American Bar Association
Joint Committee on Employee Benefits

Q&A Session with PBGC
May 9, 2007

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.

PREMIUMS

1. **QUESTION:** The Deficit Reduction Act of 2005 created a new "termination premium" (generally, $1,250 per participant per year for three years), which applies where certain distress and involuntary terminations occur. Assume that a plan terminates in a distress or involuntary termination that is subject to the termination premium. Assume also that the value (as of the termination date) of the PBGC's recoveries on its claim for unfunded benefit liabilities (UBL claim) plus the value (as of the termination date) of the 3-year termination premium exceeds 100% of the amount of PBGC's UBL claim. In such circumstances, would PBGC require payment of the full termination premium or would it limit the termination premium so that the value of the termination premium plus the value of the PBGC's recoveries on its UBL claim would not exceed the amount of the PBGC's UBL claim?

   PROPOSED RESPONSE: The PBGC would require payment of the full amount of the termination premium. The termination premium is calculated based on the number of participants in the plan immediately before the termination date. It is unaffected by the size of the PBGC's UBL claim or the value of PBGC's recoveries on its UBL claim.

   RESPONSE: The PBGC agrees with the response as reflected in Q&A 1 of the 2007 Blue Book.

   [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. The questions and proposed answers herein that were based on those in Blue Books 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.]

2. **QUESTION:** Please describe the PBGC's experience to date in attempting to collect the termination premium established by the Deficit Reduction Act of 2005, including the status of any negotiations or litigation.

   RESPONSE: The PBGC has issued proposed regulations regarding the termination premium and expects to issue those regulations in final form later this year. Until the regulations are final, companies are expected to adhere to the statutory requirements.

   The PBGC has filed claims regarding the termination premiums in Chapter 11 cases. The status of the termination premium in bankruptcy cases is in litigation in at least one case, *In re: Oneida Ltd., et al.,* (Bankr. S.D. N.Y.). A hearing was held in that proceeding on March 13, 2007, regarding whether or not the termination premium constitutes a pre-petition claim. PBGC staff members present were not aware of any case in which the termination premium had been collected, but pointed out that the requirement has been in place only for a relatively short time.

3. **QUESTION:** The Pension Protection Act of 2006 (PPA) established a per-participant cap on the variable-rate premium (VRP) for plan years beginning after 2006 equal to $5 multiplied by the number of participants. The cap applies only if the aggregate number of employees of all contributing sponsors and all members of the sponsors' controlled groups is 25 or fewer.

   The following questions relate to this new provision:

   (a) If an eligible plan has 20 participants, what is the maximum VRP due?

   (b) Do all single-employer plans with 25 or fewer participants qualify for the cap?

   (c) Might a single-employer plan with more than 25 participants qualify for the cap?

   (d) On what date are employees counted for purposes of the 25-employee eligibility rule?

   PROPOSED RESPONSE:

   (a) The per-participant cap is $100 ($5 x 20), so the maximum total VRP for the plan is $2,000 ($100 x 20). In other words, the maximum VRP for the plan is $5 multiplied by the square of the participant count.

(b) No. The eligibility criterion is based on employees, not the participant count. If there are more than 25 employees, taking into account all employees of all contributing sponsors of the plan and all members of their controlled groups, the plan is ineligible for the cap.

(c) Yes. Consider a contributing sponsor with 25 employees, all of whom are participants in a plan. If the plan also retains benefits for 10 former employees who are either terminated vested or retired, there would be 35 participants. This plan would qualify for the cap (assuming there are no other contributing sponsors and no controlled group members).

(d) The eligibility rule is based on the number of employees on the first day of the premium payment year. Note that the cap itself ($5 times the square of the participant count) is based on the participant count on the premium snapshot date (generally the last day of the prior plan year).

RESPONSE: The PBGC agrees with the response as reflected in Q&A 2 of the 2007 Blue Book. In addition, these responses are in accord with the proposed regulations issued in February 2007 to implement this new cap provision.

4. **QUESTION:** Treasury recently issued new mortality tables to be used to determine current liability for plan years beginning in 2007. ERISA section 4006(a)(3)(E) provides that when the new tables take effect, the assumptions and methods used to determine unfunded vested benefits (UVBs) for purposes of the variable-rate premium also change as described below:

(a) The required interest rate underlying the UVB calculation increases from 85% of the annual rate of interest determined by the Secretary of the Treasury on amounts invested conservatively in long-term investment grade corporate bonds (the "corporate bond rate") to 100% of that rate (See ERISA section 4006(a)(3)(E)(iii)(II)); and

(b) Market value of assets is used instead of actuarial value (See ERISA section 4006(a)(3)(E)(iii)(III)).

How do these changes impact the calculation of UVBs for variable rate premiums and for other PBGC requirements such as reporting under ERISA section 4010 and 4043? When are the new mortality tables first reflected in the calculation of UVBs?

PROPOSED RESPONSE: See Technical Update 07-1, Effect of Treasury Mortality Tables on PBGC Requirements (http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu15995.html), which explains how the establishment by the Secretary of the Treasury of new mortality tables for determining current liability affects premium calculations and PBGC requirements under ERISA sections 4010 and 4043.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 3 of the 2007 Blue Book.

5. **QUESTION:** Is electronic filing mandatory for an amendment to a filing to which the electronic filing requirement did not apply?

PROPOSED RESPONSE: Electronic filing is required for flat- and variable-rate premium filings for plan years beginning after 2006. For plans that had 500 or more participants for the prior plan year, e-filing is also required for any filing made after June 2006 for a plan year beginning in 2006. The e-filing requirement applies to estimated and final filings and to both original and amended filings. (PBGC may grant exemptions to the e-filing requirement for good cause in appropriate circumstances.) Whether an amended filing must be made electronically is determined according to these rules rather than by reference to whether the original filing being amended was subject to the e-filing requirement.

Since the rules governing applicability of the e-filing requirement to amended filings are the same as for original filings, in most cases an amended filing will have to be e-filed if the original filing was required to be e-filed, and vice versa. But this need not be the case. For example, if a plan with 500 or more participants for the prior year made its final 2006 filing before July 2006 but amended it in 2007, the original filing would not have been subject to the e-filing requirement, but the amended filing would be.

