1. **PBGC Premiums**

PBGC may waive late payment penalties for delinquent premiums based on a “demonstration of good cause.” (§2610.8(b)(2))

(a) In general, what standards does PBGC apply in determining whether “good cause” has been demonstrated?

*No response.*

(b) If the premium delinquency was due to reasonable reliance on a professional advisor, will this satisfy the “good cause” standard?

*No response.*

(c) Will the PBGC consider coordinating its review standards with the standards currently applied by the IRS and the DOL?

*PBGC is reviewing the IRS position.*

(d) What office reviews penalty appeals and what are the qualifications of the appeals officers?

*No response.*
2. Benefit Liabilities

Is the class of “nonforfeitable benefits” defined in §4001(a)(8) different from “benefit liabilities” defined in §4001(a)(16)? What are the differences, if any?

The IRS has authority to define benefit liabilities; the PBGC declined to comment on this question.

3. Benefit Liabilities

In the absence of regulations from the IRS indicating the scope of “benefit liabilities,” what guidance has been given to PBGC employees in applying the standard termination requirements?

The PBGC declined to comment on this question.

4. Common Control

Where a group of entities includes one or more limited partnerships, how is it determined whether the group is under “common control” for purposes of §4001(a)(14)(B)? This issue arises because that section refers to regulations under §§414(b) and 414(c) of the Code, which discuss interests in partnerships solely for purposes of applying attribution of ownership rules.

For many years the PBGC has conferred with the IRS (formally or informally). Whenever a “common control” question arises, the PBGC does an analysis and reaches a tentative conclusion and then asks the IRS if the IRS agrees. In the absence of further IRS regulations, the PBGC staff intends to continue this procedure.

5. Standard Terminations

In PBGC audits of standard terminations:

(a) What criteria does PBGC use in determining whether to audit plans that have closed out in standard terminations?

The PBGC audits both randomly and with targeting.

(b) Is there any pattern to the problems that PBGC has uncovered in its audits?

The primary problem is lump sum distributions. Issues involve use of correct interest rates, assumptions and dates.

(c) What types of corrections has PBGC required? If additional benefits must be distributed, has this correction method been coordinated with the IRS (e.g., where the trust has ceased to exist)?

PBGC requires that benefit distribution amounts be corrected.
6. **Standard Terminations**

Where a plan sponsor has initiated a standard termination (i.e., issued a NOIIT), does the PBGC have guidelines if the sponsor wishes to cease the termination and treat the plan as ongoing?

**Follow-up:**

Would a sponsor be able to cease a standard termination at any time, so long as assets had not been distributed and Form 501 not filed?

*The PBGC indicated that an employer that has initiated a standard termination, i.e., issued a Notice of Intent to Terminate to affected parties, may stop the termination at any time up until the point when assets are distributed. The PBGC indicated that there is not a formal process to stop the termination. However, the PBGC indicated that participants should be informed that the plan will not terminate and, if the employer has filed a Standard Termination Notice with the PBGC, the employer should also notify the PBGC.*

7. **Standard Terminations**

Where the standard termination rules have not been satisfied:

(a) What is PBGC’s procedure for invalidating a standard termination where the filing deadlines have not been satisfied?

(b) Have any standard terminations been invalidated by the PBGC in the past year?

*The PBGC indicated that it has invalidated 280 standard termination proceedings in the past year. The PBGC indicated that it invalidates a standard termination when the statutory requirements are not met. The most common reason for invalidating a standard termination is a defect in the Notice of Intent to Terminate; the next most common problem is the failure to file the Standard Termination Notice. The PBGC would also nullify the termination if the plan administrator did not distribute assets on a timely basis. However, if the plan administrator failed to file Form 501, Post-Distribution Certification for Standard Termination, the PBGC would not nullify the termination, but would assess a penalty for the late filing of the form.*

8. **Standard Termination**

The standard termination rules (§2617) require that the NOIIT and Notices of Plan Benefits be issued to each “affected party,” including each “participant.” The term “participant” is not defined. See 2617.2 Is a “participant” for this purpose the same as a “participant” for PBGC premium purposes (§2610.2)?
The term “participant” for standard termination purposes is defined in §2617.2. The preamble to the final standard termination regulations (53 Fed. Reg. 59206, 59210 (12/14/92)) discusses the definition of participant. The key factor is whether the individual is “earning or retaining credited service under the plan.” For premium purposes, a different rule applies.

