

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

**Q&A Session with PBGC  
May 3, 2006**

*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.*

**STANDARD TERMINATIONS**

- 1. QUESTION:** In its response to Question 2 of the 2006 Blue Book, the PBGC stated that it was considering making changes in how it selects plans for standard termination audits. (According to the response to Question 12 of the 2001 PBGC Blue Book, the PBGC divides plans into two strata, selecting for audit all plans with 500 or more participants and a random sample from among the smaller plans.) Has the PBGC made any such changes and, if so, what are they?

**RESPONSE:** The PBGC is making changes to its audit program. For terminating plans for which post-distribution certifications are filed on or after January 1, 2006, the PBGC will select all plans with more than 300 participants for audit and a random sample of smaller plans. Plans may also be selected for audit when there is an indication of a problem (e.g., based on a complaint from a plan participant or practitioner).

[Scrivener's Note: References herein to the "Blue Book" for a given year refer to the Summary of Discussions between the Enrolled Actuaries Program Committee and Staff of the Pension Benefit Guaranty Corporation held at the Enrolled Actuaries Meeting for the year involved. Copies of the Blue Books (copyright ©, Enrolled Actuaries Meeting), can be found on the PBGC's website at (<http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html>.)]

- 2. QUESTION:** Assume that a contributing sponsor makes a commitment to make a plan sufficient as part of a standard termination and the plan's enrolled actuary relies on that commitment in certifying to the plan's sufficiency in the Schedule EA-S submitted along

with the PBGC Form 500. Assume further that, for whatever reason, the contributing sponsor later decides that it does not want to honor that commitment. Is the contributing sponsor bound by the commitment?

**PROPOSED RESPONSE:** The contributing sponsor is bound by the commitment unless the standard termination is withdrawn or is nullified by the PBGC or a court. However, because a standard termination is a voluntary termination, it may be withdrawn by the contributing sponsor, which effectively nullifies the commitment. (This answer assumes there is no contractual or other obligation on the part of the contributing sponsor to proceed with the termination or to make the plan sufficient.)

If a standard termination is withdrawn, then under 29 CFR § 4041.28(b), the plan administrator may not make any further distribution of assets to effect the plan's termination and must promptly notify the PBGC. The plan administrator should also notify all other affected parties. (In this regard, the Notice of Intent to Terminate was required to include a statement that the plan administrator will notify the affected party if the termination does not occur.) The plan is an ongoing plan for all purposes.

**RESPONSE:** The PBGC agrees with the response as reflected in Q&A 3 of the 2006 Blue Book and Q&A 8 of the 2005 Blue Book.

[Scrivener's Note: Some of the questions and proposed answers herein were based on those in prior Blue Books and were presented to the PBGC at this session with the general goal of obtaining confirmation on matters of legal interest or a more extended response. Except as otherwise indicated, where the PBGC cites to a question and answer in a Blue Book, the question and proposed answer herein are either identical or very similar to the referenced question and answer in the Blue Book. Thus, such a response effectively represents agreement with the proposed answer. In some cases, the response also includes a further elaboration of the issue involved and the views of the PBGC.]

- 3. QUESTION:** What options are available if you fail to file a Standard Termination Notice (Form 500) with the PBGC on or before the 180th day after the proposed termination date?

**PROPOSED RESPONSE:** You have several options if you fail to file a Standard Termination Notice (Form 500) with the PBGC on or before the 180th day after the proposed termination date.

One option is to move the proposed termination date to a later date, provided that the new date is no more than 90 days after the date the first notice of intent to terminate was issued. This would move the Form 500 filing deadline. If you move the proposed termination date, you must include the new proposed termination date in the notice of plan benefits, reflect additional accruals, if any, in the notice of plan benefits and in the distribution, and promptly issue the notice of intent to terminate and the notice of plan benefits to additional affected parties, if any, as of the later proposed termination date. You should check whether any statutory or regulatory requirement (e.g., regarding qualification) will apply to the plan as a result of using the later termination date.

Another option is to request an extension under § 4041.30(a) for filing the Form 500. There is no prescribed format for requesting an extension. Any request that is filed later than 15 days before the deadline expires must include a justification for not filing the request earlier. The PBGC will grant an extension where it finds compelling reasons why it is not administratively feasible for the plan administrator to take the action until the later date and the delay is brief. Because the PBGC will consider the length of the delay and whether ordinary business care and prudence in attempting to meet the deadline is exercised, the request should focus on these factors. Requests for extension must be in writing and mailed to Manager, Processing and Technical Assistance Branch, Standard Termination Compliance Division, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Suite 930, Washington, D.C. 20005-4026, e-mailed to: [standard@pbgc.gov](mailto:standard@pbgc.gov), or faxed to: (202) 326-4001.

Finally, you may start over. Starting over requires issuing a new notice of intent to terminate, which may be included in the same envelope as the notice of plan benefits. Although the new proposed termination date must be at least 60 days after the notice of intent to terminate is issued, that 60-day minimum period may run concurrently with the PBGC's 60-day review period if the Form 500 is filed immediately. (Remember that day zero of the 60-day minimum period before the proposed termination date is the date the last notice of intent to terminate is issued (e.g., mailed), while day zero of the PBGC's 60-day review period is the date the standard termination notice is received by the PBGC.) Although starting over need not significantly delay the distribution date, it will delay the termination date, which could present issues such as additional accruals or additional participants.