In summary, for an amended filing made in 2007 (or later), if the amended filing is for a plan year:

- Beginning in or before 2005, it need not be made electronically.
- Beginning in or after 2007, it must be made electronically (unless an exemption is granted).
- Beginning in 2006, it must be made electronically if the plan had 500 or more participants for the plan year preceding the plan year for which the amended filing is made (unless an exemption is granted), but it need not be made electronically if the plan had fewer that 500 participants for the plan year preceding the plan year for which the amended filing is made.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 4 of the 2007 Blue Book.

6. **QUESTION:** Q&A 16 of the 2000 Blue Book provides information on premium and termination requirements when a plan, in the normal course of administration pays out all benefits of all participants except substantial owners of the sponsoring company. Does that information apply if the plan ceases to be covered by Title IV for any reason?

PROPOSED RESPONSE: Yes. If a plan ceases to be covered by Title IV of ERISA, the plan administrator should notify PBGC of this occurrence so that PBGC will know that the plan should be removed from the premium database. If the plan subsequently ends after it has ceased being covered by Title IV, no termination filing with PBGC is required. (See section 403(d)(1) of ERISA, which generally provides that upon termination of a plan not covered by Title IV, the assets of the plan must be allocated in accordance with section 4044 of ERISA.) If the plan continues and becomes covered again, it must begin paying premiums again. To notify PBGC or to request a coverage determination, the plan administrator should write to:

Standard Termination Compliance Division
Pension Benefit Guaranty Corporation
1200 K Street, NW, Suite 930
Washington, DC 20005-4026

E-mail: standard@PBGC.gov
Fax: (202) 326-4001

RESPONSE: The PBGC agrees with the response as reflected in Q&A 5 of the 2007 Blue Book.

7. **QUESTION:** PBGCs regulations now mandate e-filing of premium information, subject to PBGC's ability to grant a waiver from the e-filing requirement "for good cause in appropriate circumstances" (29 CFR § 4007.3). Please describe the PBGC's experience to date with any such waiver requests.

   RESPONSE: This is a new requirement, and only a few waivers have been granted, on a facts and circumstances basis. Thus, the waivers are not precedential. The PBGC cautions that reasons such as that the employer is not comfortable with computers or e-filing are clearly insufficient to merit a waiver.

8. **QUESTION:** Please describe the PBGC's audit and enforcement plans relating to PBGC premiums, particularly in light of the recent legislative changes increasing the flat-rate premium for all plans and the variable-rate premium for many plans.

   RESPONSE: The PBGC will continue to enforce both flat-rate and variable-rate premium requirements. Electronic data analysis comparing the information submitted in PBGC premium filings with that submitted in Form 5500 filings are used in this effort.

STANDARD TERMINATIONS

9. **QUESTION:** A plan is terminating in a standard termination. The plan properly provided the Notice of Intent to Terminate to all participants prior to the termination date. Prior to the date the Notice of Plan Benefits is issued, the plan provides benefits to a participant either through the purchase of an irrevocable commitment or in a form other than an annuity, in

accordance with 29 CFR § 4041.22 (which sets forth the limited circumstances under which benefits may be provided during the pendency of the termination process) and all other applicable requirements under the Internal Revenue Code and ERISA. Must this participant receive a Notice of Plan Benefits?

PROPOSED RESPONSE: Under 29 CFR § 4041.24(a), a Notice of Plan Benefits must be provided to every affected party as of the proposed termination date. However, PBGC staff interprets this regulation as not requiring a plan administrator to issue a Notice of Plan Benefits to a participant whose benefits are paid out in accordance with 29 CFR § 4041.22 on or before the due date for issuing the Notice of Plan Benefits.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 6 of the 2007 Blue Book.

10. **FOLLOW-UP QUESTION:** Is such a participant to be included among the participants whose distributions of benefit liabilities are certified to and described (by category and amount) in the post-distribution certification (PBGC Form 501)?

PROPOSED RESPONSE: Yes.

RESPONSE: The PBGC agrees that such a participant should be included among those whose distributions of benefit liabilities are to be so certified and described, unless the participant's benefits are paid out prior to the plan's termination date.

11. **QUESTION:** Please describe PBGC's new audit initiative relating to plans that distribute plan assets in satisfaction of plan liabilities before or without filing a standard termination notice with the PBGC.

PROPOSED RESPONSE: PBGC now audits all plans that distribute plan assets in satisfaction of plan liabilities before or without filing a standard termination notice (Form 500) in accordance with PBGC's regulation (29 CFR part 4041). PBGC also reserves the right to take any other appropriate action in such circumstances. This initiative will not affect plans that in the normal course of administration pay out all benefits due all participants except substantial owners of the sponsoring company.

RESPONSE: The PBGC agrees with the response as reflected in a portion of Q&A 7 of the 2007 Blue Book. [Scrivener's Note: The remaining portion of Q&A 7 notes that the PBGC now conducts standard termination audits for all plans with 300 or more participants, as discussed in last year's JCEB summary of its May 3, 2006, meeting with PBGC.]

12. **FOLLOW-UP QUESTION:** What concerns, if any, would PBGC have in connection with this new audit initiative where a plan that is about to undergo a standard termination

purchases irrevocable commitments for all participants in pay status before initiating the standard termination process? What sanction, if any, would be imposed on a plan administrator for purchasing such irrevocable commitments where PBGC concludes that the irrevocable commitments are proper in all respects other than the timing of their purchase?

RESPONSE: The PBGC would be concerned that the purchase of such irrevocable commitments could circumvent the termination requirements, including the statutory requirement to notify the participants regarding annuity contract purchases in a termination proceeding. Where an annuity contract is purchased prior to a plan termination, the scope of any audit might expand, and penalties for any notice delinquencies might be assessed.

The analysis regarding whether a purchase is in contemplation of the termination is done on a case-by-case basis. The PBGC cannot provide any general guidance or comfort regarding time periods which would be sufficiently in advance of a plan termination so that a purchase of irrevocable commitments would not pose a problem. The PBGC does note, however, that the concern only arises if the purchase is of an irrevocable commitment -- a purchase of an annuity contract which would be held as a plan asset, as is sometimes done by ongoing plans¸ does not raise these concerns. In addition, if the participants involved are timely provided with all notices that would be required in a standard termination (including the notice of annuity information that identifies the insurer) and are included in participant counts and related information as part of the standard termination filings, then these factors may reduce the PBGC's concerns. Plan sponsors are urged to contact the PBGC to discuss any situations in which such purchases are being contemplated (such as to lock in interest rates).

