

**American Bar Association  
Joint Committee on Employee Benefits**

**Q&A Session with PBGC  
May 18, 2005**

*The following notes are based upon the personal comments of the various individuals from the Pension Benefits and Guaranty Corporation who attended a meeting with the representatives of the various sections comprising the Joint Committee on Employee Benefits from the American Bar Association on May 18, 2005. The comments were made by these individuals in their individual capacities and not as representatives of the PBGC, or of any other government agency or office. None of these comments should be considered official guidance or the position of any agency.*

*This document has been prepared by private sector members of the American Bar Association's Joint Committee on Employee Benefits who were present at the meeting and reflects their description of the answers to the questions that were discussed at the meeting. This document has not been reviewed or cleared by the government individuals involved in the meeting.*

**REPORTABLE EVENTS**

**Question 1.**

Assume that Plan A, a non-multiple-employer single-employer plan, spins off new Plan B; that Plan B is transferred to another controlled group as part of a sale of assets to that other controlled group; that all benefit liabilities for half of the active participants in Plan A are transferred to Plan B as part of the spinoff; and that the spinoff is not reportable under 29 CFR § 4043.32 ("Transfer of benefit liabilities") because of the applicability of one or both of the waivers in § 4043.32(c)(3) ("Section 414(1) safe harbor") and .32(c)(4) ("fully funded plans").

- a. Is the transaction reportable as an active participant reduction under § 4043.23? (Note that the response to Question 19 of the 2005 Blue Book treats a similar situation involving a multiple-employer single-employer plan as an active participant reduction.)

**PBGC Response:**

The transaction is reportable as an active participant reduction. Under the fact pattern, the reduction in participants is 50%, which fits the literal language of § 4043.23. Moreover, the only burden on the employer or plan administrator is merely to submit a notice.

This fact pattern could also give rise to other reportable events. The spinoff of Plan B, and its transfer from seller's controlled group to buyer's

controlled group would appear to result in all members of the seller's controlled group ceasing to be members of the controlled group of the Plan B "portion" of pre-transaction Plan A, and thus could be a reportable event under § 4043.29 ("Change in contributing sponsor or controlled group"), subject to applicable waivers in § 4043.29(c) (which does not include any waiver for compliance with Code section 414(l)).

Similar fact patterns could also give rise to reportable events. For example, if Plan A remained with the seller's controlled group, but simply transferred the benefit liabilities for the participants involved to another plan established or previously maintained by buyer, the transaction would be reportable under § 4043.32, subject to applicable waivers in § 4043.32(c). Alternatively, if the transaction had been structured as a stock sale of one of the members of the seller's controlled group, the transaction could be reportable under § 4043.29 (subject to applicable waivers) not only with respect to Plan B, but also with respect to Plan A and any other plans of seller's controlled group. It was noted that this reportable event would occur as of the date the parties enter into a legally binding agreement to transfer ownership and thus could occur prior to any reportable event under § 4043.23.

**Follow-Up Question:**

Would a reportable event occur as a result of an active participant reduction under § 4043.23 if a portion of a plan representing the benefit liabilities for half of the active participants is spun off to or transferred to another plan within the same controlled group?

**PBGC Response:**

In the view of the PBGC staff, such a spinoff would appear to constitute an active participant reduction under § 4043.23, under the literal terms of that section. However, it is doubtful whether the PBGC would devote significant enforcement resources to address such situations, as the PBGC is far more concerned about transfers outside of a controlled group.

- b. If so, did the reportable event occur with respect to Plan A, Plan B, or both?

**PBGC Response:**

Under the fact pattern described in the Question 1, the reportable event under § 4043.23 would occur with respect to Plan A, as that was the plan that had the participants as of the start of the year and had the participant reduction thereafter.

- c. Would the responses to 1.a. or 1.b. be different if Plan A had instead split up into two new plans, Plan B and Plan C?

**PBGC Response:**

If Plan A splits up into two new plans, Plan B and Plan C, the analysis under § 4043.23 is not materially different. Plan A still has a participant reduction. Indeed, it would appear to have lost 100% of its participants. Since Plan A would no longer exist at the time the notice would be due to the PBGC (30 days after the transaction), the plan administrators and contributing sponsors of Plans B and C would have the reporting obligation.

- d. Alternatively or in addition, assuming that the asset sale involves the transfer of a discrete set of “operations at a facility in any location” from the buyer to the seller, might this constitute an event under ERISA section 4062(e) for which reporting is required under ERISA section 4063(a)?

**PBGC Response:**

The PBGC declined to respond to this question.

**PLAN TERMINATIONS**

**Question 2.**

Please describe the analytical framework the PBGC uses in evaluating whether to proceed with an involuntary termination of a plan under ERISA section 4042(a)(4) (relating to “long-run loss”).

**PBGC Response:**

In general terms, the analysis involves two steps:

1. A review of whether there is a reasonable likelihood of plan termination (without which, there could be no loss to the PBGC). In this step, financial analysts run projections going out several years to attempt to assess the likelihood of plan termination.
2. If plan termination is a reasonable likelihood, then the analysis turns to whether the PBGC’s position would be better if the plan were terminated currently, rather than at a later date. If so, the “long run loss” criteria for involuntary termination may be met.

As a matter of procedure, potential involuntary plan termination cases are first identified in the Early Warning Program, by personnel including attorneys, financial analysts, auditors and actuaries. Potential involuntary termination cases are then reviewed in more detail by the Trusteeship Working Group, which also includes attorneys, financial analysts, auditors and actuaries, for uniformity in treatment with other cases.

The most typical long-run loss scenario involves corporate sales or spinoffs, where liability would attach to one or more solvent companies if a termination occurred prior to a transaction, but the solvent companies could not be reached if the plan termination occurred after the transaction.

Other fairly common long-run loss situations occur where plans contain significant shutdown benefits for which the PBGC would become responsible if termination occurred after the shutdown event, or where plan assets are decreasing due to a high volume of lump sum benefit payments.

A notable long-run loss case is *PBGC v. FEL Corporation*, 798 F. Supp 239 (D. NJ. 1992). That case involved a breakup of a controlled group, and the court agreed with the PBGC determination to involuntarily terminate the plan on the basis of a long-run loss analysis, and also approved of the two-prong analysis used by the PBGC, as described above.

**Follow-Up Question:**

Sometimes an employer invites PBGC to use its ERISA section 4042 powers to involuntarily terminate a plan, such as the situation in which the employer would not be equipped to complete a distress termination. Are there any differences between the way in which a “friendly 4042” case is handled and other cases?

