, so that the notice of plan benefits sent to the beneficiary need not include the personal data (or best available data) used to determine the benefit being paid to the beneficiary?

**PROPOSED RESPONSE:** Yes, the exception applies. The purpose of the exception is to strike a proper balance between an affected party’s need for personal data and the burden imposed on plan administrators in providing personal data. Where, as here, the benefit that had been calculated for the participant based on the personal data at issue has been in pay status for more than one year as of the proposed termination date, and the benefit being paid to the beneficiary as of the proposed termination date was simply a percentage of the previously-calculated benefit, there has been an adequate opportunity for the participant and/or the beneficiary to raise questions about the accuracy of the personal data, and there is no need for the notice of plan benefits to include the personal data.

**PBGC’S WRITTEN RESPONSE:**

No, the exception applies only to an affected party in pay status for more than one year as of the proposed termination date. The definition of affected party in § 4001.2 includes each beneficiary of a deceased participant. Therefore, the exception does not apply if the survivor annuitant has been in pay status for less than a year.

**6. 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 last year. 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 without original signatures and filings with inaccurate dates for the issuance of the Notice of Intent to Terminate and Notices of Plan Benefits. 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 requiring issuance of supplemental notices in approximately 15 percent of the standard terminations. PBGC issued a Notice of Noncompliance in a case where the corrected notices were not submitted after multiple
requests. Significant defects seen in the Notice of Intent to Terminate were the omission of annuity information or information on the cessation of accruals. The sample Notices of Plan Benefits that were defective lacked the personal data used to calculate the benefit; a description of the mortality table or interest rate used to convert the benefit to a lump sum; an explanation of how interest rates are used to calculate lump sums; a statement that the use of a higher interest rate results in a smaller lump sum amount; or a statement that the applicable interest rate may change before the distribution date.

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

**PBGC’S WRITTEN RESPONSE:**

PBGC required corrective action in over 32 percent of the plans audited in FY 2014. Over three-fourths of the plan termination audits in which an enforcement letter was issued had multiple findings. The most common error was the incorrect accrued benefit calculation resulting from plans incorrectly taking into account service or compensation in the calculation of the benefit. In some plans, benefits of terminated participants who had not incurred a five-year break in service and had not received a distribution of the entire benefit as of the date of plan termination were not fully vested. In others, benefits accrued under prior plan provisions were not protected or the top-heavy benefit was ignored.

Lump sum calculation errors were found in over 20 percent of the cases where enforcement action was taken, generally resulting from the use of an incorrect interest rate, mortality table, or participant age. Use of an interest rate and mortality table stated in a post-termination amendment resulting in a lower benefit remains a problem.

PBGC continues to see plans that roll over missing participants’ benefits to Individual Retirement Accounts instead of either purchasing irrevocable commitments (and submitting the information to PBGC) or transferring the designated benefit to PBGC. Occasionally, PBGC finds that designated benefits have not been calculated in accordance with PBGC’s Missing Participants regulation (part 4050) or that interest is not paid to the extent designated benefits are sent to PBGC more than 90 days after the distribution deadline. Absence of spousal consent, incorrect provisions in annuity contracts, deducting processing fees from participants’ benefit amounts, and attempted election of alternative treatment of benefits by individuals who were not majority owners accounted for some of the enforcement actions.

Two atypical enforcement actions noted this year were plans incorrectly claiming Code section 412(e)(3) status and use of incorrect interest crediting rates in cash balance plans.

**DISTRESS AND INVOLUNTARY TERMINATIONS**

8. **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 indicated that there have not been many changes since last May, and noted the following areas of activity:
• Loans from a plan to sponsor or owners, or similar transactions with third parties.

• Improper investments with parties in interest, and imprudent investments.

• Plan expenses issues.

• Failure to collect required minimum contributions. A significant case regarding this issue is *Embee Sunshade (PBGC as trustee of the Embee Sunshade Company, Inc. Pension Plan v. Herbert and Barnett Brickner and Embee Sunshade Company, CV-13-2429, (E.D.N.Y., April 22, 2013)),* in which the plan’s fiduciaries failed to take appropriate action to collect minimum funding contributions prior to the plan’s takeover by the PBGC. The PBGC noted that *Embee Sunshade* was not a case in which the employer simply did not have the ability to pay the contributions; rather, the employer had diverted assets to an affiliate instead of paying the required contributions.

PBGC also said that PBGC departments are coordinating more closely to issue subpoenas sooner and more often than in the past. Citing a recent successful subpoena enforcement case, PBGC said that it will seek to enforce subpoenas if necessary.

**GUARANTEED BENEFITS**

9. **QUESTION:** Assume that a plan is terminated in a distress or involuntary termination during the bankruptcy proceeding of the plan sponsor; that the plan allows for unsubsidized early retirement at age 55 with 10 years of service; and that the plan’s normal retirement age is age 65. Participants A, B, C, and D are each at least 55 years old and no more than 64 years old at all relevant times. Participants A and B each attain 10 years of service between the bankruptcy petition date and the plan’s termination date, and Participants C and D each attain 10 years of service between the plan’s termination date and the date the plan is terminated pursuant to a termination and trusteeship agreement signed by the plan administrator of the plan and PBGC. Participants A and C each go into pay status immediately upon attaining 10 years of service. Participants B and D had not yet gone into pay status, or elected to do so, when the plan is terminated pursuant to the termination and trusteeship agreement. What is the “Earliest PBGC Retirement Date” for Participants A, B, C, and D?

**PBGC’S WRITTEN RESPONSE:**

PBGC determines a participant’s earliest PBGC retirement date (EPRD) under the rules in PBGC Reg. § 4022.10. For Participants A and B, who met the requirements for an early retirement benefit by the plan’s termination date, EPRD is the date the participant reaches age 55. (The guaranteed benefit for each participant, however, is based on the amount of his service and the amount of his compensation, if applicable, as of the bankruptcy filing date.) For Participants C and D, who had not met the requirements for an early retirement benefit as of the plan’s termination date, EPRD is the date the participant reaches age 65, unless there is another early retirement benefit for which they have met the requirements by the plan’s termination date.
IRC SECTION 430(K) LIENS

10. **QUESTION:** Is the determination as to whether the total of missed contributions, including interest, exceeds $1M such that an IRC Section 430(k) lien arises, determined only at the time of a missed contribution, or is it determined on a continuing basis by adding interest for the period following the most recent missed contribution date? For example, if the total of missed contributions (including interest) once the first quarterly contribution for a plan’s 2015 calendar plan year (due April 15, 2015) is missed is $999K, could an IRC Section 430(k) lien arise before the next required contribution is due and missed at least in part?