**RESPONSE:** The PBGC agrees with the response as reflected in Q&A 4 of the 2006 Blue Book.

4. **QUESTION:** In conjunction with an offer to employees to continue participation in Plan A or begin accruing benefits under a new defined contribution plan, Plan C, the sponsor of underfunded Plan A intends to spinoff to Plan B assets and liabilities of employees choosing Plan C. Plan B will immediately undergo a standard termination based on an employer commitment to make new Plan B sufficient so that participants may elect to roll lump sum values over to Plan C. Under what circumstances would the PBGC treat such a standard termination as permissible under Title IV of ERISA?

**PROPOSED RESPONSE:** The PBGC would treat such a standard termination as permissible under Title IV of ERISA if the spinoff is done using PBGC "safe-harbor" assumptions under IRC § 414(l). This response does not address the effect of the choice option or standard termination on the plan's qualified status under the Internal Revenue Code.

**RESPONSE:** No response.

5. **QUESTION:** Are there other circumstances in which the PBGC would 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?

**RESPONSE:** No response.

6. **QUESTION:** In the event that a plan covered by Title IV distributes benefits to all participants except substantial owners, does the plan then cease to be covered by Title IV, including the Title IV standard and distress termination procedures?

**PROPOSED RESPONSE:** Yes, under ERISA Section 4021(b)(9) such a plan would cease to be covered by Title IV once distribution of benefits to all participants except substantial owners was completed. (See the response to Question 16 in the 2000 PBGC Blue Book, and PBGC Opinion Letter 90-6, which continues to reflect the position of the PBGC.)

**RESPONSE:** The PBGC agrees with the proposed response, provided that distributions to all other participants were made in the normal course of plan operations (and not due to plan termination).

**FURTHER DISCUSSION:** A JCEB representative noted that a plan that is not covered by Title IV when it terminates and therefore need not follow the Title IV termination procedures may still be required by Section 403(d) of ERISA to comply with the allocation rules of Section 4044 of ERISA.

7. **QUESTION:** The regulations provide that a majority owner may elect to forgo receipt of his or her benefits to the extent necessary to enable the plan to satisfy all other plan benefits (29 CFR § 4041.21(b)(2)). Has the PBGC permitted any non-majority owners (such as certain substantial owners) to similarly waive benefits in order to permit a plan to complete a standard termination? If so, what factors has the PBGC taken into consideration in determining whether to permit such a waiver?

**RESPONSE:** To the best knowledge of the PBGC representatives, the PBGC has not permitted any non-majority owners to waive benefits in order to permit a plan to complete a standard termination since the 1992 regulations (containing the majority owner requirement) went into effect.

### ***MISSING PARTICIPANTS***

8. **QUESTION:** The PBGC's missing participants regulations call for benefits to commence, subject to actuarial adjustment for late commencement, no earlier than the date a missing participant makes an election, thereby effectively cutting off the PBGC's liability upon the

death of a missing participant without a survivor. Nevertheless, these same regulations provide that, “[i]n the absence of proof of death, individuals not located are presumed living” (29 CFR § 4050.2). This provision arguably requires the payment of designated benefits to the PBGC regardless of the age the individual would be if still alive (*e.g.*, 150 years old), even where it would be a virtual certainty that the PBGC would simply keep the money. Does the PBGC interpret this provision as requiring the payment of designated benefits in such circumstances, or instead as merely creating a presumption that may be rebutted?

**PROPOSED RESPONSE:** The presumption is rebuttable. However, the PBGC would not treat the presumption as having been rebutted unless the age the individual would be is such that it is virtually impossible for the individual to still be alive.

**RESPONSE:** No response.

### ***REPORTABLE EVENTS***

9. **QUESTION:** Assume that a calendar-year plan has a reduction in active participants from 1000 as of the beginning of 2005 to 500 active participants on December 1, 2005. That is a reportable event (active participant reduction) because the number of active participants is reduced to less than 80% of the number of active participants at the beginning of the current plan year (*i.e.*, the beginning of 2005). The plan sponsor reports this event in 2005 (for 2005) since neither a waiver nor an extension applies.

In 2006, the number of active participants is still 500. As that number of active participants is less than 750 (75% of the active participant count at the beginning of 2005), must the plan sponsor file a second notice of reportable event for 2006?

**PROPOSED RESPONSE:** Yes. Each plan year starts a new reporting cycle, and the first day of that plan year on which the active participant count is less than 80% of the count at the beginning of the plan year or is less than 75% of the count at the beginning of the preceding plan year is the date on which an active participant reduction reportable event occurs. A later decline in the active participant count during the 2006 plan year (even if the number of active participants has in the interim increased to 750 or above), is not an active participant reduction reportable event, unless the number is reduced to less than 80 percent of the number of active participants as of the beginning of 2006 (in this example to 399 or below), in which case it would be a new reportable event.

**RESPONSE:** The PBGC agrees with the response as reflected in Q&A 12 of the 2006 Blue Book. The PBGC also notes that a maximum of two filings per year would be required with respect to this reportable event (one with the respect to the 80% threshold and one with respect to the 75% threshold) regardless of how much the active participant count might fluctuate.