**PBGC Response:**

Most distress termination cases do convert into involuntary terminations under ERISA section 4042. However, the PBGC will convert cases only if it concludes that the ERISA section 4042 criteria are met. In non-bankruptcy situations, the PBGC desires the controlled group to provide proof that the criteria are met -- not just data, but a brief with substantial analysis, along the lines of what would be submitted for a private letter ruling. (The PBGC also prefers such a demonstration with respect to a distress termination.)

In addition to its authority to convert a distress termination into an involuntary termination, the PBGC also has discretion to waive some of the filing and procedural requirements for a distress termination. For example, the PBGC will often use this discretion to waive the need for actuarial calculations. Those calculations can often be expensive for an employer and might otherwise be charged to the plan. Furthermore, the PBGC ultimately would perform the calculations itself, even if they were included in the distress filing.

**Further Follow-Up Question:**

In non-bankruptcy cases, how bad does the employer’s financial situation have to be in order to permit a distress termination? Does the employer have to be on “life support” or will mere “hospice care” be sufficient?

**PBGC Response:**

More than just red ink is necessary to justify a distress termination. The PBGC takes several factors into account, including:

- The sponsor's projected revenues and projected costs.
- Whether the sponsor has adopted, or intends to adopt, a follow-on plan.
- Whether all reasonable business steps have been taken to reduce expenses to "bare bones," and the company has exhausted all other reasonable avenues, including getting funding waivers for the plan contributions.

The instructions for the distress termination notice (Form 601) lists some required information to be provided in connection with such an analysis. In addition, in some cases, the PBGC is willing to negotiate a final contribution by the sponsor and then permit a distress termination to occur.

### **Question 3.**

Please describe the criteria the PBGC uses in determining whether to object to a "follow-on" plan.

#### **PBGC Response:**

The initial concerns regarding follow-on plans arose in the 1980s, with cases in which new plans were intended to replicate the benefit structure under the terminated plan which the PBGC had assumed. At that time, the PBGC issued opinion letters indicating that follow-on plans in such cases could be abusive and be subject to restoration under the PBGC's powers in ERISA section 4047.

In 1986 or 1987, in the LTV case, the PBGC first used its power under section 4047 to restore a plan (see *PBGC v. LTV*, 496 US 633 (1990)). This case still represents the PBGC's position regarding follow-on plans.

There is no list of factors for determining whether restoration is proper in a given case - it is a facts and circumstances test. Among the important circumstances are whether the new plan acts to induce employees to agree to the termination of the prior plan.

Plan sponsors are encouraged to talk through these matters with the PBGC in advance. The PBGC has never indicated that all follow-on plans are abusive or should trigger restoration of the prior plan. Furthermore, the PBGC has approved situations in which defined contribution plans were adopted after termination of a defined benefit plan.

There is no bright line rule regarding how soon after the termination of a prior plan a new plan must be adopted in order to be considered a follow-on plan. However, the longer the time between the original plan termination and the adoption of the new plan, the less the concern would be, in part because the financial condition of the company can change with time. There is also no bright line rule regarding what percentage of replacement benefits is sufficient to trigger treatment as a follow-on plan - it is an evolving area. In

determining what benefits are lost, early retirement subsidies are taken into account as well as normal retirement benefits.

#### **Question 4.**

When the PBGC is valuing benefits under ERISA section 4044 for a cash balance plan that uses a variable index for its interest credits, how does the PBGC determine the amounts of future annuity benefits that depend on the performance of that variable index?

#### **PBGC Response:**

The PBGC has an internal operating policy for valuing such benefits for purposes of allocating plan assets under section 4044 and for purposes of determining the benefits the PBGC will pay from such plans. [Scrivener's note: A copy of the policy is attached.]

In general, for valuing such benefits for purposes of allocating plan assets under section 4044, if the plan uses one of the indices permitted under IRS Notice 96-8, then (1) the PBGC will project interest credits on the hypothetical cash balance account from the date of plan termination to the expected retirement date using the 30-year treasury rate as of the date of plan termination, decreased by the "Associated Margin" (for variations from 30-year Treasuries) for the variable index used by the plan, as set forth in IRS Notice 96-8, and increased or decreased by any plan margin (e.g., +50 basis points where the plan's interest credit is 1-year Treasury constant maturities +50 basis points), (2) the PBGC will then convert the hypothetical account at that expected retirement date into an annuity commencing at that same date using the plan's conversion factors, and (3) the PBGC will discount that annuity back to the date of plan termination using the PBGC's interest and mortality assumptions under the valuation regulations.

For purposes of computing the annuity benefit which the PBGC will pay from a terminated cash balance plan, the policy generally provides that the PBGC will use the actual performance of the plan's variable index.

#### **Question 5.**

The PBGC conducts its standard termination audits after the plan administrator has completed the distribution and filed the post-distribution certification, and does not consider itself bound by an IRS Determination Letter. Would the PBGC be willing to make an advance determination as to the validity of a proposed distribution (e.g., where there is an interpretive issue either as to plan provisions or as to applicable law)?

#### **PBGC Response:**

The PBGC is not inclined to provide advance determinations on proposed distributions, largely because many of the problems it finds on audit (e.g., delayed lump sums resulting in a new stability period and, therefore, a different "applicable interest rate") cannot be anticipated in advance. However, the PBGC is willing to consider answering specific

interpretive questions in advance. In addition, the PBGC would defer to the IRS with respect to the determination of an interpretive issue regarding plan benefit calculations.

#### **Question 6.**

Under what circumstances, if any, would the PBGC treat a standard termination of an underfunded plan (with an employer commitment to make the plan sufficient) as valid where, immediately before the standard termination, the terminating plan had been spun off from an underfunded plan that remains ongoing?

#### **PBGC Response:**

The PBGC declined to respond to this question.

#### **Question 7.**

(The following question is also being addressed to the Internal Revenue Service and the Department of Treasury. We would appreciate the PBGC's view on both the minimum funding liability and termination liability aspects of this question.)

Code section 412(c)(11)(B) and ERISA section 302(c)(11)(B) impose derivative joint and several liability for minimum funding deficiencies on all members of a controlled group of corporations if the sponsoring employer of a single employer defined benefit or money purchase pension plan within that group fails to make the required minimum funding contributions to the plan in question. Under certain circumstances, Code section 412(n) and ERISA section 302(f) impose a lien on all assets of the members of a controlled group of corporations if a sponsoring employer within that controlled group fails to timely make required minimum funding contributions, which lien arises on the due date of the unsatisfied minimum funding contribution. In the case of a controlled group member that is not a cosponsor of the pension plan in question and whose employees are not participants in the plan, if (i) the controlled group member leaves the controlled group during the middle of a plan year in an arms-length sale to an unrelated buyer, (ii) the transaction is not undertaken to avoid pension liability, and (iii) the plan sponsor subsequently fails to make required minimum funding contributions for the year, is the former controlled group member still potentially liable on a derivative basis under Code section 412(c)(11)(B) and ERISA section 302(c)(11)(B) for such minimum funding contributions, and if so for what portion of the plan year? In other words, what is the relevant date for determining controlled group status for derivative liability under Code section 412(c)(11)(B) and ERISA section 302(c)(11)(B)?

