For well over 20 years, private-sector representatives of the JCEB and PBGC staff members have met annually for informal discussions of matters of mutual concern. Before 2017, 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). Beginning with the 2017 session, rather than following a Q&A format, the meeting format provides for an informal discussion of a number of broad topics that are agreed upon in advance. As was the case in prior JCEB-PBGC meetings, statements made by PBGC staff at the 2018 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.

PROGRAM UPDATES

Standard Termination Experience. PBGC staff said that in FY 2017, PBGC received about 1,500 Form 500 (standard termination notice) filings and about 1,350 Form 501 (post-distribution certification) filings. The Form 501 filings reflected that distributions were completed for almost 142,000 participants and beneficiaries, and that they received in the aggregate about $8.8 billion in benefits. (For PBGC's FAQs about standard terminations, see www.pbgc.gov/prac/terminations/standard-terminations.)

PBGC continues to audit all plans with more than 300 participants and a sampling of smaller plans. In addition, PBGC audits plans with respect to which it has received a complaint, and all plans that distributed assets before or without filing a Form 500.

PBGC completed audits of 343 plans in FY 2017 and found that about 25% of the plans did not comply with plan provisions or applicable law. PBGC issued determinations to each such plan setting forth its findings and specifying the necessary corrective actions. These audit findings resulted in additional distributions of about $4.6 million to 435 participants and beneficiaries. Common errors PBGC found were similar to those that have occurred in prior years, including:

- errors in the calculation of accrued benefits or lump sums;
- attempted benefit waivers by non-majority owners; and
• annuity contracts that did not provide for all benefit forms provided under the plan.

PBGC staff noted that they are aware that some plans—particularly those with a small number of participants and/or complex benefit forms—have encountered difficulties in finding an insurance company from whom it can purchase required irrevocable commitments. Staff said that PBGC has heard of these problems for about 3 years, but believes that the plans involved ultimately have been able to purchase the required annuities, albeit at a higher cost than they might have wished.

In these kinds of cases, staff said, PBGC has granted extensions of time to purchase the annuities. PBGC staff also noted that insurers have informally indicated that purchasing annuities earlier in the calendar year may be advantageous as it may be difficult to do so later in the calendar year when more insurers will have met their quotas for the calendar year.

In response to a question about plans that distribute plan assets prior to or without filing a Form 500, PBGC staff said that PBGC had not, to date, taken any action with respect to such premature distributions as long as all plan benefits have been paid, but that PBGC will take action with respect to such cases if all benefit liabilities have not been satisfied. In *PBGC v. Idaho Hyperbarics, Inc.*, No. 4:16-cv-00325-CWD, (D. Idaho, November 15, 2017), the district court upheld PBGC’s right to seek enforcement of a final agency determination requiring an employer to pay benefits owed in connection with plan termination in which there had been a premature distribution, holding that the three-year statute of limitations does not begin to run until PBGC issues an initial determination. (A copy of the court's decision can be found at [www.pbgc.gov/sites/default/files/order-denying-motion-to-dismiss.pdf](http://www.pbgc.gov/sites/default/files/order-denying-motion-to-dismiss.pdf).)

**Reportable Events Experience.** PBGC staff said there was a significant reduction in the number of reportable events in calendar year 2017, including a decline in the number of events due to failure to make required contributions. Staff said they believed that the reduction was largely a result of market conditions and of certain changes in the regulations.

PBGC staff also said that it appeared that some filers may have met the new low-default-risk waiver but didn’t realize it, and thus it appears likely that the low-default-risk waiver is underused. PBGC staff is hopeful that companies will become more aware of this waiver and review the criteria for the waiver once a year; if the criteria are met, the waiver could eliminate the need to file a number of reports that would otherwise be required and would simplify monitoring efforts by filers, as there would be no need to track the events subject to this waiver throughout the period during which it applies.

In response to a question regarding whether PBGC would consider providing for a waiver for companies who voluntarily file 8-Ks with the SEC but may not meet the "Public Company" definition for purposes of the Public Company waiver, PBGC staff said that they would review the issue.
PBGC staff said that PBGC continues to be concerned about required reports that are filed late. The bulk of late filings are regarding missed or late contributions. PBGC staff noted that smaller plans tend to have more filing problems than larger plans. PBGC staff said that they are working on a document that they hoped would be helpful in raising awareness regarding the requirements.