**10. QUESTION:** Assume a plan is frozen. Under 29 CFR § 4043.22, the reportable events notice for amendments reducing benefits is waived. However, under 29 CFR § 4043.23, a significant reduction in the number of active participants does create a reportable event. Does freezing the plan create a reportable event due to a reduction in the number of active participants?

**PROPOSED RESPONSE:** No. If the participants continue to work for the company, even though they do not earn benefit accrual service, they continue to meet the definition of active participant under 29 CFR § 4043.23.

**RESPONSE:** The PBGC agrees with the response as reflected in Q&A 13 of the 2006 Blue Book.

**11. QUESTION:** Several reportable events include waivers from reporting where the plan would have no unfunded vested benefits (“UVBs”) if UVBs were determined in accordance with the assumptions and methodology in § 4010.4(b)(2) of the PBGC’s regulations (the “4010 Optional Assumptions”). See 29 CFR § 4043.23(c)(2)(iii), .27(c)(2)(ii), .29(c)(3)(iii), .30(c)(2)(iii), .31(c)(5)(iii), and .34(c)(2)(iii). However, § 4010.4(b)(2) was removed from the PBGC’s regulations in the PBGC final rule published at 70 Fed. Reg. 11540 (March 9, 2005). Starting with the annual reports due (for calendar-year filers) on April 17, 2006, (April 15, 2006, falls on a Saturday), the 4010 Optional Assumptions are no longer available for determining if a 4010 filing is required. However, the final rule did not remove the various references to the 4010 Optional Assumptions in the reportable events regulation.

(a) May the funding-based waivers in the reportable events regulation that are tied to the 4010 Optional Assumptions continue to be used even after those assumptions are no longer available for determining if a 4010 filing is required.

(b) If so, it is not entirely clear which mortality assumptions must be used as part of the 4010 Optional Assumptions in the case of a calendar year plan. This is because the optional assumption rules require that new mortality assumptions be used “for any plan year ending on or after the effective date” of a PBGC amendment to the mortality assumptions it uses under its valuation of benefits regulation (29 CFR Part 4044, Subpart B). The PBGC adopted such an amendment, moving from a version of GAM-83 to a version of GAM-94, effective for plan terminations on or after January 1, 2006 (70 Fed. Reg. 72205, Dec. 2, 2005). If a reportable event occurs in the 2006 calendar plan year, would the old or new mortality assumptions apply for purposes of this waiver? (For the 2006 calendar plan year, the “event year” ends on or after January 1, 2006. This would suggest using the new mortality table. But the “testing date” for the event year (generally) is the last day of the preceding plan year, i.e., December 31, 2005. The plan year containing that testing date ends before January 1, 2006. This would suggest using the old mortality table.

**PROPOSED RESPONSE:**

(a) Yes, pending further guidance from the PBGC. See the instructions to the PBGC’s Form 10, which have recently been amended.

(b) The old mortality assumptions must be used. The “plan year” that must end on or after January 1, 2006, in order to trigger the requirement to use the new mortality assumptions generally is not the event year. Rather, it is the plan year that contains the “testing date” (as defined at 29 CFR § 4043.2) for the event year. The testing date under the reportable events regulation is the same as the premium snapshot date used for premium purposes, and thus is usually the last day of the preceding plan year. Thus, in the case of a calendar-year plan where the event year is the 2006 plan year and the testing date is December 31, 2005, the amended mortality assumptions need not be used because the 2005 plan year does not end on or after January 1, 2006. However, if the testing date for the event year were January 1, 2006 (e.g., because of the special merger-spinoff rule in 29 CFR § 4006.5(e)), the amended mortality assumptions would have to be used.

**RESPONSE:**

(a) The PBGC agrees with the response as reflected in Q&A 15(a) of the 2006 Blue Book.

(b) The PBGC agrees with the response as reflected in Q&A 15(b) of the 2006 Blue Book

**FOLLOW UP QUESTION:** If a plan with a fiscal year uses the first day of its plan year as the testing date, would the new mortality assumptions have to be used for all events occurring in that plan year, including events occurring well before the PBGC announced (in December 2005) that it was adopting the new assumptions (e.g., an event occurring on May 1, 2005, for a plan with an April 1 plan year)? (If so, that could retroactively deny the plan the availability of the waiver tied to the 4010 Optional Assumptions.)

**RESPONSE:** The PBGC answers affirmatively and acknowledges the potential retroactive impact. However, the PBGC does not believe that many reportable event filings will be affected and noted its ability to grant waivers and extensions in appropriate circumstances.

**FURTHER DISCUSSION:** A JCEB representative suggested that the reportable events instructions be clarified with respect to the appropriate mortality assumptions to be used as part of the 4010 Optional Assumptions. The version of the instructions that was updated in February 2006 states that the GAM-83 mortality assumptions are to be used, and does not note that the new assumptions (based on GAM-94) must be used if the plan year containing the testing date ends on or after January 1, 2006.

