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**ABA Joint Committee on Employee Benefits**

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# PBGC Questions and Answers

## ABA

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## PBGC

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## PBGC Premiums

1. What is the PBGC's policy with respect to refunding premiums erroneously paid by a plan that was not a covered plan under Section 4022, but has since become covered prior to applying for a refund. For example, assume a plan was a "church plan" excluded from coverage under Section 4022(b) from its adoption in 1990 through December 31, 1995. On January 1, 1996, the sponsor ceases its affiliation with the church, so the church plan exemption is no longer available; the plan is now covered by the PBGC and subject to PBGC premiums. Will the PBGC refund the erroneously paid premiums (subject to the statute of limitations) that are requested after the plan's change in status? If not, please explain the legal basis.

### Answer:

PBGC will refund overpaid premiums, or afford offsets from future premiums, at the payor's request.

### Follow-Up:

Where a plan changes status from single employer to multiemployer (with correspondingly lower premiums), the plan should notify the PBGC to avoid dunning notices.

## PBGC Penalties

2. What has been the PBGC's experience in assessing penalties for late filings? What has been the largest penalty assessed and under what circumstances?

### Answer:

The PBGC indicated that there have been eight types of errors in the premium area. One, not paying premiums for retirees, e.g., because the plan administrator thought the retiree was covered by an annuity. Two, not paying premiums for a terminated nonvested participant. Sometimes this results because the plan administrator does not realize the plan does not have a "deemed distribution" cashout rule. Three, not reconciling the participant count to the Form 1. Four, missing a plan year altogether. Five, not paying premiums for terminated vested participants. Six, not paying the correct premium because assets were improperly reported so there was a higher level of underfunding in reality. Seven, arithmetic errors in the Schedule A. Eight, inadequate records to support the Form 1 numbers. These errors are either discovered on a late filing or a PBGC audit.

The PBGC has recently started to conduct premium audits. Premium audits currently are mainly targeted audits in certain geographic areas. They will become more targeted. This program is a moneymaker for the PBGC!

PBGC has a new premium system that generates premium notices quickly. The system also is programmed to identify certain declines in the number of participants and to send letters asking why this occurred.

### Follow-Up:

Penalties under Section 4071: Most of PBGC's experience is under the 1992 Statement of Policy—not the more recent Statement. Most of the penalties are as a result of a failure to file timely the Form 501 post-dis-

tribution information. The penalties under the earlier policy were sometimes in the thousands of dollars. Under the new program, they are in the hundreds of dollars. And, under the new program, there seem to be many fewer penalties assessed.

The largest reportable event penalty to date was \$5,000 for a failure to report a bankruptcy case. This amount was a negotiated amount. There is a right to administrative review for penalties. On review, there can be a reduction in the penalty amount.

No penalties have yet been assessed in connection with the Form 200, although there is one case pending. PBGC is cross checking information with the IRS and expects to discover cases where the penalty for failure to file the Form 200 should apply.

The PBGC is in the process of computerizing its reportable events reporting system. It expects more reportable event penalties. It is also coordinating information with the IRS. PBGC has become more interested in plans with an underfunding in excess of \$5,000,000. Previously, \$25,000,000 was the threshold.

### **Reportable Events**

3. Summarize the status of the reportable events negotiated rulemaking project. In particular, please discuss:

(a) Are there significant issues that the group could not agree on?

(b) What is expected to be the effective date of the new proposed waivers and will such dates likely be different from the effective dates for the new reportable events?

(c) When are the proposed regulations expected to be issued?

(d) Does PBGC expect to utilize the negotiated rulemaking procedure again in the future? If so, for what regulation projects?

**Answer:**

(a) No.

(b) New reportable events will be prospective only; waivers to reportable events will be retroactive.

(c) A draft of the proposed regulations is expected to be circulated to members of the negotiated rulemaking project by late May.

(d) This is the last RPA regulation project. No new significant regulations are being planned.

4. What special arrangements has the PBGC made with multinational corporations to ease reportable event reporting requirements?

**Answer:**

PBGC has made special arrangements with Michelin, the parent of Uniroyal Goodrich. Michelin merged an overfunded and an underfunded plan. Michelin agreed to contribute \$350,000,000 and to contribute normal cost for the next six years. Most of the \$350,000,000 came from the French parent. In fact, the contribution actually made was \$380,000,000, i.e., \$30,000,000 in excess of the agreed upon amount. The normal cost funding obligation was agreed to by Michelin North America. As a result of this agreement, Michelin received an exemption from the reporting requirements for reporting certain foreign brother-sister transactions. Previously, one of their plans was within the top five underfunded plans on PBGC's top 50 list. PBGC understands that Michelin made a business decision to improve funding in the plan. This agreement was negotiated over a long period of time beginning before RPA was introduced.