**PROPOSED RESPONSE:** Whether the $1M lien threshold is crossed is determined only at the time a required contribution is due. Therefore, in the hypothetical presented, an IRC Section 430(k) lien could not arise until the next required contribution is due.

**PBGC’S WRITTEN RESPONSE:**

PBGC concurs with the proposed response.

11. **QUESTION:** Assume that an IRC Section 430(k) lien arises because the total of missed contributions, including interest, exceeds $1M, and that thereafter the full amount of missed contributions, including interest, is paid so that the IRC Section 430(k) lien amount is zero. Under IRC Section 430(k), the lien continues to exist until the end of the first plan year in which the total of missed contributions, including interest, no longer exceeds $1M. Assume further that, during that same plan year, one or more other contributions are missed, at least in part, and that the highest total of such missed contributions, including interest, does not exceed $1M. Does the original lien that had been reduced to zero apply to these additional missed contributions, including interest, or does the original lien remain at zero, with the additional missed contributions, including interest, resulting in a lien only if and when they cross over the $1M threshold?

**PROPOSED RESPONSE:** The original lien that had been reduced to zero remains at zero, with the additional missed contributions, including interest, resulting in a lien only if and when the missed contributions cross over the $1M threshold.

**PBGC’S WRITTEN RESPONSE:**

The lien continues to exist until the end of the first plan year in which the total no longer exceeds $1M. Until then, the lien amount on any date equals the total amount of missed contributions plus interest.

12. **QUESTION:** When a lien arises under IRC Section 430(k), the lien “may be perfected and enforced only by the [PBGC], or at the direction of the [PBGC], by the contributing sponsor (or any member of the controlled group of the contributing sponsor).” IRC Section 430(k)(5). Has PBGC ever directed a plan’s contributing sponsor or a member of its controlled group to perfect or to enforce an IRC Section 430(k) lien? If so, please describe the circumstances and what happened. Also, please explain the circumstances in which PBGC would anticipate directing a plan’s contributing sponsor or a member of its controlled group to perfect or to enforce an IRC Section 430(k) lien.
PBGC’S WRITTEN RESPONSE:

We are not aware of any case in which PBGC has directed a plan’s contributing sponsor or a member of its controlled group to perfect or to enforce an IRC Section 430(k) lien. And outside the context of an actual case, PBGC is unable to speculate on any circumstances in which it would be in a plan’s best interest for PBGC to direct such perfection or enforcement instead of taking such action itself on the plan’s behalf.

PBGC REPORTING

[Scrivener’s Note: See also Q&A 43(c)–(f) regarding informal guidance in the 2015 “Blue Book” on issues relating to PBGC reporting.]

13. QUESTION: Under PBGC’s reportable events regulation, there are a number of waivers and extensions for an active participant reduction reportable event that depend, in whole or in part, on the number of active participant reductions “resulting from cessation of operations” at “one or more facilities” or at “a single facility.”

(a) As a general matter, does PBGC agree that these provisions should be interpreted in a manner that is consistent with how they should be interpreted for purposes of ERISA Section 4062(e), taking into account the recent legislative changes thereto?

(b) In particular:

(1) Should one count only those separations that are from employment “at” the affected facility (in accordance with ERISA Section 4062(e)(2)(A), (B))? 

(2) Should one disregard those separations that would be disregarded (pursuant to ERISA Section 4062(e)(2)(C), (D)) when determining the workforce reduction numerator under ERISA Section 4062(e)(2)(B) and the plan-specific reduction fraction under ERISA Section 4062(e)(4)(B)(ii)(I)?

(3) Should one count separations taking into account the 3-year lookback rule in ERISA Section 4062(e)(6)(B)?

PBGC’S DISCUSSION RESPONSE:

PBGC declined to answer this question.

14. 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 DISCUSSION RESPONSE:

PBGC indicated that most of the delinquent filings are for missed contributions; typically those filings are either untimely or incomplete, or both. PBGC has asked OMB to approve revisions to Forms 10 and 200 that are intended to provide clearer directions regarding filing
requirements. PBGC also anticipates issuing proposed regulations this year that would provide further guidance.

ERISA SECTIONS 4062(e), 4063, AND 4064

[Scrivener’s Note: See also Q&A 43(g)–(l) regarding informal guidance in the 2015 “Blue Book” on issues relating to ERISA Sections 4062(e), 4063, and 4064.]

15. QUESTION: Please provide an update regarding PBGC’s experience and enforcement plans in connection with finding out about Section 4062(e) events and pursuing and resolving Section 4062(e) liability in light of the recent legislative changes to Section 4062(e).

PBGC’S WRITTEN RESPONSE:

PBGC has updated its website with a simplified description of the law and its changes. The update can be found at http://www.pbgc.gov/about/faq/pg/important-changes-to-erisa-section-4062(e).html. There are some ambiguities in the legislative language; PBGC will provide future guidance on questions of interpretation and implementation. In addition, PBGC has begun contacting employers to gather additional information to assess the application of the Consolidated and Further Continuing Appropriations Act of 2015 to pending cases. If PBGC decides that no action should be taken in a particular case, it will inform the employer of that decision.

16. QUESTION: What are PBGC’s plans regarding the issuance of guidance on the recent legislative changes to ERISA Section 4062(e)? In particular, when does PBGC expect to be issuing 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 guidance?

PBGC’S WRITTEN RESPONSE:

See response to Question 15.

17. QUESTION: An employer has 1,500 “eligible employees,” 1,000 of whom are participants in the only PBGC-covered single-employer plan established and maintained by the employer. Of the 1,000 active plan participants in the plan, 500 work at Facility A, 300 work at Facility B, and 200 work at other locations and are unaffected by the cessations described below.

In January 2015, the employer ceases all operations at Facility A. In March 2015, for entirely separate reasons and based on a decision by the employer that was made after the January 2015 cessation had been fully implemented, the employer ceases all operations at Facility B. In both cases, all active plan participants working at the facility in question are separated from employment on the date of the cessation by reason of the cessation. (Assume that all of the 800 active participants are taken into account in determining the workforce reduction under Section 4062(e)(2)(B), i.e., none of them is disregarded based on the rules in Section 4062(e)(2)(C)–(E), and that no other active participants are taken into account pursuant to the 3-year lookback rule in ERISA Section 4062(e)(6)(B).) Because each cessation results in the separation from employment of more than 15 percent of all eligible employees of the employer, each cessation constitutes a Section 4062(e) event.
How would PBGC determine the numerator and denominator of the fraction by which the plan’s underfunding (on a PBGC variable-rate premium basis) is multiplied to determine the alternative Section 4062(e) liability amount under Section 4062(e)(4)(B), or by which the plan’s underfunding (on a PBGC termination basis) is multiplied to determine the Section 4062(e) liability amount under Section 4062.8 of PBGC’s regulations? (For simplicity, assume that the plan’s underfunding is the same as of all relevant dates.) In particular, would the fraction for the second event use a denominator reduced to reflect the first event, in which case the Section 4062(e) liability amount for the two events would exceed 100% of the plan’s underfunding?