**RESPONSE:** The PBGC will look into the issue and determine whether a clarification is appropriate.

**12. QUESTION:** Assume a plan sponsor purchases an irrevocable commitment from an insurance company to provide annuities for a group of plan participants and the purchase is not in connection with a plan termination. Is this a reportable event under the "Transfer of Benefit Liabilities" event? If so, what information should be provided to satisfy the requirement to provide "an explanation of the actuarial assumptions used in determining the value of benefit liabilities (and if appropriate) plan assets transferred"?

**PROPOSED RESPONSE:** No, this is not a reportable event. If individual annuity contracts are purchased, the effect is the same as a lump sum being distributed to each participant. If a group policy is purchased, the policy remains an asset of the plan.

**RESPONSE:** No response.

- 13. QUESTION:** Assume that a plan has filed for a distress termination with the PBGC with a proposed termination date of July 1, 2005; that the PBGC has neither approved nor disapproved the distress termination; that all required installments and other contributions required under section 412 of the IRC have been made to the plan assuming that the plan terminates as of July 1, 2005; and that one or more such required contributions have not been made to the plan assuming that the plan remains ongoing. Is there a requirement to report these arguably “missed” contributions to the PBGC (on Form 10 or Form 200, as applicable)? If so, and if a Form 200 is required, would the PBGC consider a lien to have arisen and, if so, under what circumstances, if any, would the PBGC perfect it?

**PROPOSED RESPONSE:** In such circumstances, unless and until the PBGC otherwise advises the person who would be responsible for such a filing (the plan administrator or contributing sponsor in the case of a Form 10, and the contributing sponsor or ultimate parent in the case of a Form 200), the PBGC would not require such reporting and would not anticipate perfecting any such lien. Whether a lien has arisen in such circumstances is an issue within the jurisdiction of the IRS.

**RESPONSE:** With respect to the first sentence of the proposed response, in the circumstances described in the question, the PBGC will decide what action, if any, to take on a case-by-case basis. The PBGC notes that contributions are due for all periods up to a plan’s termination date, and that the pendency of a distress termination application with a proposed termination date does not serve to cut off the requirement to make contributions. The PBGC recommended that the person responsible for making a Form 10 or Form 200 filing make the filing to ensure compliance. The PBGC agrees with the second sentence of the response, but notes that the PBGC also plays a role in connection with determinations regarding liens under IRC § 412(n).

- 14. QUESTION:** If the new pension legislation passes, and provides a new method of determining plan funding status for purposes of the minimum funding rules in Section 412, and provides for an extension of the variable-rate premiums to more plans (perhaps by eliminating the full funding limitation impact on variable rate premiums, or perhaps by applying a new method for calculating unfunded vested benefits for purposes of the variable rate premium) what happens to the exemptions under the reportable event rules which are stated with reference to the amount of a plan’s “unfunded vested benefits” and whether a plan is subject to the variable-rate premium? Will these exemptions be applied as if there were no change in the calculation methods or applicability of the variable-rate premiums, or

will they be applied based on a new calculation methodology, and a broader application of the variable-rate premiums?

**RESPONSE:** No response.

**15. QUESTION:** Will the PBGC establish a new regulation drafting project in order to make revisions to such reportable event exemptions?

**RESPONSE:** No response.

**16. QUESTION:** How should employers apply such reportable event exemptions in the meantime (especially if part of the pension legislation is applicable in 2006, and part does not become applicable until 2007)?

**RESPONSE:** No response.

#### ***ERISA SECTION 4062(e) AND 4063 EVENTS***

**17. QUESTION:** A plan sponsor ceases operations at a facility and more than 20% of a plan's active participants are separated as a result. Must the plan sponsor report this to the PBGC under ERISA section 4063(a)(1) under the following circumstances?

(a) The plan sponsor files a reportable event notice for an active participant reduction using the Form 1 extension.

(b) The plan sponsor files a reportable event notice for an active participant reduction without an extension (30 days after the event occurred).

(c) The plan sponsor does not file a reportable event notice for an active participant reduction because a funding-based waiver applies.

#### **PROPOSED RESPONSE:**

(a) Yes. Any extension for reporting the reportable event has no effect on the 60-day time limit for reporting the cessation of operations under ERISA section 4062(e) in accordance with ERISA section 4063(a).

(b) Yes. The reportable events filing requirement is separate from the filing requirement under ERISA section 4063(a) when there is a 4062(e) event. The reportable events notice will not necessarily state that the active participant reduction constitutes a cessation of operations within the meaning of ERISA section 4062(e), nor will it necessarily request (as is required by ERISA section 4063(a)(2)) that the PBGC make a liability determination. However, if the filer submits the 4062(e) notice at the same time as or earlier than the

reportable events notice, the reportable events notice may incorporate by reference any information that is already in the 4062(e) notice.

(c) Yes. Any waiver from reporting the reportable event has no effect on the 60-day time limit for reporting the cessation of operations under ERISA section 4062(e) in accordance with ERISA section 4063(a).

**RESPONSE:** (a) The PBGC agrees with the response as reflected in Q&A 21(a) of the 2006 Blue Book.

(b) The PBGC agrees with the response as reflected in Q&A 21(b) of the 2006 Blue Book and also indicates that the reportable event notice form may be used as the notice under section 4062(e), provided that: (1) the filing states that the active participant reduction constitutes a cessation of operations within the meaning of ERISA section 4062(e) and includes a request for a liability determination; and (2) the filer alerts the PBGC by clearly noting that the filing includes a notice of the section 4062(e) event (such as by indicating in a cover letter for the form that the filing also serves as the section 4062(e) notice).