### **Missing Participants**

5. What has been the PBGC's experience under its missing participant program under Section 4050?

**Answer:**

Sixteen plans have participated in the program and have transferred responsibility for 150 participants. PBGC received approximately \$600,000 in cash on their behalf. The PBGC has had a very high success rate in finding missing participants by using commercial credit bureaus rather than the IRS or Social Security locators. The PBGC would prefer that employers use the same private organizations.

### Standard Terminations

6. What has been the PBGC's experience in auditing terminated plans? In particular, what types of problems have been most common (e.g., lump sum calculation interest rates)? What other problems have been identified?

**Answer:**

The PBGC indicated that common problems found as a result of standard termination audits include a failure to use the proper interest rate (described as the "vast majority of problems"), failure to use proper mortality tables or other actuarial factors and the failure to offer all required options or obtain spousal consents.

7. Under Section 4041(b)(2)(C), the PBGC has the ability to accept defective standard terminations that have failed to satisfy the procedural rules of Section 4041(b)(2)(A) or (B) if rejection of the termination "would be inconsistent with the interests of participants and beneficiaries." Has this discretion been exercised and under what circumstances?

**Answer:**

The PBGC said that it has exercised the authority under Section 4041(b)(2)(C) to accept defective standard terminations in appropriate circumstances. However, they indicated they would only exercise this authority if doing so is in the best interests of participants. For example, the PBGC said it is not likely that a defective filing would be allowed unless an amendment ceasing benefit accruals had already been adopted.

PBGC has also exercised discretion where Form 500 was late by a short period or where final distributions were late. In addition, PBGC has exercised discretion to honor the processing of a termination but required accruals to continue for a period of time (i.e., where no freeze amendment was adopted, the sponsor need not begin the entire termination process over although accruals are required to continue).

### Reversion of Surplus Assets

8. Assume that a contributory plan permits a reversion for the portion of surplus assets that is not attributable to employee contributions. If the plan is involved in a spin-off-termination pursuant to an amendment in which the surplus attributable to employee contributions is allocated to the ongoing plan, may the employer receive a reversion of the surplus in the terminating plan without violating Section 4044(d)(2)? Does the answer differ if the spin-off amendment causes only part of the reversion to be allocated to the terminating plan?

**Answer:**

Following §414(l), the on-going plan must have at least as much of a share of the surplus, including the employees' share of the surplus, as it would have had if it had terminated immediately before the transaction.

9. If a contributory plan terminates with surplus assets, should the participants' share of the surplus be determined net of benefits that have already been distributed. The regulations under Section 4044 appear to indicate that category 2 benefits are determined net of benefits attributable to employee contributions that have already been distributed. Should such employees' share of the plan's surplus be reduced by the contributory benefits that have been paid out?

**Answer:**

The PBGC declined to answer this question.

## Notice of Significant Underfunding

10. If a multiple employer plan is underfunded by more than \$50 million, but each unrelated employer's share is less than \$50 million (individually and in the aggregate with any other plans of each such unrelated employer) is a notice required under Section 4010?

**Answer:**

PBGC is currently studying the question in response to an inquiry from a plan. However, it will not penalize nonfilers at the current time.

11. Would PBGC reconsider the Section 4010 actuarial assumptions used in measuring a plan's underfunding for purposes of the filing requirement for plans that are subject to the full funding limit but, nevertheless, are currently subject to the Section 4010 filing requirement?

**Answer:**

The agency has no plans to reconsider the Section 4010 actuarial assumptions for plans subject to the full funding limit.

## Corporate Transactions

12. The BNA Pension Reporter of February 12, 1996, included a copy of a letter from the PBGC to a plan trustee setting forth the Corporation's view that a transfer of assets in a corporate transaction did not satisfy Code Section 414(l) because the interest assumption applied was not determined on a terminating plan basis.

(a) Please explain the PBGC's interpretation of Code Section 414(l).

(b) Under what authority is the PBGC acting?

(c) Under what circumstances does PBGC intend to apply this practice in the future?

(d) Is the PBGC examining transactions that have already closed for compliance with this interpretation?

**Answer:**

(a) The PBGC advised that its interpretation is "the same as everyone else's interpretation." PBGC assumptions are a safe harbor; the actuary may use other reasonable assumptions. However, the PBGC also indicated that, where PBGC assumptions are not used, the PBGC would like to see a demonstration on a settlement basis.