13. **QUESTION:** PBGC's standard termination regulations provide that a majority owner (based on a 50% or more ownership interest taking into account the constructive ownership rules) may elect to forgo receipt of his or her plan benefits to the extent necessary to enable the plan to satisfy all other plan benefits (29 CFR §§ 4041.2, .21(b)(2)). Assume that two or more participants are each substantial owners, but not majority owners, and together have a 50% or greater ownership interest. Assume further that they agree among themselves that they will each elect such an alternative treatment under the majority owner rules. May they elect the alternative treatment?

PROPOSED RESPONSE: No. To be eligible to elect an alternative treatment under the majority owner rules, a participant must be a majority owner (taking into account the constructive ownership rules). There is no aggregation of ownership interests among participants (except to the extent provided under the constructive ownership rules).

RESPONSE: The PBGC agrees with the response as reflected in Q&A 8 of the 2007 Blue Book.

14. **QUESTION:** PPA changes the interest rate and mortality table used in calculating minimum lump sum values, with the change statutorily exempted from the anti-cutback rules

of IRC section 411(d)(6). An implementing amendment need not be adopted until the end of the 2009 plan year (and perhaps even later if IRS extends the remedial amendment period).

Assume that a plan undergoes a standard termination and seeks a determination letter upon termination. After the plan's termination date, but by the end of the 2009 plan year (or by any later date during an extended remedial amendment period), the plan is amended to substitute the PPA interest and mortality assumptions for the GATT interest and mortality assumptions for purposes of calculating minimum lump sum values. The plan obtains a favorable determination letter from IRS and thereafter pays lump sums on the basis of the PPA assumptions (including the transition rule for distributions in the 2008 through 2011 plan years) during the permitted distribution period in the standard termination. These lump sums are lower than they would have been without taking the PPA lump sum amendment into account.

Would PBGC consider these lump sums to be correctly determined?

PROPOSED RESPONSE: No, under existing regulations. PBGC regulations (29 CFR § 4041.8) limit the effectiveness of amendments adopted after a plan's termination date when determining plan benefits in a standard termination. Under this regulation, amendments adopted after the plan's termination date generally may not be taken into account to the extent they decrease benefit values, as would be the case with the PPA lump sum amendment in the question. Although the regulation explicitly permits post-termination amendments to decrease benefit values "to the extent the decrease is necessary to meet a qualification requirement under section 401 of the Code", the plan here could have met qualification requirements by adopting the PPA lump sum assumptions for determining minimum lump sum values while preserving the GATT assumptions as an alternative basis for determining lump sums. Therefore, an amendment simply substituting the PPA lump sum assumptions for the GATT lump sum assumptions is not "necessary" to meet qualification requirements and, thus, the plan may not rely on the PPA lump sum amendment to decrease lump sum values. Also, as noted in PBGC's response to Q&A 14 of the 2001 Blue Book, PBGC is not bound by an IRS determination letter in determining benefit entitlements in a standard termination audit.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 8 of the 2007 Blue Book.

15. FOLLOW-UP QUESTION: Assume a situation similar to the preceding question except that the plan's termination date is July 1, 2007, and that on or before that date an amendment to the plan is adopted to substitute the PPA interest and mortality assumptions for the GATT interest and mortality assumptions for purposes of calculating minimum lump sum values for distributions in or after the 2008 plan year (including the transition rule for distributions in the 2008 through 2011 plan years). Suppose lump sum distributions are made in 2008, during the permitted distribution period in the standard termination, and the lump sum amounts are lower than they would have been under the provisions of the plan actually in effect on July 1, 2007, for current distributions (*i.e.*, based on the GATT interest and mortality assumptions).

Would PBGC permit these lump sums to be determined based on such a PPA amendment?

PROPOSED RESPONSE: Yes. Even though the PPA interest and mortality assumptions are not applicable on the termination date, the plan terms as they exist on the termination date nevertheless include the amendment to shift to those assumptions in the future. For purposes of 29 CFR § 4041.8, the adoption of the amendment on or before the termination date is sufficient to permit the lump sum calculations to be transitioned to the PPA interest and mortality assumptions starting with distributions in the 2008 plan year.

RESPONSE: There was dialog on this issue at the JCEB meeting, and PBGC staff members expressed their preliminary views that an amendment adopted on or before a plan's termination date in the 2007 plan year to reflect PPA interest and mortality assumptions could not be used to determine the minimum value of lump sum payments in the 2008 plan year if such value would be less than the amount calculated using the GATT interest rate and mortality assumptions in effect on the plan's termination date. PBGC is considering guidance on the matter.

16. **QUESTION:** A plan provides a benefit that is not protected under the anti-cutback rules of IRC section 411(d)(6), such as a social security supplement that is not a qualified social security supplement. Must that benefit be included in benefit liabilities for purposes of determining whether a plan may terminate in a standard termination under section 4041 of ERISA?

PROPOSED RESPONSE: Yes. Unless the benefit is amended out of the plan on or before the termination date, the full benefit must be included in benefit liabilities for purposes of a standard termination under section 4041 of ERISA. (For information on post-termination amendments, see 29 CFR § 4041.8. See also immediately preceding Questions 14 and 15 of this JCEB Summary.)

RESPONSE: The PBGC agrees with the response as reflected in Q&A 9 of the 2007 Blue Book.

17. **QUESTION:** The PBGC's standard termination regulations (see 29 CFR § 4041.22(b)) allow the plan administrator of a plan undergoing a standard termination to make lump sum distributions during the period beginning with the issuance of the first notice of intent to terminate through the end of the PBGC's 60-day review period if: "(1) [t]he participant has separated from active employment or is otherwise permitted under the Code to receive the

distribution; (2) [t]he distribution is consistent with prior plan practice; and (3) [t]he distribution is not reasonably expected to jeopardize the plan's sufficiency for plan benefits."

Assume that a plan provides for lump sum distributions on separation from active employment in addition to lump sum distributions on plan termination (so that condition (1) is met for such a separated participant), and that no lump sum distributions would be reasonably expected to jeopardize the plan's sufficiency for plan benefits (so that condition (3) is met). Further assume that the consistent prior practice of the plan has been to pay such separation lump sums whenever a participant was separated and elected the lump sum with appropriate spousal consent. May the plan administrator rely on this consistent prior plan practice to determine that condition (2) is met where, during the pendency of the standard termination, the employer shuts down its plant and, as a result, all active participants are separated and apply for separation lump sums with appropriate spousal consent?