(c) The PBGC agrees with the response as reflected in Q&A 21(c) of the 2006 Blue Book.

**18. QUESTION:** Assume that a plan administrator is required to report to the PBGC under ERISA section 4063(a), either because there has been a withdrawal of a substantial employer from a multiple employer plan or because there has been a cessation of operations within the meaning of ERISA section 4062(e). To which office of the PBGC is the report to be submitted, and what information must the report contain?

**PROPOSED RESPONSE:** The report must contain the information required by the statute, i.e., (1) notification of the cessation of operations within the meaning of ERISA section 4062(e) or of the withdrawal of a substantial employer from a multiple employer plan, and (2) request for a liability determination. There is no prescribed format for the report. The report must be filed with the PBGC's Department of Insurance Supervision and Compliance within 60 days of the withdrawal or cessation. It may be mailed to DISC at 1200 K Street, NW, Washington, DC 20005-4026, faxed to 202-842-2643, or e-mailed to [4063.report@pbgc.gov](mailto:4063.report@pbgc.gov).

**RESPONSE:** The PBGC agrees with the response as reflected in Q&A 22 of the 2006 Blue Book.

### ***ANNUAL EMPLOYER REPORTING (ERISA SECTION 4010)***

**19. QUESTION:** 29 CFR § 4010.7(a) and § 4010.9(a) require reporting identifying and financial information with respect to each member of the controlled group (excluding exempt entities). Does this include members outside of the U.S. (for example, foreign subsidiaries)?

**PROPOSED RESPONSE:**

Yes. Also see Question 19 of the 2003 Blue Book.

**RESPONSE:** The PBGC agrees with the responses as reflected in Q&A 19 of the 2006 Blue Book and Q&A 19 of the 2003 Blue Book.

**20. QUESTION:** 29 CFR § 4010.9 provides that if consolidated financial statements are used to satisfy the financial information reporting requirement, additional information must be provided with respect to each controlled group member included in the consolidated financial statements (other than an exempt entity). Specifically, revenues and operating income for the information year and net assets at the end of the information year must be reported on Schedule I.

(a) Does this requirement apply to non-exempt members of the controlled group who do not sponsor pension plans?

(b) Can you provide additional information about what constitutes “revenues,” “operating income,” and “net assets”?

(c) Is this information is required even if it is not readily available?

**PROPOSED RESPONSE:**

(a) For information years ending on or after December 31, 2004, this information is required for all non-exempt members of the controlled group with financial information included in consolidated financial statements. This includes foreign subsidiaries.

(b) In general, these terms refer to the following:

(1) Revenues for the information year include total dollar payments for goods and services that are credited to an income statement. This amount may also be called net sales or net revenues. In general, it is the proceeds resulting from a sales transaction, before the cost of the product or service is subtracted.

(2) Operating income for the information year includes income for the period after subtracting out expenses that are directly attributable to the generation of the income. In general, it does not take into consideration costs of financing the enterprise, such as interest expense or income taxes. This amount is developed by taking net revenues for the period and subtracting out direct costs of producing those revenues (including items such as cost of sales and sales, general and administrative expenses).

(3) Net assets at the end of the information year are determined by subtracting the total liabilities (excluding owner’s equity) from the total assets.

(c) Yes. This information must be reported for all non-exempt entities whose financial information is combined with other entities in the consolidated financial statements.

**RESPONSE:** The PBGC agrees with the responses as reflected in Q&A 20 of the 2006 Blue Book.

### ***PARTICIPANT NOTICES***

**21. QUESTION:** A plan administrator failed to provide a Participant Notice under section 4011 of ERISA as required for one or more prior plan years. How can the plan administrator correct the failure?

**PROPOSED RESPONSE:** The PBGC encourages plan administrators to correct Participant Notice failures as soon as possible, both to ensure that participants receive more timely information and to minimize penalty exposure. Voluntarily coming forward to the PBGC about a Participant Notice violation may also reduce penalties.

For purposes of correcting two or more missed Participant Notices, a plan administrator generally may issue a corrective notice that combines the missed Participant Notices, provided that the corrective notice includes all of the information (e.g., funding percentages for the applicable plan years) required to be included in the missed Participant Notices. Depending on the timing, a plan administrator might choose to combine into a single document the information required to be included in a missed Participant Notice with a Participant Notice for a later plan year (regardless of whether a Participant Notice is required for that later plan year). If the plan administrator combines the information required to be included in a missed Participant Notice with a Participant Notice for a later plan year, the PBGC (in its enforcement discretion) generally will not treat the Participant Notice for that later plan year as violating the requirement in § 4011.10(d) that additional information may be included only if it is in a separate document. (*Note: This modifies the PBGC's response to Question 18 of the 1998 Bluebook, which stated that two Participant Notices may not be combined into a single document.*)

A plan administrator that filed an erroneous certification on the annual PBGC premium filing regarding Participant Notice compliance for the prior plan year must file an amended certification.