The PBGC further advised that it is acting under the new reportable event provisions. In the instant case, there was a \$50 million dollar swing in plan funding: The plan was \$20 million dollars overfunded before the spin-off, but \$30 million dollars underfunded after the spin-off using PBGC assumptions. Instead, the plan used FAS 87 assumptions. Further, interest rates dropped dramatically during the period surrounding the transaction. PBGC took the position that the assumptions were inadequate.

(b) The PBGC advised that it has authority under Code Section 7476 to bring a declaratory judgment action relating to the plan's qualification. They said they could also ask the DOL to bring a breach of fiduciary duty action and the IRS to move to disqualify the plan.

(c) The PBGC does not have a set policy, but may look at any transaction unless the actuary certifies that the safe harbor is met.

(d) The PBGC prefers to deal with transactions before they occur. However, if the PBGC finds a closed transaction in violation of Code §414(l), it will discuss with the DOL and the IRS the appropriate action to take.

13. At least one sponsor that is neither subject to Section 4010 nor in the advance reportable event group recently received a letter from the PBGC after an anticipated transaction was announced in which

the PBGC requested extensive financial information about the plan and the sponsor (although no reportable event had occurred or might ever occur). A division was announced for sale but no specific buyer had been found. On what basis was this information requested and what would be the consequences if the sponsor ignored this request?

**Answer:**

The information requested was part of the PBGC's Early Warning Program, which was established in 1991 before the enactment of the Retirement Protection Act, which added Section 4010 and certain subsections of Section 4043. The Early Warning Program was established to provide the PBGC with advance information concerning transactions that might pose a risk to the agency and participants. When PBGC monitoring reveals a transaction that might pose a risk, the agency's practice is to contact the company to find out more about the transaction and request certain financial information. The PBGC then makes the company aware of any concerns that it might have. Generally, the company will accommodate the PBGC's concerns, e.g., by keeping the pension plan which it had intended to spin-off, putting additional money into the plan or deciding not to sell the division. If a company refuses to provide the PBGC with the requested information, the PBGC could issue a subpoena [pursuant to Section 4003(b)]. If a public company is involved, the PBGC can (and in one case has) informed the SEC that it has problems with the proposed transaction. Ultimately, the PBGC could seek to terminate the pension plan if its concerns were not accommodated.

**Substantial Cessation of Operations**

14. What is the PBGC's current interpretation of Section 4062(e) as it applies to sales of divisions or subsidiaries? Has any litigation occurred in this regard?

**Answer:**

There has been little enforcement because these factual situations arise infrequently. Interpretive issues surround the question of what is a "facility" and what is a "cessation." Several Opinion Letters have discussed the fact that Section 4062(e) does not apply in particular situations.

**Benefit Liabilities**

15. 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?

**Answer:**

The PBGC declined to answer.

16. 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 after a plan termination?

**Answer:**

The PBGC has not applied penalties this year. Litigation in *Blau-Knox* is continuing in the Sixth Circuit on the question of whether the five year period runs from the date that the seller stopped subsidizing the buyer or from the date that the sale occurred.

**Litigation**

17. Please describe significant new PBGC litigation in the past year that has set (or is likely to set) important precedent and that should be of interest to benefits attorneys who are not professional litigators.

**Answer:**

*PBGC v. Acme Precision Products*, 19 EBC 2258 (E.D. Mich.)

This involved whether the statute of limitations had run on employer liability. The PBGC was successful

on the statute of limitations issue. An underlying challenge to employer liability of the entire controlled group is under administrative appeal at the PBGC.

*Piggly Wiggly*, 19 EBC 1163 (N.D. Ala.) (1995)

The district court upheld PBGC's determination of a wrongful \$1 million dollar reversion where only PBGC immediate interest rates were used for lump sum distributions (instead of immediate and deferred rates depending on the circumstances). The employer argued reliance on current (although outdated) regulations. The employer appealed to the Eleventh Circuit, which affirmed the district court without opinion.

*Fetty v. PBGC*, 915 F.Supp 230.

PBGC, acting as trustee of a terminated plan was sued by participants for shutdown benefits. The PBGC position was that the termination preceded the shutdown. The district court held that the PBGC's administrative decision was entitled to judicial deference.

There has been a great deal of litigation over the priority of PBGC claims and bankruptcy. Cases include: *In Re Bailey Corp.*; *CF&I Fabricators*; and *Copperweld Steel*.