PROPOSED RESPONSE: If, for a significant period of time prior to the plan termination, the plan's terms have provided for lump sum benefits upon separation from active employment, and the plan has consistently been paying such distributions when elected with appropriate spousal consent, then the PBGC would consider the distributions to be "consistent with prior plan practice" for purposes of 29 CFR § 4041.22(b)), notwithstanding that they are now being paid on account of a plant shutdown. However, if an amendment was recently made to the plan to allow for separation lump sums upon separation from active employment and there is thus only a brief period of "consistent prior plan practice," such distributions on account of a plant shutdown would not appear to satisfy the requirements of 29 CFR § 4041.22.

RESPONSE: The PBGC declined to provide an answer, noting that the analysis in any case would be on a facts and circumstances basis. Plan sponsors may contact the PBGC to request case-specific guidance in such situations.

DISTRESS AND INVOLUNTARY TERMINATIONS

18. QUESTION: Does PBGC's existing policy on the assessment of penalties under ERISA section 4071, as published in the Federal Register on July 18, 1995 (60 Fed. Reg. 36937), including the general "guideline" penalties described therein, apply to failures to provide information in accordance with PPA section 506 ("Disclosure of Termination Information to Plan Participants")?

PROPOSED RESPONSE: Yes.

RESPONSE: The PBGC's existing policy, including the general "guideline" penalties, do apply to such failures. However, the PBGC is in the process of reexamining its penalty policies and may issue further guidance specifically addressing penalties for such failures.

19. **QUESTION:** Please describe PBGC's experience in attempting to collect employer liability, due and unpaid contributions, and premiums (along with related penalties and interest) from foreign entities that are members of a controlled group maintaining a PBGC-covered plan that terminates in a distress or involuntary termination.

RESPONSE: The PBGC's position is that controlled group liability does extend to foreign entities. While the PBGC has difficulty in collecting on that liability, it has had success in several situations, including cases in which the foreign affiliate (1) has assets in the United States (such as sale proceeds or debts owed to it from U.S. subsidiaries) or (2) has provided collateral to the plan (*e.g.*, to enable the U.S. affiliate to receive a funding waiver related to the plan).

20. **QUESTION:** In Question 3 of the 2005 Q&A session with JCEB, PBGC explained the criteria it uses in determining whether to object to a "follow-on" plan.

a. If an employer establishes a new plan that the PBGC would classify as a "follow-on" plan, does the PBGC have any remedies other than restoring the prior plan to the original plan sponsor pursuant to ERISA section 4047 and 29 CFR § 4047.1, *et seq.*?

b. Before the PBGC restores a plan, does the PBGC have to demonstrate that the sponsor can afford the plan in addition to the "follow-on" plans or in lieu of the "follow-on" replacement plans?

c. What types of compensation are considered in determining whether a "follow-on" plan has been provided – salary, bonuses, qualified plans, unfunded deferred compensation, other items?

d. Is the follow-on plan doctrine applicable to an asset purchaser who hires all the employees of the former sponsor and puts them in a new or existing defined benefit plan?

PROPOSED RESPONSES:

a. The PBGC has no other remedy than restoring the plan to the original sponsor.

b. In order to restore a plan, the PBGC must demonstrate that the sponsor can afford the plan in lieu of the "follow-on" plan(s).

c. Only qualified and nonqualified defined benefit pension plans are considered in determining whether the employees have been provided a "follow-on" plan.

d. Once there is an asset purchase, PBGC's follow-on plan doctrine is not applicable.

RESPONSE: The PBGC declined to answer this question.

PARTICIPANT NOTICES

21. **QUESTION:** PPA section 501(a) expands the annual funding notice requirement that applies under ERISA section 101(f) to multiemployer plans, so that it applies also (with modifications) to single-employer plans, effective for plan years beginning after December 31, 2007, with the notice required to be provided within 120 days after the end of the plan year to which it relates (subject to an exception for small plans). PPA section 501(b) repeals the requirement, under ERISA section 4011, that plan administrators of certain plans issue a Participant Notice, effective for plan years beginning after December 31, 2006. Do these effective dates mean that there will be more than a two-year period during which neither a Participant Notice under ERISA section 4011 nor an annual funding notice under ERISA section 101(f) will be required for a PBGC-covered single-employer plan?

    PROPOSED RESPONSE: Yes. In the case of a calendar-year PBGC-covered single-employer plan, a Participant Notice under ERISA section 4011 for the 2006 plan year was required to have been issued within two months after the deadline (or extended deadline) for the Form 5500 for the 2005 plan year, i.e., in the fall of 2006. (For most non-calendar year plans, a Participant Notice under ERISA section 4011 for the 2006 plan year will be due in the 2007 calendar year.) No Participant Notice under ERISA section 4011 will be required for the 2007 (or any later) plan year. The first annual funding notice for this plan under PPA section 501(a) will be the one for the 2008 plan year, which will be due within 120 days after December 31, 2008 (subject to an exception for small plans), i.e., in the spring of 2009.

    Note that the Title IV Participant Notice "for" a plan year is generally issued "in" that plan year, whereas the Title I annual funding notice "for" a plan year will be required to be issued "in" the following plan year. Note also that while the Title IV Participant Notice is under the jurisdiction of the Pension Benefit Guaranty Corporation, the Title I annual funding notice is under the jurisdiction of the Department of Labor.

    RESPONSE: The PBGC agrees with the response as reflected in Q&A 13 of the 2007 Blue Book.

22. **QUESTION:** When the PBGC announced its Participant Notice Voluntary Correction Program in 2004, it stated that it was "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). At last year's JCEB session, which took place before PPA became law, PBGC indicated that it was focusing on increasing compliance with Participant Notice requirements. What effect, if any, does the repeal in PPA of the Participant Notice requirement for post-2006 plan years have on the PBGC's current enforcement plans regarding pre-2007 plan years?

    RESPONSE: Even though Congress removed the participant notice requirement from PBGC oversight for post-2006 plan years, there is no change in the rules that applied for 2006 and prior years. PBGC will continue to enforce the requirement and penalize plan administrators for pre-2007 failures where appropriate. In this regard, PBGC will continue to use electronic data analysis to identify cases in which a filing states that the participant notice is not required, although the funding information indicates it is required.