Proposed Answer: Consistent with the minimum funding lien rules, the relevant date for determining controlled group member status for purposes of derivative liability under Code section 412(c)(11)(B) and ERISA section 302(c)(11)(B) is the date the minimum funding contribution is due, with a possible exception for sales of entities out of the controlled group for a principal purpose of avoiding

derivative funding liability. This would also be consistent with the ERISA section 4062 controlled group member liability rule that imposes liability on those entities that are controlled group members on the termination date of a Title IV single-employer plan, subject to the five-year "look-back" rule for transactions undertaken with a principal purpose of avoiding controlled group liability.

**PBGC Response:**

The PBGC declined to respond to this question.

**Question 8.**

The response to Question 19 of the 2001 Blue Book stated that the PBGC was looking closely at the issue of how pre-tax section 401(k) money that was used to purchase an annuity from a defined benefit plan should be treated under ERISA section 4044 if the defined benefit plan later terminates. In the response, PBGC staff said that the PBGC's preliminary reaction was that the pre-tax money does not fall into Priority Categories 1 or 2 (voluntary or mandatory employee contributions, respectively), and that the benefit liabilities attributable to the pre-tax money would therefore be treated in the same manner as benefits attributable to employer contributions, i.e., benefits in Priority Categories 3 through 6. Has the PBGC reached a definitive conclusion on this set of issues and, if not, is the current thinking still as described in the 2001 Blue Book?

**PBGC Response:**

No definitive decision has been made regarding this issue, but the current thinking is still as described in the 2001 Blue Book.

**PBGC PREMIUMS**

**Question 9.**

Small plans that are subject to the 30-year phase-in of the PBGC's guarantee for substantial owners and that are significantly overfunded for guaranteed benefits in many cases must pay very large variable-rate premiums under current law—sometimes thousands of dollars for a plan with just a few participants. This is because the calculation is based on underfunding for vested benefits rather than for guaranteed benefits. The Administration's pension reform proposal regarding single employer plans would appear to make the problem worse rather than better because the new "risk-based premium" calculation would be based on underfunding for all benefits. Is there any thought being given to building in premium relief for these very small plans?

**PBGC Response:**

This issue is not addressed in the pension funding proposal. However, the PBGC noted that the proposed National Employee Savings and Trust Equity Guarantee Act of 2005

(NESTEG) legislation sponsored by Senator Grassley (S. 219) would reduce the 30-year phase-in to a 10-year phase-in, which would reduce this concern.

**Question 10.**

There is a vast discrepancy between the flat rate premium of \$19 per participant and the multiemployer rate of \$2.60, a greater than 7-1 ratio. That differential would expand to approximately 12-1 if the administration's pension reform proposal regarding single employer plans is adopted.

- a. Is the differential reflective of the PBGC's risk or of other considerations?

**PBGC Response:**

The difference between the premium levels is a result of the statute and there is no direct correlation between the rates and the PBGC's relative risks under the programs. However, the PBGC noted that the insured benefits and events triggering the guaranty are significantly different under the single-employer and multiemployer programs. In addition, the deficit the PBGC reported in the multiemployer program as of September 30, 2004, was \$236 million, far smaller than the corresponding deficit of \$23.305 billion reported in the single-employer program.

- b. Is the single-employer scheme subsidizing the multiemployer scheme?

**PBGC Response:**

The single-employer scheme is not subsidizing the multiemployer scheme, since the two programs are maintained separately under ERISA.

**ADMINISTRATION'S PENSION REFORM PROPOSAL**

**Question 11.**

Is the PBGC considering revising its method for determining plan termination liability to utilize the assumptions for calculating the ERISA minimum funding amounts (and lump sum payment amounts) under the administration's pension reform proposal regarding single employer plans (the "Yield Curve Approach")?

**PBGC Response:**

This pension funding proposal did not include such a change. Moreover, the PBGC is currently comfortable with its methodology for determining plan termination liability (which is based on market prices for annuity contracts), even though there may be some differences between the amounts determined under that method and the Yield Curve Approach.

**Question 12.**

As of September 30, 2004, the PBGC reported a deficit under its single-employer program (excess of the present value of the liability for future benefits under the program over program assets) of \$23.305 billion. In addition, in its Performance and Accountability Report for the fiscal year ended September 30, 2004, the PBGC estimated that single-employer defined benefit plans in the following two categories were underfunded (generally based on December 31, 2003 data) by the amounts indicated below:

Category	Estimated Underfunding (in Billions)
Plans of Companies with Credit Ratings Below Investment Grade and Classified as Reasonably Possible of Termination	\$96
All Plans	Over \$450

In this regard:

- a. Please clarify the extent to which each of the assumptions (*e.g.*, interest, mortality, expected retirement age, load) used for the reported deficit, and for each of these two additional estimates, are in line with, or differ from, those utilized by the PBGC in determining an employer’s liability upon a plan termination.

**PBGC Response:**

The mortality assumptions for the reported deficit are based on a table which reflects the PBGC’s actual experience, while the mortality assumption utilized by the PBGC in determining an employer’s liability upon a plan termination is set forth in regulations (see § 4044.52 *et seq.* and the proposed changes to them). The proposed regulations are intended to bring the mortality assumptions more in line with those currently used by insurance companies for providing annuities.

Despite the differences in mortality assumptions, the two methods generate values for plan funding status which are very close to the same. This is due to the fact that under both methods, the PBGC starts by obtaining annuity quotations and then essentially divides the annuity prices by the mortality factors involved to derive the interest assumptions. As a result, the differences in the mortality assumptions are effectively offset by differences in the resulting interest rate assumptions.

The \$450 billion figure is based on data from the Form 4010. The PBGC noted that that data is based on a different expected retirement age assumption than those for the other figures. In addition, that figure was

determined by rolling forward the December 31, 2003 data to September 30, 2004.

- b. If available, what would the corresponding estimates for the deficit under the single-employer program, and the funding status of the plans in the two additional categories, be if the interest assumptions were changed to:
- i. the assumptions under the Yield Curve Approach?

**PBGC Response:**

Using the assumptions under the Yield Curve Approach, the \$23 billion deficit figure would be reduced to approximately \$19 billion.

