ABA Joint Committee on Employee Benefits
GOVERNMENT AGENCIES MEETINGS

MAY 1997

ABA Sections of Business Law, Health Law, Labor and Employment Law, Real Property, Probate and Trust Law, Taxation and Tort and Insurance Practice
PBGC Questions and Answers

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PBGC Premiums

1. Please describe the standards that PBGC applies in determining whether to reduce or abate penalties for late payment of premiums.

Answer: The standards were generally described in a notice published in the Federal Register on December 2, 1996. A plan administrator must provide a demonstration of "good cause," based on the facts and circumstances. Above all, prudent behavior in administering the plan is required. For example, where a disaster has occurred in the business place generally, or specifically with respect to the plan's records, relief would generally be available. However, where the plan administrator was "too busy" would not be good cause.

2. Does PBGC have a general policy permitting late premium penalties to be reduced for late payers that voluntarily pay premiums before a delinquency notice is issued by PBGC?

Answer: Under the December 2, 1996 Federal Register notice, for plan years beginning after December 31, 1995, the delinquency penalty will be 1 percent per month, provided the penalty is paid before a notice of delinquency is issued by the PBGC. After a notice is issued, the penalty will be 5 percent per month for all months (including pre-notice months).

3. Is PBGC considering a voluntary compliance program such as the Delinquent Filer Voluntary Compliance program (DFVC) or the Voluntary Compliance Resolution program (VCR) to enable self-reporting by delinquent premium payers subject to a significantly reduced late payment penalty?

Answer: PBGC offered a "voluntary compliance" program for pre-1996 delinquencies using a 1 percent per month penalty. This expired March 31.

4. Please describe the PBGC's experience in its premium audit program. Are premium overpayments being identified (in addition to underpayments)? If so, is the PBGC notifying the payer?

Answer: The program has been very successful. Field audits have identified $4.8 million in underpayments and 5500 reviews have identified an additional $3.2 million of underpayments. The audit is typically a multi-year review. PBGC prepares a detailed analysis of any underpayments or any overpayments for each year, then nets these to arrive at a final figure. A copy of the detailed analysis is given to the plan (or the employer). If there were a net overpayment, the overpayment would be refunded; in fact, none of the plans reviewed to date have had net overpayments.
5. Premium audit letters from PBGC suggest that if there is a discrepancy in the participant count between the PBGC Form 1 and the 5500, and it is determined by the plan sponsor that the 5500 is incorrect, then there is an obligation to file a corrected 5500. Is this an “official” PBGC position? Has this position been discussed with and approved by the IRS or the Labor Department?

Answer: There is an obligation to file a correct Form 5500. The PBGC has informally discussed this position with IRS and DOL. Where a 5500 review reveals a discrepancy between the participant count on the 5500 and on the Form 1, PBGC sends a form to the plan (or employer), requesting that the plan (or employer) categorize the discrepancy by checking the reason for the discrepancy. If the box on the form is checked to say “the 5500 is wrong,” the form indicates the plan must file a corrected 5500. In response to a question concerning the obligation to file a corrected 5500 if the errors are insignificant, the PBGC said the errors they have seen to-date have all been significant. Responding to another follow-up question, the PBGC said it could not say whether DOL would apply 5500 penalties if the 5500s were corrected.

Plan Termination Insurance Coverage

6. Where the IRS has ruled that a plan is and always has been a “church plan” under Section 414(e) of the Code, are there any circumstances in which the PBGC would not honor such a determination under Section 4021(b)(3) of ERISA?

Answer: Generally, the PBGC will honor a private letter ruling issued under Section 414(e) of the Code. If, however, there has been fraud or any misrepresentation in the request for the letter ruling, PBGC would not honor it. PBGC also reserved judgment on “bizarre circumstances.” In most cases, however, the plan obtains a letter ruling, then applies for a PBGC refund, and PBGC processes the refund request.

7. Are there circumstances under which the PBGC would disregard an election of ERISA coverage under Section 410(d) of the Code by a plan administrator of a church plan that is otherwise exempt under Section 4021(b)(3)?

Answer: PBGC voiced concerns about refunding premiums to a church plan that is not now covered by Title IV, but that subsequently becomes covered. Coverage would not be available if the Amendment to Section 410(d) election were to violate a prior agreement by the plan administrator under which the PBGC issued premium refunds but the plan administrator represented that a Section 410(d) election would not be made in the future.

