American Bar Association
Joint Committee on Employee Benefits
Q&A Session with PBGC
May 5, 2010

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 in advance to the agency 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 the official position of PBGC. This report on the discussions was prepared by designated JCEB representatives, based on the notes and recollections of the JCEB representatives at the meeting (with informal review by PBGC staff), and it was understood that this report would be made available to the public.

PREMIUMS

1. **QUESTION:** Please provide an update describing PBGC's collection experience with respect to the $1,250 per participant termination premium.

   PBGC'S MEETING RESPONSE: The only case law to date is *PBGC v. Oneida Ltd*., 562 F.3d 154 (2d Cir. 2009), *cert. denied*, 2009 WL 3316342 (Dec. 14, 2009). In *Oneida*, the Second Circuit held that the claim for the statutory termination premiums that the reorganizing Chapter 11 debtor incurred when its pension plan terminated was not a claim in the bankruptcy case and thus not was not discharged in bankruptcy. PBGC continues to pursue termination premiums in all appropriate cases. Because PBGC typically collects termination claims via agreements that resolve all PBGC claims against the liable entities, the specific amount collected with respect to claims for termination premiums is not readily ascertainable.

2. **QUESTION:** Please confirm the PBGC's guidance in Q&A 8 of the 2010 Blue Book, which dealt with a situation in which the 2009 comprehensive premium filing had been made based on the standard premium funding target, but the sponsor subsequently elected to use the October 2008 full yield curve to determine the minimum required contribution for 2009. The question was whether the 2009 filing could be amended to reflect an election to use the alternative premium funding target where doing so would lower the variable rate premium, thus generating a refund or credit.

   [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 answers reflect the views of individual staff members and do not represent the official position of PBGC.]

PBGC'S MEETING RESPONSE: PBGC's guidance in the Blue Book was that, if the variable rate premium due date for 2009 had already passed, the answer was "no." But if the comprehensive filing had been submitted early and the due date had not already passed, then the filing could be amended and an election made to use the alternative premium filing target. PBGC confirmed that it continues to agree with these responses, as well as with the other PBGC guidance set forth in Q&A 8 of the 2010 Blue Book.

3. **QUESTION:** Please confirm the PBGC's guidance in Q&A 9 of the 2010 Blue Book. Q&A 9(a) dealt with a situation where a plan administrator erroneously checked Box 5 (the election to use the alternative premium funding target) on the 2009 premium filing, but in Box 7 correctly indicated that the standard method was used. Q&A 9(b) addressed a situation where a plan administrator elected to use the alternative method to determine 2008 variable rate premiums and correctly checked Box 5, but incorrectly checked Box 5 again in its 2009 filing. In addition, please provide guidance as to how PBGC would address situations where a plan administrator inadvertently failed to check Box 5, despite the fact that Box 7 and the accompanying calculations indicated that the alternative method had been elected and used.

   PBGC'S MEETING RESPONSE: In response to Blue Book Question 9(a), PBGC's guidance was that if Box 5 was checked, an election to use the alternative premium funding target had been made and would govern. In response to Blue Book Question 9(b), PBGC's guidance was that checking Box 5 again in 2009 would not restart the five-year clock, and that, because the error would have no effect, there would be no need to amend the 2009 filing. PBGC confirmed that it continues to agree with the guidance that it gave in the 2010 Blue Book regarding these questions. PBGC indicated that it would not currently provide answers to questions regarding situations in which a plan administrator erroneously failed to check Box 5 on the 2009 filing, that it is in the process of actively working through the issues, and that it would listen to comments and consider questions raised by the JCEB, and would consider all such comments and questions as it works through the issues.

   SUBSEQUENT EVENT: On June 16, 2010, PBGC issued Technical Update 2010-02, (available on PBGC's website at: http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu17239.html)which provided a relief process for plans where Box 5 was not checked, but the Box 7 entries reflected calculation of the variable rate premiums using the alternative method.

4. **QUESTION:** PBGC's regulations provide that an election of the alternative premium funding target is binding for five years. Assume that the plan administrator of calendar-year Plan A elects the alternative premium funding target for the 2009 plan year.