- ii. the 30-year Treasury rate?

**PBGC Response:**

Using the 30-year Treasury rate, the deficit would be between \$19 billion and \$23 billion.

- iii. the rate of interest on long-term corporate bonds, both on a spot basis and (as used for current liability) on a four-year weighted average basis?

**PBGC Response:**

Using the rate of interest on long-term corporate bonds on a spot basis, the \$23 billion deficit figure would be reduced to approximately \$18 billion.

- iv. a rate more in line with historical assumptions regarding return on plan assets, such as 7% or 8%?

**PBGC Response:**

The deficit would be lower than \$18 billion, but would still be “somewhere in the teens.”

**Follow-Up Question**

Will the recent downgrading of the credit ratings of Ford and GM impact the \$96 billion figure?

**PBGC Response:**

Yes.

### Question 13.

In the event that the PBGC Board is given discretion to determine the amount of the variable rate premium, then:

- a. what factors would be taken into consideration in making the determination?

**PBGC Response:**

As described in the Blue Book, a key factor that the Board would consider in making the determination of the variable rate premium would be the combined premium amount needed to retire the PBGC deficit under the single-employer program over a reasonable time (expected to be approximately 7 years).

- b. have any projections or estimates been made of the amount that the variable rate premium would initially be set at and the amount of revenue which it would generate? (We note in this regard that for the year ended September 30, 2004, the flat-rate premium of \$19 per participant generated approximately \$677 million and the variable rate premium of \$9 per \$1000 of underfunding generated approximately \$804 million. If the number of participants remains relatively constant, an increase in the flat rate premium to \$30 could be expected to generate approximately \$1.068 billion, leaving the variable rate structure to account for any additional budgeted increase in premium revenue, either via an increased number of employers paying the premium or an increased premium rate, or both.)

**PBGC Response:**

The Administration's budget proposal reflected estimated flat rate and variable rate premium increases of approximately \$18 billion over 5 years, which would be sufficient to retire the PBGC single employer program deficit in ten years (rather than 7 years).

The estimated rate per \$1,000 of underfunding in the variable rate premium was estimated to be approximately the same as the \$9 per \$1,000 rate currently in effect. However, under the budget proposal, the variable rate premium would generate greater revenue by expanding the base of plans that would pay the variable rate premium. Currently, only 17% of participants are covered by plans which have to pay the variable rate premium, since plans which are subject to the full funding limit do not pay the variable rate premium. In contrast, under the proposal, all plans with unfunded benefits would pay the variable rate premium, which would increase the percentage of participants in plans paying the variable rate premium to between 80% and 90%, increasing the amount of revenue generated by the variable rate premium.

However, the budget reconciliation figure approved by Congress was significantly lower than the amount included in the Administration's budget proposal. This would impact the rate at which the PBGC deficit could be retired and could actually cause the rate per \$1,000 for the variable rate premium to go down.

The PBGC will be issuing a pension data book addressing a number of issues including premiums very soon. It will be located in the PBGC Publication/White Papers portion of the PBGC website. [Scrivener's note: see <http://www.pbgc.gov/publications/databook/databook04.pdf>]

## **MISCELLANEOUS ISSUES**

### **Question 14.**

Please describe the reorganized PBGC in sufficient detail so that practitioners will know which office to contact for a particular purpose.

#### **PBGC Response:**

Attached is a new organizational chart and press release describing the reorganized PBGC. [Scrivener's note: The press release is also available on the PBGC's website at [http://www.pbgc.gov/news/press\\_releases/2005/pr05\\_34.htm](http://www.pbgc.gov/news/press_releases/2005/pr05_34.htm).]

### **Question 15.**

The PBGC announced as part of its initiation of the Participant Notice Voluntary Correction Program that it "is expanding its Participant Notice enforcement program with a view toward more actively auditing compliance and assessing penalties for noncompliance" (69 Fed. Reg. 25792 (May 7, 2004)). Please describe the PBGC's current and planned enforcement activities in this area and summarize the most common errors found.

#### **PBGC Response:**

Prior to the introduction of the voluntary correction program, the PBGC was aware that there were issues with compliance with the participant notice requirement and desired to give plans the opportunity to clean the slate. The PBGC program has closed for calendar year plans, but is still open for some fiscal year plans. Overall, there was less participation in the program than the PBGC had expected.

Common participant notice errors found by the PBGC relate to situations in which the employer failed to use the model notice or to provide the notice to all of the proper individuals.

The PBGC is now in the process of expanding enforcement efforts and finalizing a new penalty policy for failure to provide participant notices. To assist employers with compliance, the PBGC will try to provide updated model notices on an earlier basis. In connection with enforcement efforts, the PBGC indicated that based on information in the Forms 5500, it is able to identify employers who should have provided participant notices.

**Question 16.**

When the PBGC assesses an information penalty against a plan administrator under ERISA section 4071, under what circumstances would the PBGC pursue the plan administrator in his or her personal capacity to collect the penalty? In particular, please address the situation where the plan administrator is an officer of the plan sponsor and is designated by the plan to serve as the plan administrator by virtue of his or her position with the plan sponsor.

**PBGC Response:**

To date, the PBGC has not pursued a plan administrator in his or her personal capacity to collect an information penalty. However, the PBGC notes that the penalties for noncompliance can be heavy, with the maximum penalty currently at \$1,100 per day for failure to provide the PBGC with information it requests under ERISA section 4071.

**Question 17.**

The PBGC's regulations governing the Missing Participants program provide that, "[i]n the absence of proof of death, individuals not located are presumed living" (29 CFR § 4050.2). Does the PBGC interpret this provision as requiring the plan to pay a designated benefit for the missing participant regardless of the age the individual would be if still alive, or does the provision merely create a presumption that may be rebutted (e.g., where the participant would be 150 years old if still alive)?

**PBGC Response:**

The PBGC declined to provide an answer to this question, either regarding whether any age would be appropriate for cutting off the presumption and regarding whether the presumption is even rebuttable absent actual proof of death.

**Question 18.**

The response to Question 12 of the 2001 PBGC Blue Book noted that the PBGC, in its standard termination audit program, "currently" divides plans into two strata, selecting for audit all plans with 500 or more participants and a random sample from among the smaller plans. The Blue Book response made clear, however, that the PBGC may from time to time change its procedures for selecting plans to audit, including the number of

strata and the thresholds between strata. Is the information in Question 12 of the 2001 Blue Book still current?

**PBGC Response:**

The information in the response to question 12 of the 2001 Blue Book is still current.

**Follow-up Question:**

What percentage of plans with fewer than 500 participants are audited under the standard termination audit program?

