Joint Committee on Employee Benefits Q&A
with Pension Benefit Guaranty Corporation
based on meeting with staff on
May 8, 2002

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 and the responses were given at a meeting of JCEB and government representatives. The responses reflect the unofficial, individual views of the government participants as of the time of the discussion, and do not necessarily represent agency policy. 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 has not been reviewed by PBGC staff members. The questions were submitted in advance to the agency, and it was understood that this report would be made available to the public.

PBGC Premiums and Coverage

1. **Question:** Last year PBGC indicated that the Corporation is presently reevaluating it's premium audit program.

(a) Please describe the status of the program and any changes that have been implemented.

(b) Please indicate the premium audit program results in the past year.

Answer: The PBGC's Premium Compliance Program is being restructured. Among other things, the PBGC will seek much less information from sponsors (e.g., volume of W-2s) in order to avoid being burdensome. The PBGC will be using outside auditing firms, and PBGC will act in a monitoring and oversight role. An entrance conference will be held to explain the process, and an exit report will be issued at the end of the process.

2. **Question:** Please describe any changes in the PBGC premium structure under consideration that may be used to encourage the formation of new defined benefit plans and the likelihood that these changes will be enacted.

Answer: Of the various proposals under consideration by Congress, several are premium related. These would (1) redefine the term "substantial owner" to refer instead to "majority owner," (2) provide that newly adopted defined benefit plans maintained by sponsors with under 25 employees would pay a premium of only five dollars per participant for the first five years, (3) provide for a phase-in of the variable rate premium at a rate of 20% per year for all new plans; and (4) lower the cap on variable rate premiums for employers with no more than 25 employees to "$5 squared." In addition, PBGC would be authorized to pay interest on premium refunds.

Overall, other major premium reforms are unlikely, particularly since the PBGC's budget surplus is substantially down. Moreover, the LTV termination is likely to be very costly ($2 billion in underfunding).

3. **Question:** If a plan that is a PBGC covered plan (section 4022(a)) pays estimated premiums by the last day of the second month following the start of the plan year but ceases to be a covered plan during that premium payment year, will PBGC agree to refund a portion of the estimated premium payments? For example, where a calendar year plan of a section 501(c)(3) hospital pays estimated premiums early in the 2002 premium payment year, but becomes a "church plan" (section 4021(b)(3)) on July 1 of the premium payment year, will PBGC refund premium payments on a prorated basis?

   Suggested answer: Yes. Although this situation is not described in regulation section 4006.5(f) involving proration of premiums for short plan years, it appears that the change in status from a covered to a non-covered plan is analogous to a mid-year plan termination for which a premium refund would be allowed under section 4006.5(f).

   Answer: No. There are three exceptions in the regulation: (1) a short plan year, (2) a change in plan year, and (3) plan termination. Accordingly, this was specifically omitted from the regulations. The PBGC indicated that this is a very complex issue. Among other things, the corporation is concerned about plans that may go in and out of coverage in the same year.

4. **Question:** ERISA section 3(37) defines a multiemployer plan as one maintained pursuant to two or more bargaining agreements between the union(s) and two or more employers. There is no requirement that bargaining-unit employees make up a majority of the participants; indeed, a percentage test like that was dropped from the definition in 1980. There is also no requirement that the plan be jointly trusteed under the Taft-Hartley Act.

   Some plans that have traditionally been treated as a multiple employer plans now believe that they are in fact multiemployer plans because a number of their sponsoring employers contribute pursuant to labor agreements for some part of their workforce. These plans did not elect, pursuant to MPPAA, to be treated as single employer plans.

   (a) Are there any formalities such a plan needs to go through to secure its multiemployer status?

Suggested answer: No. A definition is a definition, a plan either meets it or it doesn't. For assurance, however, the plan sponsor might want to seek a PBGC Advisory Opinion confirming its judgment.

(b) Has the PBGC encountered and ruled on such cases?

(c) Can a plan that determines it is really a multiemployer plan put that concept into effect prospectively? Can it choose to put it into effect retroactively?