PROPOSED RESPONSE: If the two events occurred sequentially within a relatively short time period, PBGC generally would determine the denominator of the fraction for the second event without any reduction to reflect the first event. Thus, in the hypothetical presented, the total Section 4062(e) liability amount would be 80% of the plan’s underfunding for both purposes described in the question.

PBGC’S DISCUSSION RESPONSE:

PBGC declined to answer this question.

18. QUESTION: Relief from Section 4062(e) liability is available where the liability relates to a small plan, both under the statutory exemption from Section 4062(e) liability in Section 4062(e)(3)(A) and under PBGC’s Section 4062(e) Enforcement Pilot Program.

(a) In connection with 2013 Blue Book Q&A 14, PBGC stated that, in determining whether relief under the Section 4062(e) Enforcement Pilot Program applies based on a plan having fewer than 100 participants, “PBGC uses the participant count reported on the comprehensive premium filing most recently submitted prior to the date the cessation of operations giving rise to the Section 4062(e) event began.” However, according to the PBGC’s staff guidelines under the Section 4062(e) Enforcement Pilot Program (available at http://pbgc.gov/Documents/4062(e)-enforcement-of-guidelines.pdf), PBGC uses the participant count (for flat-rate premium purposes) “as of the most recent participant count date before the beginning of the cessation of operations giving rise to the section Section 4062(e) event.” Does the reference to the “most recent participant count date” in the staff guidelines mean the most recent count date that has been reported to PBGC or the most recent count date even if the count has not yet been submitted in a filing?

(b) Please provide guidance on the key differences between the requirements for qualification for small plan relief under the statutory exemption from Section 4062(e) liability in Section 4062(e)(3)(A) and the requirements for relief under PBGC’s Section 4062(e) Enforcement Pilot Program. In particular, please address the key differences in who counts as a participant for each purpose and as of what date or dates participants are to be counted for each purpose.

PBGC’S DISCUSSION RESPONSE:

PBGC declined to answer this question.

19. QUESTION: In its response to Question 17 at the 2014 JCEB-PBGC meeting, PBGC staff provided information regarding the PBGC’s position that an ERISA Section 4068 lien, which by statute arises only upon a plan’s termination date, may apply to an asserted ERISA Section
4062(e) liability where the affected pension plan is ongoing and thus has no termination date. Does PBGC agree that, where the employer elects to satisfy its Section 4062(e) liability by making additional contributions to the plan pursuant to ERISA Section 4062(e)(4), an ERISA Section 4068 lien (which can apply, by its terms, only where a person is “liable to the [PBGC] under [ERISA Sections 4062, 4063, or 4064”] cannot apply to the Section 4062(e) liability because that liability would be to the plan rather than to PBGC?

PROPOSED RESPONSE: Yes.

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

20. QUESTION: ERISA Section 4062(e)(1) refers to a substantial cessation of operations at a “facility in any location.” This provision’s legislative history (160 Cong. Rec. S5687 (daily ed. Sept. 17, 2014) (statement of Sen. Harkin)) addresses the meaning of “facility” and “location” as follows:

[T]here may be questions as to how the terms “facility” and “location” should be interpreted. They are not explicitly defined in S. 2511 because we intend for them to be interpreted according to their natural usage. For example, if an employer maintains several buildings that are physically adjacent to each other, that would be a single facility at a single location. However, if the employer maintains a building in one part of a city and another building in another part of the city, those buildings would be separate facilities at separate locations.

Does PBGC agree with the above interpretation?

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

21. QUESTION: Under ERISA Section 4062(e)(5)(A), the term “eligible employee” means “an employee who is eligible to participate in an employee pension benefit plan (as defined in section 3(2)) established and maintained by the employer.”

(a) Suppose the plan’s sponsor has changed due to a sale. Does PBGC interpret “established” as precluding a participant in such a plan from being an “eligible employee? Or does the PBGC interpret “established and maintained” for purposes of this definition as meaning “maintained”?

(b) If an employer contributes to a multiemployer plan, are the employees who are eligible to participate in that plan, and not in any other employee pension benefit plan (as defined in section 3(2)) of the employer, considered to be “eligible employees” under the above definition?

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

22. QUESTION: ERISA Section 4062(e)(2) provides the following rules under which an “eligible employee” (i.e., an employee who is eligible to participate in an employee pension benefit plan
established and maintained by the employer) is not taken into account in determining a workforce reduction:

- Under Section 4062(e)(2)(C), an eligible employee separated from employment at a facility is not taken into account in computing a workforce reduction if, within a "reasonable period of time," the employee is replaced by the employer, at the same or another facility located in the United States, by an employee who is a citizen or resident of the United States.

- Under Section 4062(e)(2)(D), where a transferee employer conducts any portion of the operations of the transferor employer that were the subject of the cessation at issue:
  - an eligible employee who is separated from employment with the transferor employer at the facility is not taken into account in computing a workforce reduction if, within a reasonable period of time, the employee is replaced by the transferee employer by an employee who is a citizen or resident of the United States (provided that, if the eligible employee is a participant in a PBGC-covered single-employer plan maintained by the transferor employer, the transferee employer, within a "reasonable period of time," maintains a PBGC-covered single-employer plan that includes the assets and liabilities attributable to the accrued benefit of the eligible employee at the time of separation from employment with the transferor employer); and
  - an eligible employee who "continues to be employed at the facility by the transferee employer" is not taken into account in computing a workforce reduction if he or she is not a participant in a PBGC-covered single-employer plan maintained by the transferee employer, within a "reasonable period of time," maintains a PBGC-covered single-employer plan that includes the assets and liabilities attributable to his or her accrued benefit at the time he or she was separated from employment with the transferor employer.

For these purposes:

(a) In order for this rule to apply, how similar must the duties, responsibilities, hours, compensation, etc., of the replacement employee be to those of the eligible employee who would not be counted?

(b) How is it to be determined whether the possible replacement employee is to be treated as replacing Employee A (who was an eligible employee and who otherwise would be taken into account in determining the workforce reduction), or Employee B (who was not an eligible employee and who therefore in any event would not be taken into account in determining the workforce reduction), when both Employee A and Employee B were separated from employment at a facility? (Assume that the duties, responsibilities, hours, compensation, etc., of the replacement employee are sufficiently similar to those of Employee A and Employee B that the replacement employee could properly be viewed as replacing either of them.)