**PBGC Response:**

The PBGC declined to provide an answer to this question.

**Question 19.**

Have there been any situations within the last year in which the PBGC invoked the prohibition under section 4069 that the principal purpose of a transaction was to evade liability? Please include matters that were settled during or in advance of litigation.

**PBGC Response:**

The *Cone Mills* proceeding (Bankr. Del.) included a claim by the PBGC under ERISA section 4069. In that case, the debtor maintained an underfunded plan. The debtor had requested, and received, permission from the Bankruptcy Court to enter into a stock sale. However, after the deal was approved by the Bankruptcy Court, the debtor and the buyer agreed to change the transaction from a stock sale to an asset sale. Because the effective date of the sale was before the date of plan termination, changing the transaction from a stock sale to an asset sale could have allowed the buyer to escape employer liability. The PBGC brought suit both under ERISA section 4069, and other provisions, including the Federal Fraudulent Conveyance Statute (28 USC §3304). The case has been settled.

**Question 20.**

Please describe PBGC litigation in the past year that has established precedent that would be of interest to attorneys who are not primarily litigators.

**PBGC Response:**

Notable recent cases have included:

*Enron* litigation:

The PBGC filed an action in Texas to terminate an Enron plan. Enron, as Chapter 11 debtor, argued in Bankruptcy Court in New York that filing an action to terminate the plan constituted a violation of the automatic stay. The Bankruptcy Court rejected this argument.

*In re: Kaiser Aluminum*, 34 Employee Benefits Cas. (BNA) 2228 (D. Del. 2005):

The plan sponsor, a debtor in a Delaware bankruptcy proceeding, filed for approval of a distress termination of four defined benefit pension plans. The company argued, and the Bankruptcy Court held, that in evaluating whether the distressed termination requirements were satisfied, the plans could be considered on an aggregated basis. The PBGC appealed this determination, arguing that under the statute the determination of whether the distress termination requirements were satisfied should be analyzed separately for each plan. The Delaware District Court upheld the Bankruptcy Court decision and cited to *In re: Wire Rope Corp. of America, Inc.*, 287 B.R. 771 (Bankr. W.D. Mo. 2002) to support that conclusion. As of the date of the Q&A Session, the time for appeal had not run, but the PBGC was contemplating appeal. The PBGC noted that other courts had come to the opposite conclusion, and have accepted the PBGC position, including in the *In re: Special Metals Corp.* case.

*In re: WCI Steel* (Bankr. N.D. Ohio):

In this Chapter 11 bankruptcy case, competing plans of reorganization were filed. The PBGC filed objections to the reorganization plan proposed by the note holders, on the grounds that that plan did not address how the debtor's pension plans would be treated. The Bankruptcy Court rejected the note holders reorganization plan, as well as the other proposed organization plan.

*PBGC v. Republic Technologies International, LLC, et al.*, 386 F.3d 659 (6th Cir. 2004):

This case involved whether the date of plan termination should be treated as prior to, or after a shutdown event. Approximately \$95 million of shutdown benefits were at stake. The union had argued that participants had enhanced expectations to get shutdown benefits, and that those expectations should be taken into account in determining the termination date. The District Court agreed with this position. On appeal, the Sixth Circuit reversed and held that there were no enhanced expectations of shutdown benefits, and the court accepted the date of termination which the PBGC had determined. The Supreme Court has denied certiorari.

*United Airlines* litigation, including *In re: UAL Corporation*, 2005 Bankr. LEXIS 816 (Bankr. N.D. Ill. 2005):

The PBGC highlighted one aspect of this Chapter 11 reorganization case. The PBGC filed to involuntarily terminate the pilots pension plan. The retired pilots objected to this involuntary termination and the issue is still being litigated. This issue remains open despite the general settlement which the PBGC reached with United Airlines, and this plan will be terminated if the courts ultimately determine that the involuntary termination requirements are satisfied.

**Follow-Up Question:**

Have there been any cases in which the PBGC has pursued a foreign affiliate for liability with respect to a terminated plan? Does the PBGC have a policy in this respect?

**PBGC Response:**

It depends upon whether the PBGC finds out about the existence of the foreign affiliates and whether there are avenues for collection. There are jurisdictional issues in attempting

to collect against foreign affiliates. However, the PBGC has, in fact, pursued foreign affiliates in some earlier cases, one of which involved a Canadian affiliate.

**Question 21.**

Please describe any PBGC administrative or compliance initiatives in the past year that would be of general interest to employee benefit attorneys, service providers, employers and participants.

**PBGC Response:**

PBGC went electronic in 2005. Section 4010 (Annual Employer Financial and Actuarial Reporting) filings are now to be made electronically, with a choice for the first year of making the filing via the PBGC website or simply emailing the information in; so far this year, approximately 50% of the reports were filed via the PBGC website. Submitting the PBGC Form 1 (Premiums) electronically is proposed to become mandatory starting in 2006 for plans with 500 or more participants, and in 2007 for all other plans (with limited exemptions on a case-by-case basis). The PBGC has also introduced software which allows individual participants in plans for which the PBGC is responsible to access information regarding their benefit payments. In addition, it is revising software to permit plan sponsors, plan administrators, and pension professionals to make a variety of filings and pull up information with respect to their plans in “My Plan Administration Account” (My PAA).

The PBGC has also issued a proposed rule on how to calculate liability under ERISA section 4062(e) (the cessation of operation/20% loss of plan participants rule). The PBGC has received many comments regarding this proposal and is evaluating them as it prepares to develop a final rule.

The PBGC has also issued proposed revisions to the valuation regulations, to change the mortality table used in calculating the present value of plan benefits upon a plan termination (see Prop. Reg. § 4044.52). The change in mortality assumptions is not anticipated to have a significant impact on the amount of liabilities upon plan termination, because use of the updated mortality table will result in a corresponding and offsetting change in the interest assumptions. This will occur because the PBGC will continue to obtain annuity quotations in the same manner as in the past, and then use the quoted premium price and the mortality assumptions to derive the appropriate interest assumptions.

*The preceding 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.*

## Attachments

### PBGC Cash Balance Policy (Q&A 4)

See CashBal.pdf, attached

### PBGC Press Release (Q&A 14)

**FOR IMMEDIATE RELEASE**

**April 13, 2005**

**PBGC Public Affairs, 202-326-4040**

## **PBGC Restructures for Better Customer Service**

### *Changes Result in New Contacts for Pension Professionals*

WASHINGTON—The Pension Benefit Guaranty Corporation (PBGC) has realigned its corporate structure to better reflect the agency's two principal lines of business: providing insurance coverage to pension plan sponsors and participants, and paying benefits to retirees in terminated plans that PBGC administers as trustee. The organizational changes are designed to improve the agency's responsiveness to its customers and to developments in its business environment.