**SUBSEQUENT EVENT:** On October 26, 2018, PBGC posted a newly-created reference tool to help practitioners when advising plan administrators and plan sponsors of small plans (those with 100 or fewer participants) about reportable events. The tool, which is in the form of a checklist and is available at [www.pbgc.gov/sites/default/files/reportable-events-reference-sheet-small-business.pdf](http://www.pbgc.gov/sites/default/files/reportable-events-reference-sheet-small-business.pdf), refers the reader to guidance on PBGC’s website ([www.pbgc.gov/prac/reporting-and-disclosure/reportable-events](http://www.pbgc.gov/prac/reporting-and-disclosure/reportable-events)) on filing requirements, including due dates and whether a waiver from reporting is available.

Staff said that PBGC generally tries to speak with sponsors to find out why they were late in filing required reportable event notices. PBGC has not received a lot of useful feedback: generally the response is that the sponsor was not aware of the requirement.

To date, staff said, PBGC has largely focused on educating plan sponsors and helping them understand the errors that were made so that the errors will not be repeated. In other words, PBGC has focused more on the carrot than the stick (i.e., the imposition of penalties). However, a third of required filings are still filed late. Staff said that PBGC is considering alternatives to address these problems, including the imposition of penalties, which could serve to increase compliance. Staff said that PBGC is also considering whether there should be questions on PBGC premium forms or on Form 5500s regarding whether there have been reportable events and whether they were timely reported.

One attendee suggested that premium forms include an explanation of the active participant reduction (APR) reportable event due to attrition and provide filers the opportunity to provide the report as part of the premium filing, since that APR report is due at the same time as the premium filing.

**Coverage Webpage Update.** PBGC staff noted that, since the fall of 2017, [www.pbgc.gov](http://www.pbgc.gov) has a new site with detailed information regarding what kinds of plans are covered by the pension insurance program and what kinds of plans are excluded from coverage (with a focus on small professional service plans, substantial owner plans, certain Puerto Rico plans, and certain church plans). See [www.pbgc.gov/prac/other-guidance/insurance-coverage](http://www.pbgc.gov/prac/other-guidance/insurance-coverage).

This site also describes the information that PBGC typically needs in order to make a coverage determination, as well as how to make a request for such a determination. PBGC staff also noted that, in the event that a plan that has been paying PBGC premiums
is determined not be covered by Title IV, the PBGC will inform the plan how to request a refund of the premiums.

In response to a question, PBGC said that a regulation providing for the payment of interest on refunded premiums is not on PBGC's regulatory agenda, and that such situations are much less frequent than in the past.

**SUBSEQUENT EVENT:** On December 4, 2018, PBGC published a notice in the Federal Register (83 Fed. Reg. 62629) informing the public that it intends to request that OMB approve, under the Paperwork Reduction Act, a new forms and instructions package to be used by a plan administrator or plan sponsor to request a PBGC coverage determination. The proposed form is available at [www.pbgc.gov/sites/default/files/coverage_determination_form.12.form_.pdf](http://www.pbgc.gov/sites/default/files/coverage_determination_form.12.form_.pdf), and the proposed instructions are available at [www.pbgc.gov/sites/default/files/coverage_determination_instructions.12.pdf](http://www.pbgc.gov/sites/default/files/coverage_determination_instructions.12.pdf).

**Pilot Mediation Project.** PBGC began its Pilot Mediation Project in the fall of 2017. (See [www.pbgc.gov/prac/other-guidance/pbgc-plan-sponsor-pilot-mediation-project](http://www.pbgc.gov/prac/other-guidance/pbgc-plan-sponsor-pilot-mediation-project).) PBGC staff said that the first mediation case under the Pilot Project, which involves termination liability, is underway. PBGC staff said that the agency is hopeful that there will be additional mediation cases under the Pilot Mediation Project and that PBGC will have an opportunity to make a meaningful assessment as to whether the Pilot Project has been successful; if so, PBGC will consider expanding the availability of mediation.