(c) Similarly, in a transfer of operations situation, assume that a replacement employee could be viewed as replacing either Employee X (who is an eligible employee who was separated from employment with the transferor employer and who was not a participant in a PBGC-covered plan of the transferor employer) or Employee Y (who is an eligible employee who was separated from employment with the transferor employer and who was a participant in
a PBGC-covered plan of the transferor employer), where the transferee employer does not, within a “reasonable period of time,” maintain a PBGC-covered single-employer plan that includes the assets and liabilities attributable to the accrued benefit of Employee Y at the time Employee Y was separated from employment with the transferor employer. How is it determined whether the replacement employee is replacing Employee X (in which case the separation of Employee Y, but not Employee X, is taken into account in determining the workforce reduction) or Employee Y (in which case the separations of both Employee X and Employee Y are taken into account in determining the workforce reduction)?

(d) Can PBGC provide any guidance on what would constitute a “reasonable period of time” within which an employer must hire a replacement employee for these rules to apply?

(e) Can PBGC provide any guidance on what would constitute a “reasonable period of time” within which the transferee employer must maintain a PBGC-covered single-employer plan that includes the above-specified accrued benefits for these rules to apply?

(f) Is an eligible employee who is separated from employment with the transferor employer and immediately (or within a reasonable time) hired by the transferee employer (as is common in asset sale situations) treated as one who “continues” to be employed at the facility by the transferee employer?

PBGC’S DISCUSSION RESPONSE:

PBGC declined to answer this question.

23. QUESTION: ERISA Section 4062(e)(4) allows an employer to elect to satisfy its Section 4062(e) liability by making contributions to the plan in addition to minimum required contributions (but subject to a cap) for each plan year in the seven-plan year period beginning with the plan year in which the cessation at issue occurred. The amount of each of these seven payments equals the product of one-seventh of the plan’s unfunded vested benefits for the plan year preceding the plan year in which the cessation at issue occurred and a “reduction fraction,” with the payments no longer applying beginning with the first plan year for which the plan is at least 90 percent funded on a variable-rate premium basis (based on the ratio of the market value of the plan’s assets to its Premium Funding Target for that plan year).

(a) Are unfunded vested benefits and/or the funding target for a particular plan year for this purpose to be determined in the same manner (including the selection of the standard premium funding target or alternative premium funding target and the use, where applicable, of the small plan lookback rule) as unfunded vested benefits were determined for purposes of the premium filing submitted to PBGC for that plan year?

(b) Is the amount of each payment for each plan year in the above seven-plan-year period simply the nominal dollar amount determined as described above, regardless of whether it is paid on the valuation date for the applicable plan year or some later date?

(c) If the answer to (b) is no, how is the Section 4062(e)(4) amount to be adjusted for interest based on the date the payment is made? In particular, what interest rate is to be used, and how is it determined which one(s) of multiple payments made “for” the applicable plan year is (or are) to be treated as the Section 4062(e)(4) payment(s) for that plan year?

(d) May a Section 4062(e)(4) payment that is required to be made for a plan year in the seven-plan-year period be prepaid, i.e., may that payment still count for Section 4062(e)(4)
purposes for that plan year even though it is designated as being “for” an earlier plan year
for purposes of the IRC Section 430 funding rules?

(e) If the answer to (d) is yes, how would the rules governing the cap on the Section
4062(e)(4) amount for the later plan year apply to the payment “for” the earlier plan year?
These rules limit the Section 4062(e)(4) payment for a plan year to the excess of 25 percent
of the plan’s unfunded vested benefits for the preceding plan year over the minimum
required contribution for the plan year.

PBGC’S DISCUSSION RESPONSE:

PBGC declined to answer this question.

24. QUESTION: ERISA Section 4062(e)(4)(E)(i) provides that an employer that makes an
election to satisfy its Section 4062(e) liability by making additional contributions to the plan
pursuant to Section 4062(e)(4) must provide notice to PBGC of the election not later than 30
days after the earlier of the date the employer notifies PBGC of the substantial cessation of
operations or the date PBGC determines that a substantial cessation of operations has occurred.

This provision, depending on how it is interpreted and applied, could present significant timing
and related concerns, many of which were raised and addressed in this provision’s legislative
explained that:

- An employer’s notification to PBGC of an event that the employer does not believe
  constitutes a substantial cessation of operations (i.e., a precautionary filing) does not
  trigger the start of the 30-day period.
- A PBGC determination that a substantial cessation has occurred must be a final
  administrative determination to trigger the start of the 30-day period.
- The election may be conditional, i.e., it would become inapplicable to the extent that a
  court later rules or PBGC later agrees that a cessation has not occurred or that the
  alternative liability amount is lower than the amount determined by PBGC.

Does PBGC agree with the above statements?

PBGC’S DISCUSSION RESPONSE:

PBGC declined to answer this question.

25. QUESTION: ERISA Section 4062(e)(4)(A) provides that an employer that elects to satisfy its
Section 4062(e) liability by making additional contributions to the plan pursuant to Section
4062(e)(4) must make the payments for each plan year in the seven-plan year period beginning
with the plan year in which the cessation at issue occurred. The payments are due by the earlier
of (i) the due date for the minimum required contribution for the plan year or, (ii) in the case of
the first additional contribution, the date that is one year after the date on which the employer
notifies PBGC of the substantial cessation of operations or the date PBGC determines a
substantial cessation of operations has occurred, and in the case of subsequent contributions,
the same date in each succeeding year. Also, Section 4062(e)(4)(E)(ii) provides for
acceleration of the remaining unpaid additional contributions if the employer fails to pay the
full amount for any year in the seven-plan year period.
These provisions, depending on how they are interpreted and applied, could present significant timing and related concerns, many of which were raised and addressed in this provision’s legislative history (160 Cong. Rec. S5687 (daily ed. Sept. 17, 2014) (statement of Sen. Harkin)), which explained that:

- A PBGC determination that a substantial cessation has occurred must be a final administrative determination in order to trigger the start of the one-year period for making the first additional alternative liability payment.
- In all cases, the employer will have at least one year's advance notice of the need to make the first alternative liability payment.
- If an employer initially qualifies for forbearance under PBGC’s Section 4062(e) enforcement pilot program but PBGC later makes a final administrative determination that the forbearance no longer applies to the employer, the alternative liability payments are zero for any plan years in the seven-year payment period until PBGC makes that final administrative determination.
- If the employer makes an alternative liability election in a specified amount and it is later determined that the correct amount is higher, the same timing rules would apply in determining the due date of the first payment of the higher amount, and there may be separate seven-year periods, one for the originally elected amount and one for the higher amount.
- PBGC and the courts have the power to stay, in whole or in part, an employer’s obligation to make alternative liability payments until the court has determined whether there has been a substantial cessation and/or the alternative liability amount.
- Any acceleration of any unpaid balance should be stayed during the pendency of any administrative or judicial proceeding to determine whether there has been a substantial cessation and/or the alternative liability amount.
- If PBGC or a court finds that the employer had a reasonable basis to contest any material portion of PBGC’s determination, the acceleration provision would not apply, but the employer would owe past due payments plus interest.