"These changes will enable the PBGC to deal effectively with the unprecedented financial and legal challenges facing the pension insurance program," said Executive Director Bradley D. Belt. "In recognition of the interdisciplinary skills required to handle major risks, teams of actuaries, financial analysts, lawyers and accountants will be grouped under a newly created Insurance Program Department."

Certain organizational changes are of particular interest to customer groups such as pension plan sponsors and administrators who transact business with PBGC on a regular basis. The key changes:

- The head of the new Insurance Program Department (IPD) will be Terrence Deneen, who previously served as PBGC's principal deputy general counsel.
- On matters concerning ERISA and bankruptcy litigation related to ongoing and terminated pension plans, the principal point of contact shifts from the Office of the General Counsel to Chief Counsel Jeffrey B. Cohen, who heads the Office of Chief Counsel in IPD.
- For all matters related to PBGC's Early Warning Program or pre-termination activities, the new point of contact is IPD's Division of Insurance Supervision and Compliance (DISC), headed by Acting Director John L.

Spencer. These areas were formerly handled by the Corporate Finance and Negotiations Department and the Pre-Termination Processing Division, whose functions are now part of DISC. The principal responsibilities of DISC are to monitor the financial condition of pension plans and the companies that sponsor them, and to ensure that plan sponsors comply with the provisions of Title IV of ERISA.

- Plan administrators filing for standard terminations will continue to contact the Standard Termination and Compliance Division, now a part of IPD. Also within IPD is the new Multi-employer Program Division, headed by Acting Manager John Foster, which monitors multi-employer pension plans and handles their requests for financial assistance.
- On regulatory affairs, pension practitioners and others who previously contacted the office of the Assistant General Counsel for Regulations now will contact the new Legislative and Regulatory Department, headed by Acting Director James J. Armbruster.
- Contacts remain the same for external customers whose business relates to PBGC's Office of the Chief Financial Officer, including financial operations and premium payments. The restructuring also does not alter current customer contacts in the Office of Information Technology or in the Procurement Department.

The PBGC is a federal corporation created under the Employee Retirement Income Security Act of 1974 (ERISA). It currently guarantees payment of basic pension benefits earned by 44 million American workers and retirees participating in over 31,000 private-sector defined benefit pension plans. The agency receives no funds from general tax revenues. Operations are financed largely by insurance premiums paid by companies that sponsor pension plans and by investment returns.

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PBGC No. 05-34

#### **PBGC Organizational Chart (Q&A 14)**

See PBGC-cht.pdf, attached

**PBGC OPERATING POLICY MANUAL****Chapter 5. Benefit Determination & Valuation****5.12-1 Cash Balance Plans - Valuing and Paying Benefits 1st Ed. 10/24/00**

<u>I. Purpose</u>	<u>II. Scope</u>	<u>III. Background</u>
<u>IV. Benefit Valuations</u>	<u>V. Annuity Payments</u>	<u>VI. De Minimis Lump-Sum Payments</u>
FIRST (1st) Edition 10/24/00		<u>Transmittal 67</u>

For further information, contact: Joan Weiss, ext. 6840

**I Purpose**

PBGC has recently trusteeed a number of cash balance plans. In general, PBGC will treat these plans the same as any other defined benefit plan. However, cash balance plans have certain features that create unique, new issues for PBGC. On July 6, 2000, PBGC published a request for comments on these issues in the **Federal Register**. Comments have been received from several parties, and PBGC is studying those comments. PBGC may issue rules on these issues in the future.

In the meantime, PBGC must process cash balance plans. This operating policy is intended to provide PBGC staff with guidance on how to process these plans before PBGC develops final rules.

**II Scope**

This policy states the special rules that PBGC will apply to cash balance plans with respect to:

- valuing benefits for purposes of employer liability, section 4044 asset allocation, and section 4022(c) determinations,
- determining the annuity that the participant will receive, and
- determining whether the participant is eligible for a de minimis lump-sum payment and, if so, the amount of that payment.

This policy deals only with cash balance plans. Hybrids other than cash balance plans, such as pension equity plans, raise different issues than cash balance plans. Those hybrids should be referred to OPSS for consultation with CPRD and OGC.

This policy applies to all cash balance plans that terminate in a distress or involuntary termination, regardless of whether DoPT or trusteeship precedes the policy's issuance. Although the policy is principally directed at plans trusteeed by PBGC, PBGC will also apply the policy to non-trusteed plans as appropriate. Any questions on the applicability of this policy to non-trusteed plans should be referred to OPSS for consultation with CPRD and OGC.

**III Background****A Description of Ongoing Cash Balance Plans**

A cash balance plan is a defined benefit pension plan. However, unlike most defined benefit plans that describe the participant's benefit in terms of the participant's annuity at normal retirement age, a cash balance plan generally will define the participant's benefit by reference to the amount of a hypothetical account balance. A typical cash balance plan provides that each year the plan will credit a participant's hypothetical account balance with a pay credit (*i.e.*, a percentage of the participant's pay for the year) and an interest credit (*i.e.*, the hypothetical earnings on the account balance). The plan must specify both the pay credit and the interest credit. The cash balance plan also must specify the conversion factor that the plan will use to determine the annuity from the account balance. (The annuity conversion factor can be a single number, can be shown in a table, or can be derived from specified interest and mortality assumptions.)

Participants in ongoing cash balance plans who separate from employment generally have the right to receive their benefits in annuity form, although they typically choose (with spousal consent) to receive their benefits in lump sum form. In most cases, the plan defines the lump sum amount as no less than the hypothetical account balance. While cash balance plans generally are designed to pay only the hypothetical account balance, they may have to pay more in some cases in order to avoid an impermissible forfeiture under Code section 417(e) and ERISA section 205.

Under Code section 417(e) and ERISA section 205, the amount of a lump-sum may not be less than the present

value of the participant's normal retirement annuity, using either plan factors or the applicable interest rate and mortality table of Code section 417(e) (currently, the yield on 30-year Treasuries and GAM-83 mortality), whichever produces the greater value. To determine this present value in a cash balance plan, the plan must project the hypothetical account balance using the interest credit up to the participant's normal retirement date, convert that amount to an annuity, and then discount the annuity back to the calculation date using the yield on 30-year Treasuries and GAM-83 mortality (or plan factors if the plan factors would provide a greater present value.) However, when PBGC calculates the DoPT present value of *de minimis* lump-sums in a trustee plan, it substitutes the PBGC lump-sum assumptions for the plan/Code section 417(e) assumptions to determine the amount of the lump-sum. In either case, because the interest credit may be greater than the discount interest rate, the present value of the annuity may be greater than the hypothetical account balance.