Plan administrators may request compliance assistance regarding Participant Notice requirements and additional guidance on correcting a Participant Notice failure by contacting the PBGC at [pnotice@pbgc.gov](mailto:pnotice@pbgc.gov) or by calling 1-800-736-2444. See also last year's JCEB Qs and As and Question 10 of the 2006 Blue Book for information on the PBGC's enforcement activities in this area.

**RESPONSE:** The PBGC agrees with the response as reflected in the Q&A 11 of the 2006 Blue Book. The PBGC emphasized it wants employers to correct missed notices and that, if the annual PBGC premium filing certification is erroneous, an amended filing would be necessary. However, only Schedule A or Form 1-EZ would need to be revised to reflect the

correct information, and that can be accomplished on a streamlined basis. Further, the PBGC has a worksheet that it can supply to plan administrators that request compliance assistance regarding the participant notice requirements.

**22. QUESTION:** The response to Question 19 of the 1998 Blue Book provided the following guidance (based on earlier DOL advice to the PBGC) with respect to using a Participant Notice to satisfy the notice requirement of ERISA section 101(d) (pending issuance by DOL of final regulations implementing section 101(d)) with respect to a missed contribution: “If the plan is subject to the Participant Notice requirement for a plan year, and that is the first Participant Notice in which the missed contribution would be subject to reporting, the plan administrator will be in compliance with § 101(d) with respect to any missed contributions properly disclosed in the Participant Notice.” Would ERISA section 101(d) also be satisfied by disclosure of a missed contribution in the first Participant Notice in which the missed contribution would be subject to reporting where that Participant Notice is not required to be issued, but instead is issued voluntarily (*e.g.*, by a plan administrator that chooses to issue a Participant Notice each year whether or not one is required)?

**PROPOSED RESPONSE:** Yes. DOL has advised the PBGC that it would treat such a disclosure as satisfying ERISA section 101(d) pending the issuance of final regulations implementing section 101(d).

**RESPONSE:** The PBGC declines to answer this question and notes that the requirement to notify participants of missed contributions under ERISA Section 101(d) is within the jurisdiction of the Department of Labor. The PBGC also noted that the Department of Labor disclosure guide is on the PBGC website. [Scrivener’s Note: See “Reporting and Disclosure Guide issued by DOL/EBSA” at <http://www.pbgc.gov/practitioners/index.html>.]

### ***PREMIUMS***

**23. QUESTION:** Under the definition of participant that is used for flat-rate premium purposes, an individual becomes a participant when the plan has benefit liabilities with respect to the individual. See 29 CFR § 4006.6(a). Plan A is an hours-of-service calendar year plan with a service computation period that coincides with the plan year. If an individual earns his or her first year of service for benefit accrual purposes during the service computation period that ends on December 31, 2004, and that date is the plan’s premium snapshot date, would the individual be included in the participant count for Plan A’s 2005 plan year?

**PROPOSED RESPONSE:** Yes.

**RESPONSE:** The PBGC agrees with the proposed response.

**24. QUESTION:** The instructions to the Premium Payment Package (see, *e.g.*, p. 3 of the 2005 instructions) make clear that, if a newly-created plan covered under ERISA section 4021 is adopted retroactively, either the adoption date of the plan or the plan's retroactive effective date may be used as the premium snapshot date, provided that the same date is considered the first day of the plan year for purposes of prorating the premium (if applicable) and for purposes of determining the premium due date. See also Question 10 of the 2001 PBGC Blue Book. In the case of a preexisting plan that becomes newly covered as a result of a retroactively adopted amendment, is the same kind of choice — here, between the adoption date of the amendment and the amendment's retroactive effective date — available, subject to the same limitations?

**PROPOSED RESPONSE:** Yes.

**RESPONSE:** No response.

**25. QUESTION:** Is the PBGC considering providing any special relief program for employers and plans that may have underpaid their estimated 2006 flat-rate premiums because the rate increase came so close to the due date, and because the forms that plan sponsors had received from PBGC were based on the old rates?

**RESPONSE:** The PBGC is not considering any across-the-board program to provide relief for employers and plans that may have underpaid their estimated 2006 flat-rate premiums by basing the payment on the old rates reflected in the forms. It would entertain requests for penalty relief on a case-by-case basis.

**26. QUESTION:** For premium payment years beginning in 2004 or 2005, the Pension Funding Equity Act of 2004 (PFEA) temporarily changed the interest rate for determining the variable rate premium to 85% of the annual rate of interest on amounts invested conservatively in long-term investment grade corporate bonds. Since this relief expired at the end of 2005, what interest rate should be used for determining the variable-rate premium for premium payment years beginning in 2006? Should it be 85% of the annual yield on 30-year Treasury securities?

**RESPONSE:** The PBGC agrees that, absent legislative change, the interest rate that must be used in determining the variable-rate premium years beginning 2006 is 85% of the annual yield on 30-year Treasury securities. In the event that pending legislation changes this, the PBGC intends to promptly provide notice of the change on its website.

### **VALUATION OF BENEFITS**

**27. QUESTION:** On December 2, 2005, the PBGC published a final rule amending its valuation regulation to update the mortality assumptions used for various purposes, including

determining employer liability when a plan terminates in a distress or involuntary termination. The amendments went into effect for plans with termination dates on or after January 1, 2006. There was a 170 basis point increase in January 2006 in the PBGC's select rate (from 4% to 5.7%), and no change in the PBGC's ultimate rate (4.75%), as compared to the rates in effect for December 2005. How much of the 170-basis-point increase was attributable to the updating of the PBGC's mortality assumptions as opposed to the annual recalibration of the PBGC's derived interest factors with the ACLI survey results?