Does PBGC agree with the above statements?

PBGC'S DISCUSSION RESPONSE:

PBGC declined to answer this question.

26. QUESTION: Question 16 of the 2015 Blue Book asked whether and, if so, how PBGC would apply its regulatory liability formula (in 29 CFR § 4062.8) in a case in which there is a Section 4062(e) liability under the new law and the employer does not elect to satisfy its Section 4062(e) liability by making additional contributions to the plan pursuant to amended Section 4062(e)(4). PBGC stated in its response that, unless it issues contrary guidance, PBGC will apply that formula to calculating liability when plan sponsors do not elect the alternative liability. The response also stated that “the ‘reduction fraction’ provided for in calculating the alternative liability captures the formula expressed in Section 4062.8.”
(a) Does this mean that the same rules that apply in determining the "reduction fraction" under the new law would apply for purposes of determining the liability fraction under PBGC’s regulatory liability formula?

(b) In particular:

1. Would PBGC count only those separations that are from employment “at” the affected facility (in accordance with ERISA Section 4062(e)(2)(A), (B))?

2. Would PBGC disregard those separations that would be disregarded (pursuant to ERISA Section 4062(e)(2)(C), (D)) when determining the workforce reduction numerator under ERISA Section 4062(e)(2)(B) and the numerator of the plan-specific reduction fraction under ERISA Section 4062(e)(4)(B)(ii)(I)?

3. Would PBGC count separations taking into account the 3-year lookback rule in ERISA Section 4062(e)(6)(B)?

PBGC’S DISCUSSION RESPONSE:

PBGC declined to answer this question.

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

PBGC WRITTEN RESPONSE:

PBGC is evaluating whether a plan should be terminated under section 4042 after the spin-off and withdrawal of one of two contributing sponsors, or partitioned and terminated under section 4063(d) prior to any spin-off.

PBGC determined that the substitution of a former controlled group member for a withdrawing contributing sponsor would constitute a satisfactory indemnity agreement, and accordingly waived withdrawal liability.

PBGC is discussing with a plan administrator whether the payment of 125% of withdrawal liability to the plan, pursuant to a proposed plan amendment, would constitute a satisfactory indemnity agreement in a particular case, such that we would waive the payment of withdrawal liability to PBGC. PBGC has had preliminary discussions of a similar arrangement with another plan administrator.

PBGC negotiated the payment of withdrawal liability into a plan after the withdrawal of the only contributing sponsor still in operation. PBGC expects to terminate the abandoned plan under section 4042.

PBGC negotiated the payment of withdrawal liability into a plan after the withdrawal of two contributing sponsors that resulted from a sale.

PBGC is negotiating the settlement of employer liabilities resulting from the termination of a multiple employer plan trustee by PBGC in 2012.
EARLY WARNING PROGRAM

28. QUESTION: Please provide an update regarding the cases PBGC has been involved in over the past year under its Early Warning Program.

PBGC’S DISCUSSION RESPONSE:

In fiscal year 2014, PBGC entered into seven settlement agreements providing a total of $460 million in protection. There is not much variation from year to year in the number of companies monitored. In 2014, PBGC reached a settlement with Saint-Gobain Containers Inc. for it to make $207.5 million in additional contributions to its pension plan, bringing its funding ratio from 63% to 80%. In fiscal year 2013, PBGC had announced that it would be taking over the plan due to parent Compagnie de Saint-Gobain's agreement to sell Saint-Gobain Containers for $1.7 billion to a unit of Ardagh Group, a below-investment-grade company. The settlement resulted in a better funded pension plan that will remain ongoing.

In 2014, the private-equity firm Cerberus Capital Management and Albertsons announced the acquisition of Safeway, the grocery store chain. PBGC became involved when Cerberus Capital, which is an affiliate of both firms, announced that it would merge the Albertsons and Safeway grocery chains in a deal that would have caused Safeway to take on $9.4 billion in debt, reducing Safeway’s credit rating to junk status. PBGC reached a settlement in which Safeway agreed to make $48 million in required contributions, and to contribute an additional $212 million to the Safeway pension plans.

A list of recent Early Warning Program settlements is available on PBGC’s website at www.pbgc.gov/about/factsheets/page/early-warning/early-warning-program-agreements.html.

29. QUESTION: Has PBGC made, or does PBGC intend to make, any changes to its Early Warning Program as a result of the significant legislative changes to ERISA Section 4062(e)? In particular, how does PBGC see the relationship between its 4062(e) activities and its Early Warning Program activities?

PBGC’S DISCUSSION RESPONSE:

While the Early Warning Program continues to be quite active, PBGC said that no changes have been made to that program due to changes in ERISA section 4062(e). PBGC also said that there is no relationship between its 4062(e) activities and its Early Warning Program activities.

30. 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 2013 Blue Book Q&A 22 (and previously in 2011 Blue Book Q&A 19), PBGC indicated that it generally monitored 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. Have there been any changes in the criteria PBGC uses to monitor employers since these responses were published?
PBGC’S DISCUSSION RESPONSE:

In the past several years, PBGC has monitored a universe of about 1,500 companies. In 2013, the threshold for monitored companies was $50 million in underfunding. A subsequent spike in interest rates temporarily reduced underfunding levels. In response, last summer PBGC adjusted the monitoring criteria by lowering the threshold to $25 million, thus keeping the universe at about 1,500 companies. Now that interest rates have come down again, PBGC may again adjust the monitoring criteria to keep the monitored universe at about 1,500.