REPORTABLE EVENTS

23. **QUESTION:** Plans A and B are calendar-year single-employer plans that merged effective May 10, 2007, with Plan A designated as the continuing plan. Quarterly contributions of $100,000 each would have been due for 2007 for Plan A. Quarterly contributions of $0 each would have been due for 2007 for Plan B. Plan B has a $5,000,000 credit balance in the Funding Standard Account (FSA) as of January 1, 2007 before reflecting any contributions for 2006. No contributions were made to either plan or the combined plan for 2007. Q-12 of IRS Notice 89-52 says that FSA credit balances can be used to meet/cure quarterly contributions required to the extent the contributions reflected in the FSA have been made. Since the FSA credit balance was available by the 30th day following the April 15, 2007 due date for the first 2007 quarterly contribution, does the plan need to report late quarterly contributions to PBGC under 29 CFR § 4043.25(c)?

    PROPOSED RESPONSE: Section 4043.25(c) provides that for the event of failure to make a required minimum funding contribution, notice is waived if the required minimum funding contribution is made by the 30th day after its due date. Provided that the merger was adopted and effective by the 30th day following the April 15, 2007 due date for the first quarterly contribution, then under the facts given above, PBGC would deem this waiver to apply.

    (We note that there is no such waiver for PBGC Form 200, *Notice of Failure to Make Required Contributions*. Thus, had the missed contribution been such that a Form 200 would have been required, reporting would not be waived even if the merger had been adopted and effective by the 10th day after the missed contribution's due date.)

    RESPONSE: The PBGC agrees with the response as reflected in Q&A 14 of the 2007 Blue Book.

24. **QUESTION:** Does PBGC have in place, or have any plans to implement, any kind of voluntary correction program for late information filings (*e.g.*, reportable events, Forms 200, annual employer reports under ERISA section 4010, notices of 4062(e) events under ERISA section 4063(a))? If so, please provide details.

    RESPONSE: The PBGC does not have in place, nor does it have any plans to implement, such a voluntary correction program.

ANNUAL EMPLOYER REPORTING (ERISA SECTION 4010)

25. QUESTION: Plan A and several other plans are maintained by members of Controlled Group X. The Information Year (as defined in 29 CFR § 4010.5) for Controlled Group X is the calendar year. Plan A, which has a plan year beginning April 1 and ending March 31, is undergoing a standard termination with a proposed termination date of July 1, 2006. For purposes of the $50 Million Gateway Test and for purposes of reporting benefit liabilities to PBGC under ERISA section 4010, must Plan A be included? Does it matter whether the distribution of benefit liabilities was completed, or the post-distribution certification filed, on or before the gateway testing date (March 31, 2006), the end of the Information Year (December 31, 2006), or the 4010 reporting deadline (April 16, 2007)?

PROPOSED RESPONSE: Plan A may be excluded for both purposes described above if all of the plan's assets (other than excess assets) are distributed pursuant to the termination on or before the last day of the Information Year, in this case December 31, 2006.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 18 of the 2007 Blue Book.

ERISA SECTION 4062(e) AND 4063 EVENTS

26. QUESTION: Section 4062(e) of ERISA provides special rules that apply when ''an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment'' (a ''section 4062(e) event''). Is the "more than 20%" test determined on a plan-by-plan basis or by considering all plans maintained by the controlled group in the aggregate?

PROPOSED RESPONSE: For purposes of determining whether a section 4062(e) event has occurred, the "more than 20%" test is determined on a plan-by-plan basis.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 19 of the 2007 Blue Book.

27. QUESTION: In the response to Question 21(b) of the 2006 Blue Book, PBGC noted—in the context of an event that constitutes both an "active participant reduction" reportable event and a section 4062(e) event—that the reportable events filing requirement is separate from the filing requirement (under ERISA section 4063(a)) for a section 4062(e) event. May the two notices be combined by including the notice of the section 4062(e) event as part of the reportable events notice?

PROPOSED RESPONSE: Yes, provided that: (1) the filing states that there has been a section 4062(e) event and includes a request for a liability determination; and (2) the filer alerts 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 notice of the section 4062(e) event).

Note that the due dates for the two types of notices will generally differ. Section 4043 reporting is due within 30 days after the plan administrator (or contributing sponsor) knows or has reason to know the event has occurred, while reporting under section 4063(a) is due within 60 days after the section 4062(e) event. Moreover, the section 4062(e) event and the active participant reduction event may not occur on the same date. Thus, in order to be timely, a combined notice will have to be submitted on or before the earlier of the two due dates.

Note also that the reportable events regulation provides a number of filing extensions for reporting an active participant reduction, none of which serves to extend the deadline for filing a notice of the section 4062(e) event. The filer, therefore, may have to submit the reportable events notice well before it is due to ensure the timeliness of a combined filing.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 20 of the 2007 Blue Book.

28. **QUESTION:** If a section 4062(e) event occurs, is reporting required under ERISA section 4063(a) regardless of the size of the plan?

PROPOSED RESPONSE: Yes. Although PBGC has waived the requirement to report an active participant reduction under § 4043.23 for certain small plans, there is no such waiver of the requirement to report a section 4062(e) event under ERISA section 4063(a). In response to a comment asking for an exemption for small plans, PBGC, in the preamble to the section 4062(e) final rule published on June 16, 2006 (71 FR 34829), said that it would consider this request as it formulates additional guidance in this area.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 21 of the 2007 Blue Book.

29. **FOLLOW-UP QUESTION:** Since the purpose of reporting a section 4062(e) event to PBGC is so that PBGC can pursue liability for a portion of the plan’s unfunded benefit liabilities as of the date of the section 4062(e) event, would the PBGC agree that no such reporting is required where the plan’s enrolled actuary certifies to the plan administrator that the plan has no unfunded benefit liabilities immediately after date of the section 4062(e) event?

PROPOSED RESPONSE: Yes.

RESPONSE: The PBGC disagrees with the proposed response. There is no exception from the reporting requirement with respect to a section 4062(e) event in such a situation.

30. **QUESTION:** On June 16, 2006, PBGC issued a final rule specifying how to calculate the liability that arises under ERISA section 4062(e) when an employer ceases operations at a facility and, as a result, more than 20 percent of employees covered by its defined benefit pension plan separate from employment. Please describe the PBGC's enforcement plans in connection with finding out about such events (including its policy relating to penalties for reporting failures) and pursuing the related liability.

RESPONSE: The PBGC is continuing to assess each case on a facts and circumstances basis. PBGC anticipates issuing further guidance with respect to section 4062(e), but not in the near future.

FOLLOW-UP QUESTION: Suppose that before the cessation of operations at a facility, only a few active employees remain, but the plan continues to cover many retired employees, would that impact the application of section 4062(e)?

RESPONSE: In such a situation, notice of the section 4062(e) event would still be required, but the PBGC would be willing to discuss with the employer whether any liability should be assessed.