PBGC was asked whether the parties could agree, in lieu of using a mediator from the Federal Mediation and Conciliation Service (FMCS) as provided under the Pilot Mediation Program, to engage a non-FMCS mediator who is mutually acceptable, for example to deal with an extremely complex matter. PBGC staff said that the Pilot Mediation Project contemplates using mediators from the Federal Mediation and Conciliation Service in all cases, and that all FMCS mediators are subject to a code of ethics that prohibits a mediator from mediating a matter if he or she is not qualified to do so. PBGC staff also said that many FMCS mediators are very sophisticated, but that if it were necessary for FMCS to contract out in order to find a qualified mediator, that could be worked through.

**SUBSEQUENT EVENTS:** PBGC staff has indicated that the above-referenced case under the Pilot Mediation Project was successfully resolved through mediation.

On January 24, 2019, PBGC announced on its [What's New for Practitioners](http://www.pbgc.gov/prac/whatsnew.htm) page that its Pilot Mediation Program is now permanent and that PBGC added fiduciary breach cases to the categories of disputes covered by the program.
Interagency Issues Relating to Missing Participants. PBGC published its final Missing Participants rule on December 22, 2017. (See [www.pbgc.gov/sites/default/files/2017-27515.pdf](http://www.pbgc.gov/sites/default/files/2017-27515.pdf).) The final rule revised PBGC's already-existing missing participants regulation—which was limited to single-employer defined benefit pension plans covered by Title IV—to simplify procedures and remove unnecessary rules. The new regulation, as authorized by the Pension Protection Act of 2006, establishes similar missing participants programs for most defined contribution plans, multiemployer plans covered by Title IV, and certain small professional service plans not covered by Title IV. The programs are available only for terminating plans. The rules require that a plan conduct a diligent search for the missing participant before using the PBGC program.

JCEB attendees had a number of comments regarding their experience in dealing with missing participant issues. A common theme was the importance of consistent approaches and guidance by DOL, Treasury, and PBGC, and a concern that unduly onerous requirements should not be imposed, particularly by DOL and Treasury in an ongoing plan context.

PBGC staff pointed out that harmonizing the required diligent search methods required by federal agencies is an important aspect of the final rule. Thus, the rule provides that compliance with DOL's fiduciary search guidance satisfies PBGC's diligent search standard regarding defined contribution plans. And, as noted in the preamble to the final rule, DOL has advised PBGC that it intends to review and possibly revise its regulations and guidance to coordinate with PBGC's implementation of its final missing participants rule.

PBGC staff also said that PBGC has been sharing information with regional DOL offices regarding locating missing participants, and noted that many EBSA regions were using their own resources to assist in finding missing participants.

Premiums. PBGC staff said that PBGC continues to provide an incentive to plans to self-report errors or omissions relating to the amount of premiums paid to PBGC. (See [www.pbgc.gov/sites/default/files/fr-65542-65545.pdf](http://www.pbgc.gov/sites/default/files/fr-65542-65545.pdf).)

PBGC also continues to educate filers about the applicable rules. Staff noted that the agency has implemented a practitioner's suggestion that the comprehensive premium payment filing instructions include a list of common mistakes made by plans in connection with premium obligations, and that the list has proved helpful. However, there are still employers and plans – particularly small plans – that appear to be unaware of or confused by the rules.

PBGC staff said that PBGC automatically checks participant counts and asset figures reported on premium filings against those reported in Form 5500s. Staff also said that PBGC's premium payment system has been updated so that standard letters now go out automatically if certain mistakes are made, and that if the mistakes are corrected within seven days, no penalties will be assessed. Finally, staff said that the My Plan
Administration Account (My PPA) program, which is used to electronically submit premium filings and payments to PBGC, is a very good, very user-friendly program.

**Early Warning.** PBGC staff said that there have been no major developments regarding the Early Warning Program since the EWP webpage was updated about a year ago. (See [www.pbgc.gov/prac/risk-mitigation](http://www.pbgc.gov/prac/risk-mitigation).) Staff said that the current number of Early Warning cases is relatively small, largely due to macroeconomic conditions. Most of PBGC's recent EWP activity has been related to Sears, and each time a new agreement with Sears has been reached, a summary of the agreement has been posted on PBGC's website at [www.pbgc.gov/about/factsheets/page/early-warning/early-warning-program-agreements](http://www.pbgc.gov/about/factsheets/page/early-warning/early-warning-program-agreements).

One practitioner recommended that a statement be added to PBGC Technical Update 00-3, which is still posted on the EWP webpage, indicating that the criteria discussed in that Update has changed and referencing the current criteria.