31. QUESTION: Could PBGC provide guidance on how it evaluates various situations it commonly encounters under its Early Warning Program. For example, PBGC stated in its response to Question 11 of the 2011 Blue Book that, among the transactions that may be of concern to PBGC are break-up of a controlled group, leveraged buyouts, payout of a large dividend, and substitution of secured debt for a significant amount of previously unsecured debt. Of course only some, but not all, such transactions will be of sufficient concern to PBGC that PBGC may insist on some form of protection for the pension plan in exchange for PBGC agreeing to forbear from initiating an involuntary termination of the pension plan. What are the factors that PBGC considers in these types of transactions when deciding whether to insist on such protection? For example, when is a controlled group break-up of concern to PBGC, what kinds of leveraged buyouts does PBGC believe would threaten a pension plan, when is a dividend too large, and under what circumstances is the substitution of secured debt for unsecured debt viewed as problematic? Any specific guidance PBGC could provide should help employers take potential PBGC concerns into account in structuring their transactions so as to minimize the likelihood that an early warning dispute would arise.

PBGC’S DISCUSSION RESPONSE:

PBGC confirmed that the cited examples accurately describe types of circumstances that raise concerns under the Early Warning Program. PBGC evaluates transactions on a case-by-case basis. Circumstances that are determined to increase the risk of plan termination warrant examination and possible intervention. PBGC said that plan sponsors are encouraged to contact PBGC early in the process of considering a transaction. PBGC is considering publishing guidance regarding the Early Warning Program and may do so this year. PBGC welcomes suggestions from practitioners regarding any such guidance.

MULTIEmployER PLAN ISSUES

32. QUESTION: PBGC recently issued a request for information regarding partitions of eligible multiemployer plans and facilitated mergers.

(a) Can PBGC share any reaction it may have to the comments that were submitted in response to the request for information?

(b) How does PBGC view these two programs working operationally?

(c) Beyond the objective standards in the statute, what criteria does PBGC expect to use when determining whether to allow a partition or whether to facilitate a merger with financial assistance?
(d) Does PBGC anticipate accelerating the timing of its partition rulings (for which it has 270 days) to match the timing for the Department of the Treasury’s suspension of benefits rulings (for which it has 225 days)?

PBGC’S DISCUSSION RESPONSE:

PBGC’s discussion response was off the record.

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

PBGC WRITTEN RESPONSE:

For the fiscal year ending September 30, 2014, the multiemployer program had assets of $1.8 billion and liabilities of $44.2 billion. This resulted in a net deficit of $42.4 billion. There were 53 plans receiving financial assistance in 2014 and we paid out approximately $97 million to those plans.

On March 11, 2015, PBGC released its Multiemployer Guarantee Study. The study highlighted that in current insolvent plans, only 20% of the participants saw reduced benefits, while more than 50% of the people in terminated plans face a reduction when those plans become insolvent.

PBGC published a Request for Information (RFI) on partitions and facilitated mergers on Feb. 18, 2015 (80 FR 8712). The RFI sought requested information on a range of issues regarding the application process for partitions and facilitated mergers, issues affecting both partitions and facilitated mergers, and issues affecting partitions only. PBGC received 19 comments, which are posted on www.pbgc.gov and www.regulations.gov. Guidance on these matters is expected at a later date.

PBGC published a proposed regulation regarding electronic filing requirements on April 3, 2015 (80 FR 18172). The proposed regulation requires that the following notices be sent electronically: 1) notice of termination under ERISA section 4041A, 2) notice of insolvency and insolvency benefit level under ERISA sections 4245 and 4281, and 3) the application for financial assistance under ERISA section 4281. PBGC may grant an exemption from the e-filing requirement in appropriate circumstances that demonstrate good cause. Under the proposal, these requirements would apply to filings made on or after 1/1/2016. Comments on the proposed rule are due by June 2.

PBGC asked OMB to approve proposed changes to the 2015 Form 5500. There are several proposed changes to the Schedule MB.

PBGC published FAQs regarding MPRA on its website.

[UPDATE: On June 19, 2015 (80 FR 35220), PBGC published an interim final rule on Partitions of Eligible Multiemployer Plans.]
LITIGATION AND GENERAL MATTERS

34. 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:

Deppenbrook v. PBGC, 778 F.3d 166 (D.C. Cir. 2015), aff’g 950 F. Supp. 2d 68 (D.D.C. 2013): The D.C. Circuit reviewed a district court decision upholding PBGC’s denial of shutdown benefits. The court affirmed, limiting its review to the administrative record and finding that PBGC’s decision was not arbitrary and capricious.

Lewis v. PBGC, 2014 WL 1816069 (D.D.C. May 8, 2014): PBGC determined that a participant’s entire pension benefit had been paid in a lump sum by the sponsor before plan termination, and thus no further benefits were due. The participant challenged, and applying a deferential standard of review, the court upheld the agency’s decision.

PBGC v. Kentucky Bancshares, 2015 WL 221621 (6th Cir. Jan. 15, 2015), aff’g 2014 WL 1047140 (E.D. Ky. Mar. 17, 2014): PBGC sued Kentucky Bancshares for underpaying participants in a standard termination. The district court upheld PBGC’s determination that the company’s amendment of its plan after termination violated PBGC’s regulation. The Sixth Circuit affirmed, applying the deferential “arbitrary and capricious” standard. The court rejected the company’s argument that the post-termination amendment was required for the plan to remain tax qualified, accepting PBGC’s view that the law establishes a floor for valuing lump sums.

PBGC v. The Renco Group, 2015 WL 997712 (S.D.N.Y. Mar. 6, 2015): PBGC sued Renco for evading or avoiding pension liabilities in a transaction that removed it from the controlled group of its struggling subsidiary. PBGC included state law fraud claims in addition to its ERISA section 4069 claim. After the court denied Renco’s motion to dismiss the state law claims, both parties moved for summary judgment. The court held that disputed issues of material fact precluded summary judgment in favor of either party, and scheduled a trial.

Royal Oak Enterprises v. PBGC, 2015 WL 364336 (D.D.C. Jan. 28, 2015): Like Kentucky Bancshares, this company argued that it was exempted from PBGC’s regulation prohibiting post-termination amendments reducing benefits because the amendment was necessary for the plan to remain tax qualified, and that participants had received the actuarial equivalent of their benefit. The court rejected these arguments, emphasizing that Title IV has its own requirements that are just as important as the rest of ERISA. The court accepted PBGC’s view that the Pension Protection Act established a floor for valuing lump sums, and nothing in the tax code prohibits a sponsor from paying a larger benefit if required by another statutory provision or a plan term. The court also found that a determination letter does not show compliance with Title IV.

Stephens v. PBGC, 755 F.3d 959 (D.C. Cir. 2014): A group of retired pilots sued US Airways for interest on their lump sum pension benefits accruing during a 45-day delay in payment. PBGC became the defendant after the plan terminated. The case went to the court of appeals several times. In this decision, the D.C. Circuit held that the plaintiffs’ claim for interest was
based on the statute rather than the plan document, so exhaustion of the plan’s administrative remedies was not required before suit. Therefore, the court held that the class members’ claims were not foreclosed by failure to exhaust administrative remedies, and reversed the district court’s refusal to certify a class.