31. **QUESTION:** Assume that an event described in ERISA section 4062(e) occurs for a plan that is undergoing a standard termination, and that the deadline for the plan administrator to provide PBGC with notice of the 4062(e) event under ERISA section 4063(a) is on or after the date the plan's assets have been distributed, pursuant to the standard termination, in satisfaction of all benefit liabilities through priority category 6 of ERISA section 4044. Is the plan administrator required to provide PBGC with such notice?

PROPOSED RESPONSE: No.

RESPONSE: Assuming that the notice requirement would continue to apply in such a case, the PBGC generally would not enforce the notice requirement in these circumstances.

32. **FOLLOW-UP QUESTION:** Assume the same situation as described in the preceding question, except that the deadline for notice of the 4062(e) event under ERISA section 4063(a) is before the date the plan's assets are distributed, pursuant to the standard termination, in satisfaction of all benefit liabilities through priority category 6 of ERISA section 4044. Is the plan administrator required to provide PBGC with such notice?

PROPOSED RESPONSE: Yes, unless the plan's enrolled actuary certifies to the plan administrator that the plan has no unfunded benefit liabilities immediately after date of the section 4062(e) event (disregarding for this purpose any commitment by the employer to make the plan sufficient for plan benefits under 29 CFR § 4041.21(b)). (See Question 29 of this JCEB Summary.)

RESPONSE: The PBGC disagrees with the portion of the proposed response stating that the notice would not be required where the plan's enrolled actuary certifies to the plan's sufficiency. The notice requirement would apply irrespective of any such certification.

33. **QUESTION:** Assume a portion of a multiple-employer plan is spun off to a substantial employer of the multiple-employer plan under IRC section 414(l), and as a result, that employer ceases contributing to the multiple-employer plan. Has a withdrawal which needs to be reported under ERISA section 4063(a) occurred? If so, what actions might PBGC take? (In Q&A 19 of the 2005 Blue Book, which involved splitting a multiple employer plan between two employers, the answer stated that there "may have been a withdrawal of a substantial employer.")

PROPOSED RESPONSE: Yes. This situation constitutes a withdrawal of a substantial employer (See Q&A 19 of the 2005 Blue Book). Therefore, the plan administrator must notify PBGC of the withdrawal pursuant to ERISA section 4063(a) (see Q&A 22 of the 2006 Blue Book for the manner of reporting).

In the event of such withdrawal, PBGC may seek a bond or escrow under ERISA section 4063(b) and (c); in unusual circumstances may pursue a partition of the plan under section 4063(d) and treat a portion of the plan as a terminated plan and the remainder as a separate plan (see Opinion Letter 81-14); may accept an appropriate indemnity agreement among employers under section 4063(e); or may reach a negotiated arrangement under section 4067. In an appropriate case, PBGC may also consider initiating termination under section 4042(a) and assessing liability under sections 4062 and 4064. PBGC's Department of Insurance Supervision and Compliance and Office of the Chief Counsel may be consulted for further guidance.

(The difference between this question and question 19 of the 2005 Blue Book is that in this case the employer is assumed to be a substantial employer. In the 2005 question, it was not stated whether either employer was a substantial employer and therefore the answer said that there "may have been a withdrawal of a substantial employer.")

RESPONSE: The PBGC agrees with the response as reflected in Q&A 22 of the 2007 Blue Book.

34. **FOLLOW-UP QUESTION:** In the situation described in the preceding question, do all of the substantial employers in both the spun-off portion and remaining portion of the original multiple-employer plan have a withdrawal which needs to be reported under ERISA section 4063(a)? That is, are the substantial employers who continue to participate in the

remaining portion of the original multiemployer plan treated as having withdrawn from the spun-off portion of the plan, and vice versa?

RESPONSE: The form of the transaction governs which plan is the surviving plan (*i.e.*, the portion from which the assets are transferred). The employer(s) which continue to participate in the surviving plan after the transaction have not withdrawn, while the employer(s) which do not continue to participate in that plan are considered to have withdrawn from it. The PBGC encourages employers to contact it prior to events which may involve withdrawals, to discuss the situation and any possible withdrawals and related liabilities.

EARLY WARNING/RISK MANAGEMENT PROGRAM

35. **QUESTION:** Please provide an update on the number and kinds of cases the PBGC has been involved in over the past year under its "Early Warning" or "Risk Management" program, including a description of the results of that involvement. How does the level of activity under this program compare to prior years?

RESPONSE: The level of activity is consistent with prior years. The PBGC declined to share further information on this issue.

36. **QUESTION:** PBGC Technical Update 00-3 provides that the PBGC will contact a company for further information about a transaction only if: (1) the company has a below investment-grade bond rating and sponsors a pension plan that has current liability in excess of $25 million, or (2) the company (regardless of its bond rating) sponsors a pension plan that has current liability in excess of $25 million and that plan has unfunded current liability in excess of $5 million. Does this mean that the PBGC will not contact a company for further information about a transaction if these tests are not met, even if the company is a filer under ERISA section 4010?

PROPOSED RESPONSE: Yes.

RESPONSE: The PBGC has not fully evaluated the impact of the Pension Protection Act of 2006 on this issue.

37. **QUESTION:** The criteria in PBGC Technical Update 00-3 for when the PBGC will contact a company for further information about a transaction are tied to current liability, a concept that will no longer be relevant for most plans after 2007. Has the PBGC decided on a substitute measure to be used for this purpose for post-2007 plan years and, if so, what is it?

RESPONSE: The PBGC has not fully evaluated the impact of the Pension Protection Act of 2006 on this issue.

LITIGATION AND GENERAL MATTERS

38. 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:

PBGC-Initiated Terminations.

- In re UAL Corp., 468 F.3d 444 (7th Cir. 2006): On October 25, 2006, the Seventh Circuit affirmed the termination of the United Pilots Plan. Recognizing that PBGC was not bound by the agreement between United and ALPA to continue the plan until June 2005 at PBGC's expense, the court held that the $84 million increase in PBGC's liability for an additional six months of accruals was unreasonable pursuant to 1342(c). The court also upheld PBGC's selection of the December 30, 2004 termination date. On April 2, 2007, the Supreme Court denied ALPA's and URPBPA's petitions for certiorari.