**PROPOSED RESPONSE:** Of the 170-basis-point increase, about 100 basis points was attributable to the updating of the PBGC's mortality assumptions. The remainder of the increase (about 70 basis points) was attributable to the annual recalibration. The recalibration reflected ACLI survey data as of June 30 and September 30, 2005, updated to take into account changes in bond yields from the dates of the surveys through the end of November 2005. The final rule amending the valuation regulation can be found at <http://www.pbgc.gov/docs/05-23554.pdf>.

**RESPONSE:** The PBGC agrees with the response as reflected in Q&A 9 of the 2006 Blue Book.

### ***GUARANTEED BENEFITS***

**28. QUESTION:** The response to Question 13 of the 2003 Blue Book makes clear that, in the case of a newly-covered plan, the phase-in period under ERISA section 4011(b)(7) begins on the date when the plan becomes a covered plan. Some plans may go in and out of coverage, such as a substantial owner plan. See PBGC Opinion Letter 90-6 and Question 16 of the 2000 PBGC Blue Book. In the case of a plan with intermittent PBGC coverage, how is the phase-in period calculated?

**PROPOSED RESPONSE:** In the case of a plan with intermittent coverage, the phase-in period is calculated by aggregating all periods of coverage.

**RESPONSE:** No response.

### ***MULTIEMPLOYER PLANS***

**29. QUESTION:** If a single-employer defined benefit plan is merged into a multiemployer defined benefit plan, and the multiemployer plan subsequently receives financial assistance from the PBGC, is the benefit of any former participant (active, deferred, or in pay status) in the single-employer plan subject to the PBGC's guarantee limit for multiemployer plans or the guarantee limit for single-employer plans?

**PROPOSED RESPONSE:** The entire accrued benefit of a participant whose benefit liabilities are transferred to a multiemployer plan would be subject to the multiemployer guarantee limit under Section 4022A(c) of ERISA.

**RESPONSE:** The PBGC agrees with the response as reflected in Q&A 5 of the 2006 Blue Book.

**30. QUESTION:** Plan M is a multiemployer plan. Because of withdrawals, only one employer is required to make contributions to Plan M. Is the plan subject to the PBGC's guarantee limit for multiemployer plans or the guarantee limit for single-employer plans?

**PROPOSED RESPONSE:** The accrued benefit of a participant in Plan M would be subject to the multiemployer guarantee limit under Section 4022A(c) of ERISA. See Opinion Letter 01-2.

**RESPONSE:** The PBGC agrees with the response as reflected in Q&A 6 of the 2006 Blue Book. Plan M would retain its character as a multiemployer plan.

**FOLLOW UP QUESTION:** Would that still be the case if the Plan M continued to have only one contributing employer for a number of years?

**RESPONSE:** Yes. Opinion Letter 01-2 does not contain any limitation on the length of time that such a plan would retain its character as a multiemployer plan.

### ***LITIGATION AND GENERAL MATTERS***

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

**RESPONSE:**

In *Boivin v. US Airways* 446 F.3d 148, 37 Employee Benefits Cas. (BNA) 1934 (DC Cir. 2006), the PBGC assumed responsibility for the US Airways Pilots' Retirement Income Plan as a result of a distress termination and became defendant in a suit brought by retired pilots regarding the calculation and payment of their guaranteed benefits. Some of the main issues in the litigation involved the length of time that the effective date of a plan amendment preceded plan termination, whether partly paid lump sums should count against the PBGC guarantee limit, and whether the PBGC was a plan fiduciary. The lower court held that the PBGC had acted in good faith in connection with the plan termination and there was no evidence it had breached any fiduciary duty in calculating estimated benefits. The Court of Appeals dismissed the case as to the PBGC, holding that the suit was premature, as the pilots had failed to exhaust administrative remedies.

*Beck v. Pace*, 427 F.3d 668, 35 Employee Benefits Cas. (BNA) 2665 (9th Cir. 2005) involved an employer in a liquidating Chapter 11 proceeding that decided to terminate certain of its pension plans in standard terminations. The plans covered union employees, and the union requested that the company consider accomplishing the terminations by merging the plans into a multiemployer plan, arguing that employees would potentially

receive higher benefits and would have available the plan's claims dispute resolution procedures. Instead, the company authorized purchase of the annuity contracts, yielding \$5 million in surplus assets. The union participants brought suit alleging a breach of fiduciary duty in rejecting the proposed merger. The company and PBGC argued that a plan merger was not an available method of terminating the plan under Title IV. The lower courts and Ninth Circuit held that Title IV and PBGC regulations did not preclude the use of a plan merger as a means of plan termination, and that the company breached its fiduciary duties by failing to adequately consider the proposed merger and to do so taking into account solely the interest of plan participants. As of the date of the session, the time limit for filing for certiorari had not yet expired. [Scrivener's Note: Petition for a writ of certiorari was filed on May 10, 2006.]