**US Airline Pilots Ass’n v. PBGC**, 2014 WL 3537827 (D.D.C. Jun. 20, 2014), *appeal pending*, No. 14-5181 (D.C. Cir.): USAPA, the union that represents active US Airways pilots, alleged that PBGC breached a fiduciary duty by failing to investigate and rectify potential pre-termination breaches by US Airways. USAPA sought appointment of a trustee to replace or supplement PBGC and perform further investigation. After holding a trial, the court held that PBGC did not breach any duty with respect to the terminated plan, rejecting each of the “red flags” that USAPA had identified. USAPA’s appeal is pending.

**Cox Enterprises v. News-Journal Corp.**, 2014 WL 3962694 (M.D. Fla. Aug. 13, 2014), *appeal pending*, No. 14-14115-F (11th Cir.): A minority shareholder won a judgment against News-Journal’s directors and officers for corporate waste. Under state law, the shareholder was entitled to a buyout, but News-Journal defaulted and the court appointed a receiver to oversee its liquidation. PBGC terminated the company’s pension plan, and sought recovery of the underfunding. The receiver recommended that the shareholder receive all of News-Journal’s assets, and the district court approved. The Eleventh Circuit reversed, confirming that debt comes before equity, and that PBGC’s claim for pension underfunding was therefore senior to the shareholder’s statutory right to a buyout. On remand (the decision cited here), the district court ordered the shareholder to remit to the court’s registry the full amount of the plan’s underfunding, and retained jurisdiction to effect distribution of the funds. The shareholder’s appeal is pending.

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

**PBGC’S DISCUSSION RESPONSE:**

PBGC said that two Appeals Board decisions regarding the United Airlines case (links below) may be of interest to the ERISA community. The Board’s September 30, 2014, decision addressed an appeal filed on behalf of 554 individuals regarding benefit entitlement issues under the United Airlines, Inc. Pilots Fixed Benefit Income Plan. The Board’s November 28, 2014, decision addressed issues regarding the allocation of PBGC’s recovery in United’s Chapter 11 case. The Board concluded that the characterization of PBGC’s claim in the bankruptcy settlement agreement was not binding on PBGC in making its recovery allocation determinations. The Board also rejected the argument that PBGC’s recovery should be revalued in light of the merger between United and Continental Airlines, finding that the merger was not an extraordinary event, but rather a result of ordinary market forces.


36. QUESTION: Please discuss any situations within the last 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 is 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 alleges that Renco engaged in the transaction with a principal purpose of evading the pension liabilities of its subsidiary, RG Steel. PBGC also alleges claims against Renco for state-law fraud, fraudulent concealment, and negligent misrepresentation.

Renco moved to dismiss PBGC’s state-law claims, arguing that they were preempted by ERISA. PBGC opposed that motion. On March 14, 2014, the Court denied Renco’s motion to dismiss. The Court held that PBGC has authority to bring state-law fraud claims, and that ERISA does not preempt state-law fraud claims where companies engage in fraud when dealing with PBGC.

The parties have completed merits discovery, including document production and 12 depositions. At the parties’ request, the court stayed discovery on the fraud damages pending dispositive motions. The parties filed cross-motions for summary judgment, but the court denied them, finding disputed issues of material fact. The court scheduled a trial to begin on July 6, 2015.

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

37. 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:

There is no new information to provide on this topic.

Note: PBGC does not consider the Asahi Tec case as implicating ERISA’s extraterritorial reach. Asahi Tec’s minimum contacts with the U.S. make the exercise of jurisdiction consistent with the Due Process clause of the Constitution. PBGC settled with Asahi Tec in November 2014, ending the litigation. See PBGC news release no. 14-14.

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

There is no new information to provide on this topic.

39. QUESTION: In the last few years, the PBGC has asked about the need for a defined contribution plan missing participant program (as authorized by the Pension Protection Act of 2006). Many groups have suggested that there is such a need. Has PBGC reached a conclusion about the need? If so, when does PBGC expect to move forward with such a program and what are the key issues and problem areas PBGC anticipates addressing in connection with such a program?

PBGC’S DISCUSSION RESPONSE:

PBGC is working on a proposed rule concerning missing participants that is targeted for release in the fall of 2015. The rule will establish a process for dealing with missing participants of terminated defined contribution plans as well as make improvements to the current defined benefit plan missing participants program. In answer to a follow-up question, PBGC reiterated that it had no authority to address missing participants in non-terminating defined contribution plans. PBGC is coordinating its rules with the two other ERISA agencies, in particular with respect to search requirements.

40. QUESTION: On December 31, 2014, the Participant and Plan Sponsor Advocate issued her first annual report to Congress. In her report (which is available at http://www.pbgc.gov/Documents/pbgc_advocate_report_2014.pdf), the Advocate discussed various issues of concern to the participant community and various other issues of concern to the plan sponsor community, and made a number of recommendations for PBGC to consider. What changes, if any, has PBGC made or does PBGC anticipate making in response to the recommendations in this report?

PBGC’S DISCUSSION RESPONSE:

PBGC declined to answer this question.

41. QUESTION: PBGC is requiring the submission of information, as part of the annual premium filing, regarding annuity purchases and lump sum distributions. What are PBGC’s concerns about such de-risking activities? Under what circumstances, if any, does PBGC believe that such activities could constitute a violation of Title IV of ERISA?

PBGC’S DISCUSSION RESPONSE:

PBGC’s discussion response was off the record.
42. **QUESTION:** During the past year, has PBGC seen any pattern in plan freezing, termination of frozen plans, or growth of cash balance plans?

**PBGC’S DISCUSSION RESPONSE:**

PBGC said that it has no updates at this time, and asked for feedback from practitioners as to whether this type of information would be useful to them. PBGC also said that it is hoping to update the information after October filings are made.

**INFORMAL GUIDANCE FROM 2015 BLUE BOOK**

43. **QUESTION:** Please provide a brief summary of any informal guidance in the 2015 Blue Book that may be of particular interest to employee benefits attorneys and that is not otherwise addressed in the foregoing Qs and As.

**PBGC’S DISCUSSION RESPONSE:**

[Scrivener’s Note: Each year, considerable informal guidance on a variety of PBGC-related issues is included in a “Summary of Discussions between the Enrolled Actuaries Program Committee and Staff of the Pension Benefit Guaranty Corporation” (generally referred to as the annual “Blue Book”). The 2015 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.]