Standard Terminations

8. Please provide examples of situations in which PBGC has exercised its discretion not to nullify a defective standard termination because it has determined that the nullification “would be inconsistent with the interests of participants and beneficiaries”.

Answer: PBGC makes case-by-case determinations of whether nullification of a defective standard termination would be inconsistent with the interests of participants and beneficiaries. The key question in making this determination is whether benefit accruals would otherwise continue beyond the proposed date of termination. If not (e.g., because of a plan freeze), PBGC probably will not nullify the termination. Willful or egregious violations of the rules will, however, result in nullification of a defective standard termination. PBGC also noted that in a top-heavy plan where benefit accruals cannot be cut off by a plan freeze, PBGC has on occasion agreed that benefit accruals would continue for non-key employees only but, that for Title IV purposes, the standard termination would not be nullified.

9. In the past, it is our understanding that PBGC has referred to the Labor Department cases in which the standard termination notice lists “financially marginal” insurance companies from among which an irrevocable commitment will be purchased. Is this practice still being followed? How does this practice relate to the statement in the preamble to the proposed amendment to the PBGC standard termination regulations that PBGC will audit insurer selections for compliance with fiduciary standards and “take appropriate corrective action?” What “corrective action” is referred to and what is the PBGC jurisdiction?

Answer: Beginning in March 1997, when PBGC issued a proposed amendment to its standard termination regulation, PBGC will no longer notify a plan sponsor during the termination process of any fiduciary question relating to an insurance company from whom irrevocable commitments may be purchased. Instead, PBGC intends to notify sponsors, when they initiate a termination, of their fiduciary responsibility to select an appropriate annuity provider in accordance with the Labor Department’s Bulletin 95-1. However, until the proposed rule is finalized, sponsors must still notify PBGC in advance of the identity of the list of potential insurers it is considering. In all cases now (not just problem cases) PBGC will notify the Labor Department of actual annuity purchases in standard termination cases, including the name of the insurance company from whom irrevocable
commitments were purchased. This notification will be made after PBGC receives post-distribution information. Referrals to the Labor Department will no longer be made concerning specific insurance companies that may or may not be used to provide annuities. In conducting an audit of a terminated plan, PBGC will review the insurance company selected and apply the standards in the Labor Department Bulletin to determine if the sponsor acted consistent with its fiduciary responsibility.

10. The proposed amendments to the standard termination regulation add rules regarding post-termination amendments. To what extent do these rules represent a change in PBGC’s previous position regarding post-termination amendments? Please describe categories of specific situations in which PBGC has challenged post-termination amendments.

Answer: The Proposed Rules do not represent a change in the PBGC’s previous position regarding post-termination amendments.

PBGC has a long-standing policy of opposing post-termination amendments that may harm participants. PBGC does not object to post-termination amendments that are necessary to maintain the plan’s qualified status, nor does the PBGC object to post-termination amendments that benefit the plan or its participants, such as amendments that may reduce the amount of any plan asset reversion to the employer.

11. Where a retiree-only plan purchases and distributes annuities (i.e., “irrevocable commitments”) for all participants, thereby satisfying all benefit liabilities, is it necessary thereafter for the plan to satisfy the standard termination procedures under Section 4041?

(a) If so, to whom would the NOIT be issued, etc.?

(b) Would the plan’s premium payment obligation cease after all assets have been distributed upon such annuity purchase (regardless of the plan’s termination date under Section 4048)?

Answer: In a situation where a retiree-only plan purchases and distributes annuities for all participants, the PBGC would take a ‘close look’ at the annuities purchased to ensure that all benefit liabilities to each participant had been satisfied. Once assured that the annuity distribution was proper and was consistent with the plan practice, the PBGC would require that certain standard termination procedures under Section 4041 be followed. The following are a few examples of procedures and exceptions to procedures:

- Notice of Intent to Terminate or Notice of Plan Benefits do not have to be given to participants;
- File Form 500 and 501 - but do not pay premium if irrevocable commitments obtained before the “snapshot date.”
- Must file Form 1 through and including year standard termination is completed

12. In auditing terminated plans, what assumptions are most often challenged in reviewing lump sum calculations? Has PBGC been challenging “age” assumptions? Mortality assumptions?