*Tynes v. PBGC, et. al.* 96 A.F.T.R.2d (RIA) 5696 (D. N.J. 2005) involved a hospital pension plan which for years was treated as subject to Title IV. The hospital had originally been a secular not-for-profit institution, but was thereafter taken over by the Archdiocese of Newark. After the hospital ran into financial difficulties, it sought and received approval from the IRS for treatment of the plan as a church plan for purposes of the Internal Revenue Code and ERISA (thus causing the plan to fall outside of Title IV). Thereafter the hospital went bankrupt, the plan was terminated and the participants brought suit arguing that the church plan exemption violated the Establishment Clause and the plan did not meet the requirements for the exemption. The IRS indicated during the litigation that it was reconsidering its determination that the plan was a church plan and the district court dismissed the case for lack of ripeness on that basis. The case is currently on appeal.

*In re: Kaiser Aluminum Corporation*, 34 Employee Benefits Cas. (BNA) 2228 (D. De. 2005) addressed whether, for a company that sponsors more than one defined benefit pension plan, the distress termination criteria of ERISA section 4041(c)(2)(B) should be applied on a plan-by-plan basis, or by considering the plans and their impact in the aggregate. Relying in part on section 1113 of the Bankruptcy Code, the district court determined that applying the distress termination criteria on an aggregated basis was permissible. *In re: Falcon Products, Inc.*, No. 05-41108-399 (Bankr. E.D. Mo. 2005) also reached a similar conclusion on this issue. [Scrivener's Note: A brief description of this case is on the PBGC website at <http://www.pbgc.gov/media/news-archive/2005/pr06-07.html>] Both decisions are on appeal.

Several of the cases in the United Airlines bankruptcy proceeding are also noteworthy. *Ass'n of Flight Attendants-CWA v. Pension Benefit Guar. Corp.*, 36 Employee Benefits Cas. (BNA) 2233 (D. DC, 2006) involved a settlement between the PBGC and United Airlines, which resolved, among other issues, the treatment of certain PBGC claims and liens and the process for termination of United pension plans (including the agreement by the PBGC to initiate a review to determine whether to terminate the flight attendants plan). The flight attendants argued that the settlement agreement was inappropriate and tainted the PBGC's decision to terminate the plan. The court decided that the PBGC was authorized under ERISA section 4067 to enter into a settlement agreement with a plan sponsor to initiate such a review. The court also decided that the PBGC had adequate grounds (beyond the settlement agreement) to terminate the plan.

Another decision in the United Airlines bankruptcy concerned whether bankruptcy law or non-bankruptcy law was applicable in determining the discount rate used to calculate the amount of the PBGC's claim for unfunded benefits of a terminated plan. While some prior cases had held that bankruptcy law would control (thus permitting the bankruptcy court to determine the interest rate involved), the bankruptcy court in the United Airlines proceeding held, in an unpublished, oral, bench decision (which has not been appealed) that the PBGC's interest rate and other assumptions for determining its claim for unfunded benefits under Title IV also act to fix the amount of the claim for bankruptcy law purposes.

The PBGC is also one of the named defendants in *John Conyers v. Bush, et. al.*, the litigation brought by House members concerning the Deficit Reduction Act of 2005, and certain inconsistencies in the provisions of that bill as it was adopted by the Senate and House.

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

**RESPONSE:** There have been no situations within the last year in which the PBGC invoked the prohibition under section 4069(a).

**33. QUESTION:** 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.

**RESPONSE:** The PBGC has several ongoing administrative and compliance initiatives. First, the PBGC is reviewing prior guidance, in order to delete obsolete items, better organize the remaining guidance and making that guidance more accessible by posting it on the PBGC website, indexing it, and improving its format. This "good guidance initiative" is being undertaken in connection with the Office of Management and Budget's broader good guidance practices program. [Scrivener's Note: See OMB's Proposed Bulletin for Good Guidance Practices, posted at <http://www.whitehouse.gov/omb/inforeg/regpol.html#ggp>.]

In addition, the PBGC is focusing on increasing compliance with ERISA Section 4011, which requires participant notices with respect to the funding status of certain underfunded plans. In this regard, the PBGC is continuing to use electronic data analysis to compare PBGC premium filings stating that no participant notice is required under Section 4011 with information on Forms 5500 and other filings to determine which employers probably are obligated to report. The PBGC is also requesting copies of participant notices from employers that have indicated that they have provided the participant notice under Section 4011.

The PBGC also has an ongoing premium enforcement initiative. For plans that claim to be exempt from the variable rate premium as a result of the full funding limit, the PBGC is reviewing information from the Form 5500 and other sources (sometimes including a plan's

audited financial statements) to determine whether the plan is actually at the full funding limit.

In addition, the PBGC notes that the interagency coordination between PBGC, DOL and IRS is increasing, and that this trend is expected to continue, especially if pension funding legislation passes.

**FOLLOW UP DISCUSSION:** During the discussing regarding the PBGC premium enforcement initiative, a JCEB representative stated that even though the postmark date is supposed to be treated as the date of filing of any PBGC premium form or payment, some PBGC agents have assessed penalties for late premium payments based on the date the payment is received by the PBGC, rather than on the postmark date. The PBGC indicated that it would review this situation.