Many plans, however, simply pay a lump-sum in an amount equal to the hypothetical account balance. The IRS has said that doing so complies with the Code and ERISA (*i.e.*, nonforfeiture is not violated) if the interest credit meets certain requirements. The IRS set forth the permissible values for the interest credit in Notice 96-8 (1996-1 C.B. 359), summarized in the table below at IV.B. 2. Plans that satisfy Notice 96-8 may pay a lump-sum equal to the hypothetical account balance, regardless of whether a greater amount would otherwise be required under Code section 417(e) and ERISA section 205.

#### **B PBGC's Issues for Trusteed Cash Balance Plans**

When a cash balance plan terminates in a distress or involuntary termination, PBGC must perform its plan valuation and make its benefit determinations as it does for a traditional defined benefit plan. PBGC uses the plan's interest credit and annuity conversion factors to make benefit determinations. If the plan's interest credit and annuity conversion factors are fixed or if the plan provides a method for converting variable factors to fixed rates ("fixing" the variable factors), the plan presents fewer special valuation or payment issues. However, PBGC faces unique issues when it must perform a plan valuation or calculate a *de minimis* lump-sum as of DoPT for a plan that lacks a fixed index or a method for fixing a variable index.

### **IV Benefit Valuations**

#### **A General**

This paragraph IV. deals with how to perform the valuation as of DoPT. See paragraphs V. and VI. for explanations of how to calculate benefits that will be paid to participants. Note that there may be a difference between the valuation liability for a participant and the amount PBGC will pay to the participant as a lump-sum. In order to value a participant's benefit, PBGC must calculate the value, as of DoPT, of the participant's annuity commencing at expected retirement age (XRA). To determine the participant's annuity, PBGC must project the participant's hypothetical account balance using the plan's interest credit from DoPT to the participant's XRA, then convert that projected balance to an annuity using the plan's annuity conversion factors. PBGC must then determine the value of the annuity. To do this, PBGC must discount the annuity to DoPT using PBGC's interest and mortality assumptions under the valuation regulation (for annuities or lump-sums, as appropriate).

The XRA is calculated by reference to a plan's earliest retirement age. Many cash balance plans allow elective lump-sums (and hence must provide immediate annuities) at any age. A participant's earliest "retirement age" is not simply his or her current age merely because the participant can receive an immediate annuity. Rather, PBGC will determine the earliest retirement age in a cash balance plan as in any other plan.

In valuing benefits for cash balance plans, PBGC will follow its general valuation rules for trustee plans, supplemented by the following guidance.

#### **B Projecting the Account Balance**

##### **1 Fixed Interest Credit**

If the plan document specifies a fixed interest credit, PBGC will use that rate to credit the participant's hypothetical account balance. PBGC will follow plan procedures as to the frequency of interest crediting and the conversion of annual rates into rates for crediting more frequently than annually.

##### **2 Variable Interest Credit Based on a 96-8 Index.**

The following chart shows Standard Indices and their Associated Margins as set forth in IRS Notice 96-8

Notice 96-8 Standard Index	Associated Margin
<b>The discount rate on</b>	
3-month Treasury Bills	175 basis points
6-month Treasury Bills or 12-month Treasury Bills	150 basis points
<b>The yield on</b>	

1-year Treasury Constant Maturities	100 basis points
2-year Treasury Constant Maturities or 3-year Treasury Constant Maturities	50 basis points
5-year Treasury Constant Maturities or 7-year Treasury Constant Maturities	25 basis points
10-year Treasury Constant Maturities or any longer period Treasury Constant Maturities	0 basis points
<b>Annual rate of change of the Consumer Price Index</b>	3 percentage points

If the plan document specifies a variable interest credit that is based on an index that is specified in IRS Notice 96-8 (see above) -- either with no plan margin or with a plan margin that is constant (regardless of whether it is outside the Associated Margin specified in IRS Notice 96-8) -- PBGC will fix the variable interest credit as follows:

Start with the average of the annual yields for 30-year Treasury constant maturities ("30-year Treasuries") for the month specified in the plan and --

- (i) decrease it by the "Associated Margin" (for variations from 30-year Treasuries) for the variable index the plan uses, as set forth in IRS Notice 96-8 (see above), and
- (ii) increase or decrease it by any plan margin (e.g., in a plan that defines the interest credit as the yield on 1-year Treasury constant maturities + 50 basis points, the plan margin would be "+ 50 basis points").

PBGC will follow plan procedures as to the frequency of interest crediting and the conversion of annual rates into rates for crediting more frequently than annually.

The average of the annual yields on 30-year Treasury constant maturities is published monthly in Federal Reserve release G.13 and is available on the Internet at [www.stls.frb.org/fred/data/irates/g30](http://www.stls.frb.org/fred/data/irates/g30).

#### **Example**

Assume that a calendar year plan credits interest annually on December 31 and specifies the interest credit for a given calendar year as "the yield on 1 year Treasury constant maturities for the July preceding the beginning of the year, plus 50 basis points." If DoPT is September 2, 2000, and the average of the annual yields for 30-year Treasuries for July 1999 is 5.98%, PBGC will use an interest credit of 5.48%, calculated as follows:

5.98%	July 1999 average for 30-year Treasuries;
- 1.00%	Associated Margin for 1-year Treasuries (IRS Notice 96-8);
<u>+ 0.50%</u>	plan margin (50 basis points);
<u>5.48%</u>	PBGC interest credit.

### **3 Variable Interest Credit Not Based on a 96-8 Index**

If the plan contains a variable interest credit that is not based on a Standard Index included in Notice 96-8, or that is based on such an index with a plan margin that is variable, the plan should be referred to OPSS for consultation with CPRD and OGC.

### **4 No Interest Credit Specified**

If the plan does not specify an interest credit and there is no guidance provided by plan practice, PBGC will credit each participant's hypothetical account balance with interest from DoPT to XRA using the average of the annual yields for 30-year Treasuries for the calendar month prior to the month of plan termination.

## **C Converting Projected Account Balance to Monthly Annuity Benefit**

PBGC will follow plan procedures (supplemented by the following guidance) to convert an account balance to a monthly annuity. If plan procedures involve use of interest or mortality assumptions that are variable, PBGC will determine an annuity conversion factor based on the interest and mortality assumptions outlined below. If plan procedures call for converting an account balance to a monthly annuity using a variable element not discussed below, the case should be referred to OPSS for consultation with CPRD and OGC.