Answer: Audits challenge interest rates most often - but an audit checks all (actuarial) assumptions. The PBGC wants to insure that other assumptions (as well as the interest rate assumption) are properly applied.

Follow-up: What would happen if some participants ‘slipped through the cracks’?

Answer: The PBGC would require (pursue) the employer to pay the participant(s) benefit - the PBGC’s purpose is to insure that all participants are made whole and therefore (if the employer is cooperative) the termination would not be voided. The termination would be voided only if it becomes necessary in order to make the participant(s) whole.

13. What has been PBGC’s experience in handling divorce orders in terminating plans? What impact has the PBGC booklet on divorce orders had in processing divorce orders?

Answer: The PBGC has found that QDROs generally are in a much better condition following the issuance of the PBGC’s booklet. However, some information is still missing. Although the purpose of the booklet was to increase the PBGC’s efficiencies, the PBGC has found that many parties are utilizing the booklet for QDROs in a non-PBGC context.
Allocation of Assets

14. Is a plant closing benefit that is triggered by a post-termination date plant closing a benefit under Category 6 in Section 4044(a)?

Answer: Yes. Any benefit that is still available under the plan on termination will be at least a Category 6 benefit. This is regardless of whether the benefit is eligible for Section 411(d)(6) protection.

Substantial Cessation of Operations

15. Does PBGC take the position that, where a subsidiary or division of a plan sponsor is sold and at least 20% of the seller’s participants cease employment with the seller’s controlled group, an event arises under Section 4062(e) regardless of whether the employees continue performing identical work for the purchaser? If so, does PBGC automatically require a five year bond or escrow under Section 4063 as if the affected participants’ portion of the seller’s plan had terminated (in lieu of imposing employer liability on the seller)? Is the bond/escrow requirement negotiable?

Answer: PBGC typically applies Section 4062(e) to plan closings. The provision may also apply to asset sales to unrelated purchasers. These situations are subject to negotiation with the PBGC in order for the PBGC to obtain security arrangements. Only a few cases have occurred (which were asset sales). The PBGC’s Early Warning Program was the impetus to track Section 4062(e) events.

In response to a follow-up question as to how to test for a 20% cessation of employment, the PBGC responded that the partial termination rules under the Code do no apply. This is an independent facts and circumstances analysis.

Transactions to Evade Liability

16. Please describe recent situations in which the PBGC has determined that the principal purpose of a transaction is to evade liability under Title IV, pursuant to Section 4069.

Answer: Section 4069 has been infrequently invoked. The leading case, White Consolidated Industries, is currently being litigated (involving a transfer of pension liabilities in a corporate spin-off).

Multiemployer Plans

17. Under Section 4207(b), a plan may adopt alternative rules for the abatement of withdrawal liability upon an employer’s reentry into the plan. Is PBGC approval required where the rules were adopted by the plan prior to the promulgation of the final regulation?

Answer: Under regulations issued in March 1986 at Section 4207.10, a plan may adopt rules subject to PBGC approval. Prior to 1986, a plan could take reasonable action (see, PBGC Opinion Letter issued in August 1983).

18. Under Section 4207(b), a plan may adopt alternative rules for the abatement of withdrawal liability upon an employer’s reentry into the plan, provided that the PBGC approves the amendment. Must the plan provide a copy of the PBGC approval to an employer upon request?

Answer: There is no reference to this issue in Title IV. However, the plan must provide notice to participating employers of the adoption. An employer could obtain a copy of the PBGC’s approval under the Freedom of Information Act.

Miscellaneous

19. What legislative changes are under current consideration by PBGC for submission to Congress to improve the solvency of the plan termination insurance program?

Answer: None. PBGC is now solvent.

20. In recent years, very few (if any) PBGC opinion letters have been published. Please explain.
Answer: PBGC has received very few requests in recent years. However, the Opinion Letter Manual also has not been updated recently.

21. Please describe the PBGC's jurisdiction on the issue of an employer's contribution of options in employer stock to its defined contribution plan. Please explain the legal position taken by PBGC officials in opposing the DOL's proposed prohibited transaction exemption on behalf of the Travelers Group, Inc. and IRS private letter ruling 9712033.

Answer: The PBGC has no jurisdiction over this issue.