- PBGC v. United Airlines, Inc., 2007 WL 57271 (4th Cir. Jan. 9, 2007): the Fourth Circuit affirmed the termination date of the United Airlines ground plan. PBGC had entered into a trusteeship agreement with United setting the plan's termination date as March 11, 2005. This termination date was critical to preventing a phase-in of $139 million in guaranteed benefits that would have taken effect one business day later. AMFA, which represents some of the ground plan participants, argued that PBGC's notice to participants about the plan termination, through publication and notice to the union and United, was not enough to cut off participants' interests, and thus could not be used to set the termination date. The Fourth Circuit rejected this and other arguments and affirmed PBGC's choice of the termination date, finding that the notice provided was sufficient

- PBGC v. Durango Georgia Paper Co., 2006 WL 3762085 (S.D. Ga. Dec. 20, 2006), appeal pending (11th Cir.): The former plan sponsor challenged the termination date agreed to by PBGC and Durango. The district court held that when a pension plan is terminated involuntarily under section 4042 of ERISA, the statute authorizes PBGC and the plan administrator to set the termination date (either before or after litigation begins), and the former sponsor had no right to object.

Standard Terminations.

- Beck v. PACE International Union, ___ U.S. ___ (2007). On June 11, 2007, the Supreme Court unanimously adopted the position articulated by PBGC, DOL, and the Solicitor General as amici curiae, and reversed a decision of the U.S. Court of Appeals for the Ninth Circuit. The Court considered whether an employer that sponsors and administers a single-employer defined benefit plan has a fiduciary obligation under ERISA to consider merger as a method of implementing the employer's decision to terminate the plan. Deferring to PBGC's interpretation of ERISA, the Court rejected the Ninth Circuit's conclusion that merger is a permissible method of termination, embracing PBGC's argument that merger is an alternative to, rather than an example of, plan termination.

- Becker v. Weinberg Group, Inc. Pension Trust, 2007 WL 455196 (D.C. Cir. Feb. 13, 2007): the district court granted PBGC's motion to dismiss this suit brought by a participant to challenge the plan administrator's plan interpretation and calculation of her benefit in the context of a standard termination. The participant added PBGC as a party, arguing that the agency should have prevented the standard termination or audited the plan and corrected the alleged error. PBGC moved to dismiss, arguing that there was no ripe claim against it, and that PBGC's decision not to halt a termination or select a plan for audit is committed to the agency's prosecutorial discretion and not reviewable by a court. The court agreed, and in a lengthy opinion, also granted summary judgment to the plan administrator on the participant's claims against it, finding that the benefit determination was reasonable.

Distress Terminations.

- In re Kaiser Aluminum Corp., 456 F.3d 328 (3d Cir. 2006): On July 26, the Third Circuit held that when an employer in Chapter 11 bankruptcy seeks to terminate multiple pension plans under ERISA's reorganization distress test, the bankruptcy court must apply the test on an aggregate, rather than a plan-by-plan basis. This would allow such employers to terminate all of their plans, even if one or more is affordable. Under a global settlement with Kaiser, PBGC could not seek further review of the decision.

- In re Falcon Prods., Inc., 354 B.R. 889, 2006 WL 2711640 (E.D. Mo. Sep. 21, 2006), appeal pending (8th Cir.): Closely following the Third Circuit's decision in the Kaiser Aluminum case, the district court rejected PBGC's arguments that ERISA, its legislative history, policy considerations, and deference to the agency's interpretation of ERISA required the bankruptcy court to apply plan-by-plan approach in assessing the debtor's distress termination application for its three pension plans. The district court concluded under Bankruptcy Code section 1113 that it would be unfair and inequitable to union employees to terminate their plan while allowing participants under another plan to maintain their benefits, particularly where those participants were no longer the employees of the debtors. The district court also concluded that the bankruptcy court did not err in reviewing the financial status of the non-debtor controlled group members solely to determine whether they could help the debtors to support the pension plans under the reorganization distress test. PBGC appealed this decision to the Eighth Circuit, and argument was held on April 12, 2007.

- In re Delta Airlines, Inc., 2006 U.S. Dist. LEXIS 88885 (S.D.N.Y. Dec. 11, 2006): the district court denied this appeal filed by retired pilots challenging the bankruptcy court order approving the distress termination of the Delta Pilots Pension Plan. In denying the appeal, the court held that the bankruptcy court's decision and factual findings were supported by a sufficient record and substantial evidence showing that Delta and the other debtors in its controlled group met the Chapter 11 distress termination standard.

Valuation of PBGC's Claims in Bankruptcy.

- o In re High Voltage Engineering, No. 05-10787-JNF (Bankr. D. Mass. July 26, 2006): the bankruptcy court for the District of Massachusetts held that PBGC's valuation regulation governs the amount of a claim for unfunded benefit liabilities. The court followed the decisions of the bankruptcy courts in the US Airways and UAL cases. HVE sought to discount the claim at a so-called "prudent investor rate" to allow money to flow to equity holders.

PBGC as Statutory Trustee.

- o Chao v. USA Mining, Inc., 2007 WL 208530 (E.D. Tenn. Jan. 24, 2007): the district court granted summary judgment in favor of the Secretary of Labor and PBGC against Dan Geiger and his three corporations for fiduciary breach committed against the SCT Yarns pension plans. Working with the plans' former trustee, now deceased, Geiger had caused the plans to "invest" millions of dollars in the corporate defendants, which never produced anything, despite abortive projects such as an inactive gold mine and a scheme to build a gentlemen's club/casino in Nevada. PBGC's and DOL's lawsuits were consolidated and the agencies filed jointly for summary judgment. The court ruled in favor of PBGC and DOL on all counts, holding that the terminated plans were entitled to damages in the full amount of all transactions that took place after Geiger became a fiduciary, and entering a permanent injunction against Geiger's again becoming a plan fiduciary.

- o Paulsen v. CNF, Inc., 2006 WL 4094289 (N.D. Cal. Dec. 22, 2006), appeal pending (9th Cir.): Six participants in the terminated plan brought suit against the sponsor's former parent company, the plan's administrative committee, and the plan's actuary, alleging fiduciary breach under ERISA and actuarial malpractice under state law. When the court required PBGC to be joined in the suit as an essential party, the plaintiffs alleged that PBGC committed fiduciary breach by failing to sue the actuary. The district court dismissed the complaint against PBGC, holding that as a federal agency, PBGC was entitled to deference on such matters. The court also held that the plaintiffs' state law claims were preempted by ERISA and that the plaintiffs lacked constitutional standing to bring an action against the actuary.

Administrative Law.