### **1 Interest Rate for Annuity Conversion**

PBGC will apply rules similar to those specified above in IV.B. (for fixing or imputing the value of the interest credit) in situations in which the annuity conversion factor is dependent on an interest rate.

## 2 Mortality Table for Annuity Conversion

### a Fixed Mortality Table

If the plan document specifies a fixed mortality table, PBGC will convert each participant's hypothetical account balance using the fixed table.

### b Variable Mortality Table

If the plan specifies a variable mortality table, PBGC will convert each participant's hypothetical account balance using the table that would apply to an annuity starting on DoPT. If the specified mortality table includes a projection scale, the plan should be referred to OPSS for consultation with CPRD and OGC.

### c No Mortality Table Specified

If the plan does not specify either a fixed or variable mortality table and there is no guidance provided by plan practice, PBGC will convert each participant's hypothetical account balance using the Code section 417(e) mortality table that would apply to an annuity starting on DoPT.

## V Annuity Payments

### A In General

PBGC will follow plan provisions, to the extent those provisions exist, in determining the annuity PBGC will pay. PBGC will credit actual interest under a fixed or variable index until the participant's annuity starting date and will convert the hypothetical account balance at that point using the plan's annuity conversion factors.

### B Crediting Interest to the Account Balance

#### 1 Fixed or Variable Interest Credit Specified

PBGC will credit each participant's hypothetical account balance with interest using the actual interest credit specified in the plan. PBGC will follow plan procedures as to the frequency of interest crediting and the conversion of annual rates into rates for crediting more frequently than annually.

#### 2 No Interest Credit Specified

If the plan does not specify the interest credit and there is no guidance provided by plan practice, PBGC will credit each participant's hypothetical account balance with interest once a year on the last day of the plan year. The interest credit will be the average of the annual yields on 30-year Treasuries for the third calendar month preceding the month containing the first day of the plan year.

For example, assume a plan year begins on March 15. Interest for the year March 15, 2001, through March 14, 2002, would be credited on March 14, 2002, using the average of the annual yields on 30-year Treasuries for December 2000 (the third calendar month preceding March 15, 2001).

PBGC will credit a fractional year's interest from the beginning of a plan year to a participant's benefit commencement date. For example, assume a participant in the plan from the preceding example will retire with benefits commencing on June 1, 2001. His or her account as of March 15, 2001, would be credited with interest for the period March 15 through June 1, 2001.

#### 3 Index No Longer Exists (or Exists Only in a Substantially Modified Form)

If the plan uses a variable index for either the interest credit or annuity conversion factor and the index does not exist for part or all of the relevant period (or no longer exists in the same form), the case should be referred to OPSS for consultation with CPRD and OGC.

### C Converting the Accumulated Account Balance to a Monthly Annuity Benefit

PBGC will convert each participant's account balance to an annuity using the interest and mortality conversion rates specified in the plan document. If the plan does not specify conversion rates and there is no guidance provided by plan practice, PBGC will convert each participant's account balance using the average of the annual yields on 30-year Treasuries for the third calendar month prior to the beginning of the plan year in which the participant's annuity starting date occurs and the Code section 417(e) mortality rates applicable to the participant's annuity starting date.

### D Annuity Payment Date

PBGC will begin to pay participants their annuity benefits no earlier than the time when they would have been able to commence payments consistent with PBGC's rules for other plans. In the case of a plan that converts to a cash balance plan, if a participant would have been eligible for an early retirement benefit under the old plan provisions, then that early retirement date applies for purposes of the entire benefit. If it is not clear when benefits can commence, the plan should be referred to OPSS for consultation with CPRD and OGC.

## VI De Minimis Lump-Sum Payments

### A In General

The following guidance supplements PBGC's regulation dealing with payment of *de minimis* benefits (*i.e.*, \$5,000 or less). Note that the amount of the benefit paid will not affect the valuation of benefits.

### B To Determine Whether the Benefit Is De Minimis

PBGC will calculate both (1) the present value at DoPT (determined using PBGC's lump-sum valuation factors) of the participant's monthly termination benefit commencing at XRA and (2) the hypothetical account balance at DoPT to the extent payable under Title IV of ERISA. If either (1) or (2) is \$5,000 or less, PBGC may pay a lump-sum, subject to VI.C.

A participant's termination benefit is the guaranteed benefit, plus any additional benefits to which plan assets are allocated, plus any 4022(c) benefit.

### C Spousal Consent

If the hypothetical account balance at DoPT to the extent payable under Title IV of ERISA (*i.e.*, VI.B.(2)) is \$5,000 or less, but the present value at DoPT (determined using PBGC's lump-sum valuation factors) of the participant's monthly termination benefit commencing at XRA (*i.e.*, VI.B.(1)) exceeds \$5,000, PBGC will require spousal consent before paying the benefit as a lump-sum.

If PBGC pays an estimated lump-sum based on a hypothetical account balance (*i.e.*, an estimate of VI.B.(2)) of \$5,000 or less, but anticipates that the present value (using PBGC factors) of the monthly termination benefit (*i.e.*, an estimate of VI.B.(1)) might exceed \$5,000, PBGC will require spousal consent for payment of the estimated lump-sum.

### D To Determine the Amount of the De Minimis Lump-Sum Benefit Payable

If, under VI.B., the participant is eligible for a lump-sum payment and the participant does not elect an annuity, PBGC will (subject to the spousal consent rules in VI.C.) pay the greater of (1) the present value at DoPT (determined using PBGC's lump-sum valuation factors) of the participant's monthly termination benefit commencing at XRA (*i.e.*, VI.B.(1)) or (2) the hypothetical account balance at DoPT to the extent payable under Title IV of ERISA (*i.e.*, VI.B.(2)), whether or not such amount exceeds \$5,000.

### E Scope of Paragraph VI

The rules in this paragraph VI. apply to two types of cash balance plans -- those that have always used a cash balance formula and those that have replaced a traditional formula with respect to all service with a cash balance formula for all service. This includes plans that set up an opening cash balance account when the plan is amended and provide the greater of the cash balance benefit or a grandfathered benefit based on the traditional formula.

Other plans freeze the traditional formula with respect to service up to a certain date (the "A" formula) and use a cash balance formula (starting with a zero account balance) for service after that date (the "B" formula). Any plan with such an "A + B" formula should be referred to OPSS for consultation with CPRD and OGC.

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[http://intranet/standards\\_manuals/manuals/policy/5.12-1 Cash Balance Plans - Valuing and Paying Benefits 1st Ed. 10/24/00.htm](http://intranet/standards_manuals/manuals/policy/5.12-1 Cash Balance Plans - Valuing and Paying Benefits 1st Ed. 10/24/00.htm) (06/13/2003, 4:59 PM).



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