**MULTIEMPLOYER PROGRAM UPDATE**

**Rule on Mergers and Transfers Between Multiemployer Plans.** PBGC published a proposed rule in June 2016 that would implement PBGC's authority under the Multiemployer Pension Reform Act of 2014 (MPRA) to facilitate mergers of multiemployer plans. (See [www.pbgc.gov/sites/default/files/legacy/docs/2016-13083.pdf](http://www.pbgc.gov/sites/default/files/legacy/docs/2016-13083.pdf).) PBGC staff said that PBGC expects to publish a final rule in August.

**SUBSEQUENT EVENT:** On September 14, 2018, PBGC published a final rule on mergers and transfers limited to the MPRA changes. (The proposed rule also sought to change other provisions in the regulations.) 83 FR 46642, 29 CFR Part 4231. (See [www.govinfo.gov/content/pkg/FR-2018-09-14/pdf/2018-19988.pdf](http://www.govinfo.gov/content/pkg/FR-2018-09-14/pdf/2018-19988.pdf).)

**Guidance Regarding Requests for Approval of Alternative Method of Withdrawal Liability Payments.** In April 2018, PBGC published a policy statement regarding requests under ERISA Section 4224 for approval of alternative methods to satisfy withdrawal liability. (See [www.pbgc.gov/sites/default/files/2018-06780.pdf](http://www.pbgc.gov/sites/default/files/2018-06780.pdf).) PBGC staff said that the guidance provides a list of information that PBGC finds helpful in its review, and general time frames regarding how long it will take to review a request once PBGC receives the required information.

PBGC staff said that PBGC wanted to provide general guidance as to what the agency's concerns are, but also to maintain flexibility, and that the guidance is not intended to foreclose other approaches. PBGC staff said that PBGC welcomes comments on the guidance. If an alternative approach satisfies statutory and regulatory requirements, a plan may use that approach, but PBGC encourages parties to come in and talk with PBGC about alternative approaches. Because this is a new and complex area, many parties feel more comfortable working through the issues with PBGC.

**Other Multiemployer Program Updates.** According to PBGC staff, there are some seven or eight requests for approval of an alternative "two-pool" method for allocating
withdrawal liability pending with PBGC, and two MPRA partition requests. In addition, PBGC is informally consulting with multiemployer plans and employers regarding a variety of matters.

SUBSEQUENT EVENT: On February 6, 2019, PBGC published a proposed rule that would implement changes under MPRA affecting the determination of a withdrawing employer's liability under a multiemployer plan. The proposed rule would provide simplified methods for implementing statutory provisions affecting the determination of withdrawal liability and annual payment amounts when the plan has had benefit reductions, benefit suspensions, surcharges, or contribution increases that must be disregarded. (See www.federalregister.gov/documents/2019/02/06/2019-00491/methods-for-computing-withdrawal-liability-multiemployer-pension-reform-act-of-2014?utm_medium=email&utm_source=govdelivery.)

Special Congressional Committee Regarding Multiemployer Plan Insolvency. PBGC staff has been heavily involved in the efforts of the Joint Select Committee on Solvency of Multiemployer Pension Plans to find ways to address the severe underfunding of troubled multiemployer plans, with three PBGC staff members detailed to the Committee. A report to Congress is due on November 30, 2018.

SUBSEQUENT EVENT: The co-chairs of the Joint Committee announced that the Committee was unable to meet the November 30, 2018, deadline. See www.brown.senate.gov/newsroom/press/release/hatch-brown-commit-to-continued-work-on-pension-crisisPast-nov-30. The Committee was dissolved effective December 31, 2018, as required under the Bipartisan Budget Act of 2018. The issue is now back with the individual committees of jurisdiction.

PBGC Q&A WEBPAGE

PBGC staff said that PBGC had recently posted a new Q&A webpage at www.pbgc.gov/prac/staff-responses-prac-questions. The site contains PBGC staff's answers to questions asked by practitioners about various PBGC-related topics such as premiums, bankruptcy claims, liens arising from large missed contributions, distress terminations, guaranteed benefits, and reportable events. The list of questions is mainly derived from calls or emails PBGC has received from practitioners who are dealing with actual (as opposed to hypothetical) situations facing their clients. Often, PBGC has received a question several times, reflecting a somewhat common situation. A few questions were based on summaries of previous JCEB meetings or from previous Blue Books, with the answers revised if necessary to present current thinking. Although the answers are not binding due to their informal nature, PBGC believes that they will provide helpful general guidance.