9. Lost Participants

The preamble to the standard termination regulations (57 Fed. Reg. 59214-15) provides that, to close out a plan, the plan administrator must distribute assets on behalf of lost participants. Where benefits exceed $3,500 in value, annuities must be purchased. For benefits valued at $3,500 or less that would otherwise be distributed in a lump sum, the plan administrator must either deposit the funds in individual interest-bearing accounts in the participants’ names or, if these are unavailable, use a pooled interest-bearing account that is maintained by a plan fiduciary. Did the PBGC coordinate this approach to missing participants’ benefits with the IRS and the DOL, and do they agree?

PBGC declined to respond.

10. Waiver of Benefits

The standard termination regulations (§2617.7(b)) provide that a majority owner may “agree to forego receipt of all or part” of his benefits until benefit liabilities of other participants are satisfied, in order to facilitate a standard termination. The preamble to the regulations (57 Fed. Reg. 59211-12) state that, “if assets become available when final distribution occurs such assets must be used to satisfy the benefit liabilities of the majority owner before any assets may revert to the contributing sponsor.” This appears to permit a majority owner to waive accrued benefits to achieve a standard termination. Was this approach coordinated with the IRS and do they agree that such a waiver does not violate qualification rules in general, and §411(d)(6) of the Code in particular?

PBGC declined to respond.

11. Insolvent Plans

Plans sometimes are party to swap agreements, such as an interest rate swap (an agreement to exchange income streams between different instruments held by different parties). The swap agreement usually includes a “netting” (offsetting) provision between the parties. Is the netting provision enforceable against an insolvent plan by the other party notwithstanding the avoidance powers in §4042, §362(b)(14) of the Bankruptcy Code, corresponding provisions of the Federal Deposit Insurance Act (12 USC §1821(e)(8)) and the requirements of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 USC §4403)? In other words, is the insolvent plan’s claim under the swap agreement offset by what the solvent party is otherwise entitled to from the insolvent plan?

PBGC declined to respond.
12. **Penalties for Failure to Issue Notices**

PBGC is authorized to assess penalties of up to $1,000 per day for failure to provide "any notice or other material information" required under §4071.

(a) In what specific instances has the PBGC imposed a penalty?

(b) If penalties have been assessed, how were these calculated (e.g., what was the daily penalty assessed for each type of notice or other material information that was delinquent)?

(c) What criteria are applied for such penalties? Does the PBGC take into that account willfulness or intentional disregard is not present?

(d) Have penalties been assessed if Form 501 (Notice of Distribution of Plan Assets) is delinquent?

*PBGC declined to respond to all questions.*

13. **Evasion or Avoidance of Liability**

During the past year, has the PBGC applied (or threatened to apply) penalties where it alleged that the principal purpose of a transaction was to evade liability under Title IV, where the transaction became effective within five years before a plan termination?

*In the past year PBGC has asserted liability under §4069 in litigation in two instances. In United Steel Workers v. United Engineering, Inc., the PBGC recently filed a claim based on a plan spinoff by Wean, Inc. to United Engineering. In Blaw Knox Retirement Income Plan v. White Consolidated Industries, Inc., 998 F.2d 1195 (3rd Cir. 1993), the court of appeals reversed a district court in holding that the five year rule under §4069 had not expired when the Blaw Knox Plan terminated because White supported Blaw Knox financially for several years following the plan transfer even though they were not affiliated.*

**Follow-Up:**

Does the PBGC utilize the threat of liability under §4069 to become a "party" in pending corporate transactions in which a plan termination has not been contemplated?

*PBGC declined to respond.*

14. **Please describe major new litigation that PBGC has commenced in the past year that has set (or is likely to set) major precedent and that should be of interest to benefits attorneys who are not professional litigators.*
On April 7, 1994, the PBGC filed suit against Armco Steel in district court in Minnesota. A joint venture (Reserve Mining) formed by subsidiaries of Republic Steel and Armco had become insolvent. The defined benefit plan also collapsed. A trade creditor of Armco successfully asserted that Armco was the “alter ego” of one of the joint venturers (First Taconite). The creditor collected its claims on appeal. The PBGC is now suing Armco as the “alter ego” for employer liability arising from Reserve Mining’s terminated plan.