**PROPOSED RESPONSE:**

(a) 2015 Blue Book Q&A 4 (“PBGC Coverage: Church Plans”). This question asked how, in light of recent court decisions finding that only a church can establish a church plan, PBGC is dealing with Title IV coverage and premiums issues regarding church plans. PBGC said that it is closely monitoring the lawsuits involving church plans. PBGC said that for a plan that stops paying premiums and/or requests a refund of premiums on the basis that it is a church plan, PBGC continues to follow its longstanding policy that in order to be determined to be a church plan under Title IV, a plan must first obtain a ruling from the IRS determining that the plan meets the definition of church plan under the Internal Revenue Code.

(b) 2015 Blue Book Q&A 10 (“Standard Terminations: PBGC’s Requirement for Submission of Plan Document and Proof of Distribution”). This question related to recent revisions to PBGC’s standard termination forms and instructions. PBGC stated that, with the exception of forms requiring original signatures, any materials required to be submitted may be submitted electronically. PBGC also stated that a listing of names and distribution amounts is not adequate proof of distribution, and provided additional guidance regarding what constitutes adequate proof of distribution with respect to lump sums and with respect to annuities.

(c) 2015 Blue Book Q&A 12 (“Reportable Events: Death of Owner; Reporting of Controlled Group Changes”). This question asked whether and when a reportable event occurs if an individual who owns 100% of the stock of several corporations dies, and the stock continues to be held by his estate until it is sold or distributed to beneficiaries. PBGC said that, as long as the estate continues to hold the stock, there would be no reportable event. Whether the act of
the estate selling or distributing the stock at a later date constitutes a controlled group break-up (and thus is reportable) depends on the facts and circumstances. Thus, if the estate sells or distributes the stock and the result is that the controlled group is broken up, a reportable event occurs.

(d) 2015 Blue Book Q&A 13 (“Reportable Events: Legally Binding Agreement as Trigger for Reporting”). This question related to the requirement under §4043.29 of PBGC’s reportable events regulation that a change in contributing sponsor or controlled group member must be reported to PBGC within 30 days after the date of actual or constructive knowledge of a “legally binding agreement” providing for such a change. PBGC said that what constitutes a legally binding agreement is determined based on the facts and circumstances of each particular case, and that the determination is generally made without regard to any conditions in the agreement.

(e) 2015 Blue Book Q&A 14 (“Reportable Events: Extraordinary Dividend “Adjusted Net Income” Test”). This question related to the “adjusted net income” test used in determining whether an extraordinary dividend reportable event occurs. PBGC stated that the adjusted net income test is based on the stand-alone adjusted net income of the relevant controlled group member. PBGC said that, if a subsidiary declares a cash dividend to its parent, and the parent immediately dividends the same cash amount to its shareholders, the adjusted net income of the parent on a stand-alone basis therefore would be used in determining whether the dividend to the parent’s shareholders is a reportable extraordinary dividend.

(f) 2015 Blue Book Q&A 15 (“Reportable Events: Effect of Technical Update 14-1 on Funding-Based Tests in Reportable Events Regulation”). This question concerned situations in which, pursuant to Technical Update 14-1 (“Effect of HAFTA on PBGC Premiums”), a plan is not required to amend its 2014 premium filing to reflect a lower asset value (resulting from discounting contributions receivable using a higher discount rate). PBGC said that, in such a case, the data reported on the 2014 premium filing may be used for purposes of determining whether funding-based waivers or extensions apply, and/or whether advance reporting is required, under PBGC’s reportable events regulation and PBGC Technical Update 13-1.

(g) 2015 Blue Book Q&A 16 (“ERISA Section 4062(e): Effect of 2014 Legislative Amendment on PBGC’s Regulatory Liability Formula”). This question related to the effect of the 2014 amendments to §4062(e) of ERISA on PBGC’s §4062(e) regulatory liability formula. PBGC said that, unless it issues contrary guidance, it will apply its regulatory liability formula in calculating liability under the new law when plan sponsors do not elect the new law’s alternative liability method.

(h) 2015 Blue Book Q&A 17 (“ERISA Section 4062(e): Effect of Technical Update 14-1 on §4062(e)(3)(B) Exemption Determinations and §4062(e)(4) Alternative Liability Determinations”). This question concerned situations in which, pursuant to Technical Update 14-1 (“Effect of HAFTA on PBGC Premiums”), a plan is not required to amend its 2014 premium filing to reflect a lower asset value (resulting from discounting contributions receivable using a higher discount rate). PBGC said that, in such a case, the data reported on the 2014 premium filing may be used for purposes of determinations under §4062(e)(3)(B) regarding whether a plan is exempt from §4062(e) liability and under §4062(e)(4) relating to the alternative liability that an employer may elect to satisfy its §4062(e) liability.
(i) 2015 Blue Book Q&A 18 ("ERISA Section 4062(e): Recent changes"). This question related to changes made to §4062(e) by the Consolidated and Further Continuing Appropriations Act of 2015 (H.R. 83), which was signed by the President on December 16, 2014. In response, PBGC cited its update regarding the new law (http://www.pbgc.gov/about/faq/pg/important-changes-to-erisa-section-4062(e).html), and stated that PBGC will provide future guidance on questions of interpretation and implementation.

(j) 2015 Blue Book Q&A 19 ("ERISA Section 4062(e): Reporting Requirement"). This question concerned situations in which an employer experiences a “substantial cessation of operations” as defined under §4062(e), but it appears that there is no liability under that provision. PBGC stated that the cessation of operations would have to be reported to PBGC, unless the cessation is exempt under §4062i.(3).

(k) 2015 Blue Book Q&A 20 ("ERISA Section 4062(e): PBGC Determinations on Cessations of Operations That Occurred Before December 16, 2014"). This question related to the application of the Consolidated and Further Continuing Appropriations Act of 2015 (H.R. 83) to pending cases. PBGC said that it needs additional information to assess the applicability of the new law to pending cases and will contact employers for that information. PBGC also said that it will inform the employer of its decision.

(l) 2015 Blue Book Q&A 22 ("Other: Withdrawal Liability for Multiple Employer Plan"). This question concerned a multiple employer plan that includes a “minimum withdrawal liability” provision that requires a contributing sponsor electing to voluntarily withdraw from the plan to pay an additional contribution to the plan equal to a defined amount. PBGC said that, in a number of cases, PBGC has waived withdrawal liability under section 4063 when it has determined that a contribution to a multiple employer pension plan, whether under such a minimum withdrawal liability provision in the plan or pursuant to an agreement among contributing sponsors, constituted an “indemnity agreement” under section 4063(e) that was adequate to satisfy the purposes of sections 4063 and 4064, provided the other contributing sponsors concurred. The determination is made on a case-by-case basis.