PBGC staff said that additional topics, and additional questions within each topic, will likely be added periodically, and that the existence of the webpage will be announced soon. PBGC staff also said that PBGC is working on an index and searchability/cross-
linking functions, and welcomes recommendations and feedback regarding the new webpage.

In answer to a question regarding whether the Q&A webpage would include guidance about PBGC's Early Warning Program, PBGC staff said that EWP guidance may be found on PBGC's EWP webpage, www.pbgc.gov/prac/risk-mitigation.

SUBSEQUENT EVENTS: PBGC announced the new Staff Guidance Q&A webpage on July 25, 2018, and updated the webpage on January 29, 2019. The webpage can be accessed by clicking on the link in the first paragraph of the above discussion, or via the "Other Guidance" page on the "Employers and Practitioners" menu of www.pbgc.gov.

PBGC REGULATORY PROGRAM

Responses To PBGC's RFI. PBGC received 38 comments in response to the Request for Information (RFI) regarding PBGC's regulatory program that the agency issued on July 26, 2017. Staff said that the bulk of the comments were from individuals. (See www.pbgc.gov/sites/default/files/fr_document_rfi.pdf; www.pbgc.gov/prac/pg/other/guidance/other-federal-register-documents.)

The RFI was issued in connection with PBGC's ongoing regulatory planning and active retrospective review of regulations in connection with Executive Order 13777, "Enforcing the Regulatory Reform Agenda." (See www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda.)

PBGC's Semiannual Regulatory Agenda. PBGC staff noted that PBGC's spring semiannual regulatory agenda was published today. (See www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPubId=201804&showStage=active&agencyCd=1212&Image58.x=41&Image58.y=16.) Staff said that today's agenda is the same as PBGC's fall 2017 agenda, with items updated as needed.

PBGC staff said that no comments regarding the proposed rule on Owner-Participant Benefits were submitted by the due date, and that PBGC is in the process of working to finalize that rule. Staff also said that the proposed rule on Terminated and Insolvent Multiemployer Plans and Duties of Plan Sponsors is expected to be published this summer. Staff said that the Benefit Payments rule, which is in the Proposed Rule Stage, would make clarifications and codify policies in PBGC's benefit payments and valuation regulations.

SUBSEQUENT EVENTS: PBGC published its final rule on Owner-Participant Changes to Guaranteed Benefits and Asset Allocation, on October 3, 2018. (See www.govinfo.gov/content/pkg/FR-2018-10-03/pdf/2018-21551.pdf.)

PBGC published its fall 2018 semiannual regulatory agenda on October 17, 2018 (See www.pbgc.gov/prac/pg/other/guidance/regulatory-agendasplans.)

OTHER TOPICS

PBGC staff asked attendees if they had any additional suggestions or comments regarding PBGC matters. One attendee said that it is important that the electronic reading room on PBGC’s website include material that is relevant to issues of concerns to employers, plans, participants, and practitioners. PBGC staff agreed that, in general, if material is guidance that is used in determining public rights, it should be included in the electronic reading room, but also said that not all materials are in publishable form. Staff said that, in moving toward greater transparency, materials need to be reviewed, and if necessary, cleaned up, to make sure that they will be helpful and not confusing.

PBGC staff also said that, under the Freedom of Information Act, frequently requested disclosable records (i.e., those that have been the subject of three or more requests) are automatically posted in the electronic reading room.

In answer to PBGC staff's question as to whether there are any areas regarding which guidance is needed, one attendee suggested that it would be helpful to provide more guidance regarding how guaranteed benefits are calculated in multiemployer plans.

Another attendee suggested that it would be helpful to provide additional guidance as to what factors PBGC considers in determining whether a person meets the third statutory distress test, which requires that, unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business.

It was also suggested that PBGC provide additional guidance regarding the types of arrangements that PBGC might seek (e.g., additional contributions or consensual liens) or agree to (e.g., entry by PBGC into a subordination agreement to allow an employer to obtain needed financing notwithstanding PBGC’s filed 430(k) liens) in the context of an ongoing underfunded plan. PBGC said that it would consider the suggestion.