- Boivin v. US Airways, Inc., 446 F.3d 148 (D.C. Cir. 2006): After the US Airways Pilots Plan terminated, seven pilots sued PBGC without waiting for the agency to complete benefit determinations, alleging that PBGC had miscalculated their estimated benefits. The district court granted PBGC's motion for summary judgment. Without reaching the merits, the court of appeals ordered the district court to dismiss the case, holding that the pilots must exhaust their administrative remedies before bringing a civil action. Noting that PBGC's administrative review regulations were entitled to deference, the court held that requiring exhaustion of administrative remedies would promote judicial efficiency by giving the agency the opportunity to correct any errors.

- Garland v. US Airways, 2006 WL 3762047 (W.D. Pa. Dec. 21, 2006): the Pennsylvania district court granted PBGC's motion to dismiss the claims of a former US Airways pilot against PBGC and its former Executive Director. The pilot alleged wrongful termination of his employment with US Airways as a result of race discrimination and retaliation. The court cited improper service of process, lack of jurisdiction including failure to exhaust administrative remedies, improper venue, and failure to state a claim upon which relief could be granted.

- Koehler v. PBGC, No. 1:06 CV 1421 (N.D. Ohio April 4, 2007): the district court granted PBGC's motion to dismiss this suit brought by a group of LTV plan participants claiming that they were entitled to disability pensions, which had been denied them by LTV and subsequently by PBGC. Among their assertions was that PBGC had breached its fiduciary duties by failing to pay the claimed benefits. PBGC argued that the plaintiffs had not exhausted their administrative remedies by appealing their benefit determinations to the PBGC Appeals Board, and that their attempt to characterize a benefit challenge as a fiduciary breach should not change the result.

o Segmiller v. PBGC, No. 04 CV 284 (M.D. Fla. Nov. 16, 2006): the district court granted summary judgment to PBGC in a UAL Ground Plan participant lawsuit challenging PBGC's recoupment of pre-termination overpayments, and seeking repayment of the recouped amounts. The court ruled against the recoupment claim because the participant failed to exhaust administrative remedies with PBGC. The court also denied the claim because it was not a claim for equitable relief as provided for under Title IV of ERISA.

Miscellaneous.

- Dumas v. PBGC, No. 2:05-cv-100 (N.D. Ind. Apr. 9, 2007): An LTV participant appealed his benefit determination, asserting that according to a PBGC communication addressing the maximum guarantee limit, he was entitled to the maximum as his pension. After submitting the administrative record, PBGC argued on summary judgment that the maximum guarantee limit is merely a cap upon whatever benefits the participant is entitled to under the plan, and is not a separate source of benefit entitlement. The Court agreed, and dismissed the complaint.

- Coleman v. PBGC, 469 F.3d 1061 (D.C. Cir. 2006): On December 4, the D.C. Circuit affirmed the district court's decision in favor of PBGC, denying shutdown and mutual consent benefits to a group of former employees under the terminated McLouth Steel Products Corporation pension plan. The court held that the representations of the United Steelworkers and the company, indicating that no shutdown had occurred, were supported independently by the facts and were reasonably relied upon by PBGC, and that the company had validly eliminated similar "mutual consent" benefits.

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

RESPONSE: The PBGC has not resolved any such matters this year and declines to comment as to any other possible matters.

40. **QUESTION:** At last year's JCEB session, PBGC indicated that it was reviewing prior guidance to delete obsolete items, better organize the remaining guidance, and make that guidance more accessible by posting it on the PBGC website, indexing it, and improving its content and format, all as part of a "good guidance initiative" being undertaken in connection with OMB's broader good guidance practices program. Please provide an update on what progress has been made and on any future plans in this area.

RESPONSE: The PBGC has made changes to its website to make it more usable. In addition, on January 17, 2007, OMB issued procedures to be followed regarding "Significant Guidance Documents" (http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf) that will impact some of the guidance issued by the PBGC. Guidance by an agency which is intended to be of general application is covered by the new rules, unless it is covered by the Paperwork Reduction Act rules. In contrast, opinions letters on specific cases and internal staff procedures are ordinarily not covered by the new rules.

The new rules create a better process for significant guidance documents, including procedures for proposing guidance, allowing comments (while permitting agencies discretion regarding whether to act on the comments), and allowing the public to request guidance addressing issues of concern. The PBGC expects to post information on pending guidance projects on its website.

41. **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: During the past year, the PBGC has issued technical updates on interest rates under PFEA (http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu15773.html) and PPA (http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu15838.html), and on the effect of new current liability mortality assumptions for 2007 on PBGC premium and reporting requirements (http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu15995.html). The PBGC has also finalized its regulations on mandatory e-filing of PBGC premium information (http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu15995.html), on its penalty policy relating to late premium payments (http://edocket.access.gpo.gov/2006/pdf/E6-19436.pdf), and on a liability formula under ERISA section 4062(e) (http://edocket.access.gpo.gov/2006/pdf/E6-9503.pdf). In addition, the PBGC has announced a new audit initiative for terminated plans. Finally, it has made further improvements to its website, and is working on adding a subscription email newsletter feature.

42. **QUESTION:** What are the PBGC's plans and priorities for issuing regulations and other guidance on the various PPA changes that fall under PBGC's jurisdiction? In particular, when does PBGC anticipate implementing: (1) its authority to pay interest on premium overpayments, and (2) the expanded missing participants program for (among others) terminating DC plans?

RESPONSE: Providing guidance regarding the impact of the PPA is the current focus and will continue to be for some time, as indicated in the PBGC's Semiannual Regulatory Agenda issued on April 30, 2007. [Scrivener's note: The Regulatory Agenda is available at http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13753.html.]

Proposed regulations on the expanded missing participants program will likely be issued in early 2008. Guidance regarding the PBGC's authority to pay interest on premium overpayments is currently anticipated to be issued in late 2008 or early 2009, and the PBGC is considering whether to apply its authority retroactively to the PPA enactment date (August 17, 2006).

The timing of guidance depends in part on the clearance process, which (for the PBGC) involves three cabinet-level departments, including the DOL (which has a policy planning board), in addition to the regular internal review process and OMB review where appropriate. In addition, Congress is considering technical corrections to the PPA, which could require further guidance, or impact planned guidance. The PBGC has been participating in staff-level deliberations between the Congressional Committees with pension jurisdiction and the federal pension regulatory agencies regarding the development of potential PPA technical corrections legislation. The timing of the technical corrections legislation and just how "technical" it will be are both uncertain.