Suggested answer: For administrative simplicity, a plan can begin treating itself as multiemployer and comply with the multiemployer rules as of the plan year in which the sponsor determines that it is a multiemployer plan. Assuming it has not terminated, it will be treated as non-multiemployer for all prior years. It will start amortizing the funding bases and everything else as if it had just become multiemployer by, e.g., adding an employer with a union contract.

Alternatively, the plan sponsor may recognize its multiemployer status retroactively, recreating the multiemployer amortization bases for plan funding, assessing withdrawal liability and applying for a refund of excess PBGC premiums.

Answer: The treatment of existing multiple employee plans as multiemployer plans is currently subject to active inter-departmental enforcement activity. The definitional issue is primarily within DOL's jurisdiction as it involves a DOL regulation. The government is concerned that this is an area ripe for abuse where sponsors are seeking to change the status of a plan from multiple employer to multiemployer.

5. **Question:** Please explain the proposals to incorporate various aspects of defined contribution plans under Title IV and indicate the PBGC's position.

Answer: Expanding the missing participant program to cover defined contribution plans is supported by the PBGC as a convenience to defined contribution sponsors on plan termination. However, expanding insurance coverage would create many difficulties, in particular the fact that benefit guarantees could be akin to insuring against losses in the stock market. Any expansion to defined contribution plans would require congressional action.

Plan Terminations and Employer Liability

6. **Question:** Please describe the current status of the PBGC's "Early Warning Program." Have any changes to the program been implemented since the PBGC issued Technical Update 00-3?

Answer: The employer profile has been refined to focus on companies with investment grade securities and underfunded plans. Program letters to sponsors have been reduced by 10% and there is more research performed in advance of issuing a letter. Letters have been issued at the rate of 100-150 per year recently. Only five settlement agreements were necessary last year.

It was also noted that PBGC has seen a significant increase in filings under section 4010. There were 80 filings in 2001, and there have been 250 so far in 2002 [*i.e.,* as of May 8, 2002, the date of the meeting].

7. **Question:** What is PBGC's recent experience in post-termination audits?

Answer: PBGC selects a statistically significant sample of recent plan terminations for audit. A sponsor will receive notice of the audit within three months following the filing of a Form 501 notifying the PBGC of the post-termination distribution of assets. Audits after the three-month period would be outside of the random program. The most frequent violation identified involves the calculation of lump sum distributions. For example, these include the use of wrong age or interest rates or the use of an incorrect month as the "look-back month" according to the rules under Internal Revenue Code section 417(e).

8. **Question:** Please describe any 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: PBGC is prosecuting a new case against USP (E.D. Michigan) in which the PBGC is at risk for $5 million in losses. In this case, the sponsor separated a subsidiary from it's ongoing controlled group. The subsidiary sponsored an underfunded plan. The breaking of the controlled group relationship arose when the parent required officers in the subsidiary to acquire stock in the subsidiary individually in order to break the controlled group chain before terminating the plan.

Miscellaneous

9. **Question:** With the recent termination of the underfunded LTV defined benefit plan, please describe what impact, if any, this may have on the PBGC, including the financial impact, possible legislative or regulatory proposals, and changes in the Early Warning Program.

Answer: PBGC's exposure is between $1 billion and $2.2 billion. No Congressional activity is expected. PBGC expects no changes to the Early Warning Program.

10. **Question:** Please describe significant PBGC litigation in the past year that would be of interest to defined benefit practitioners.

Answer: Harley v. Minnesota Mining and Manufacturing Company, 284 F3d 901 (8^{th} Circuit, 3/26/2002). Participants in an overfunded plan sued the fiduciaries for breach of fiduciary duty for investment losses in connection with a hedge fund that went bankrupt. The district court found for the plan fiduciary and the 8^{th} Circuit affirmed. Both PBGC and DOL are filing an amicus brief seeking a rehearing en banc. Related to this, there are also issues as to whether the plan actually was overfunded.

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