   (a) Assume that Plan A spins off new calendar-year Plan X effective January 1, 2010. Is Plan X required to use the alternative premium funding target for the 2010 through 2013 plan years?

   (b) Assume instead that, effective January 1, 2010, Plan A consolidates with calendar year Plan B (for which an election of the alternative premium funding target was also first in effect for the 2009 plan year), resulting in the establishment of new calendar year Plan C

in a "consolidation" (as defined at p. 50 of PBGC's 2010 Premium Payment Instructions). Is Plan C required to use the alternative premium funding target for the 2010 through 2013 plan years?

PROPOSED RESPONSE:

(a) No. Plan X is a new plan and is not bound by the election made by Plan A.

(b) No. Plan C is a new plan and is not bound by the election made by Plan A or Plan B.

PBGC'S MEETING RESPONSE: PBGC is currently engaged in a deliberative process regarding the substantive and procedural issues raised by this question and has no further comment at this time.

5. **QUESTION:** PBGC regulations require that premium information be filed electronically, but also provide that PBGC has the authority to grant exemptions from the e-filing requirement "for good cause in appropriate circumstances" (29 CFR § 4007.3). Please provide an update regarding PBGC's experience to date with any requests for such exemptions, and include guidance regarding the kinds of circumstances PBGC is likely to view as meeting the "good cause" standard.

   PBGC'S MEETING RESPONSE: PBGC received no such requests for 2009 premium payment year filings, but did receive requests regarding 2006-2008 premium payment year filings. Based on the facts and circumstances of each request, PBGC denied some of those requests and granted others. A case in which PBGC granted a request for an exemption involved the unexpected death of a filing coordinator. In that case, the Plan Administrator contacted PBGC to report that she would be able to submit a paper premium filing by the due date, but that if she had to file electronically, she would file late because she needed time to become familiar with MyPAA.

6. **QUESTION:** Please describe PBGC's current audit program relating to PBGC premiums, including recent activity, flat-rate and variable-rate premium audit findings and results (along with a brief summary of the most common problems found), and plans for future audits.

   PBGC'S MEETING RESPONSE: The PBGC audit program is the same as it was in the past. PBGC continues to perform data analysis based upon reported flat-rate and variable-rate premiums in targeting its audit efforts. PBGC's audit efforts continue to reflect the lag time inherent in the reporting cycle. As a result, PBGC is still performing audits based on the 2006 and 2007 premium payment years.

7. **QUESTION:** PBGC for years took the position that it could not legally pay interest on overpayments of premiums, but would pay it if authorized. PPA gave PBGC authority to pay interest on premium overpayments. PBGC still has not issued regulations to implement this authority or started paying interest without regulations. Is PBGC planning on implementing this PPA authority and, if so, when?

   PBGC'S MEETING RESPONSE: PBGC's Spring 2010 Regulatory Agenda lists the implementation of the PPA authority to pay interest on premium overpayments as a long-

term action (meaning more than one year). No decision has been made as to whether interest payments will be retroactive to 2006.

TITLE IV COVERAGE

8. QUESTION: PBGC has been coordinating with the other ERISA agencies for several years on a variety of issues relating to church plans and government plans.

(a) Under what circumstances, if any, is PBGC treating the termination of such a plan as subject to Title IV requirements and, if underfunded, eligible for the PBGC's guarantee? Does it matter for purposes of the termination rules or guaranteed benefits whether the plan has been paying PBGC premiums?

(b) How is PBGC dealing with such plans in the context of PBGC premium requirements?

(c) In the case of a plan that is or may be a church plan, how does the making of an election under IRC Section 410(d) (and the timing of any such election), or the failure to make such an election, affect these issues?

(d) If PBGC grants a request for a premium refund for a plan that claims non-electing church plan or government plan status, does it first issue an initial determination that the plan is not covered by Title IV of ERISA because it is a non-electing church plan or a government plan?

(e) In any case in which PBGC issues an initial determination that a plan is not covered by Title IV of ERISA because it is a non-electing church plan or a government plan, the initial determination may be appealed to PBGC's Appeals Board under 29 CFR §§ 4003.1(b)(5), 4003.51, by "[a]ny person aggrieved by" the initial determination." What notice of the initial determination is given to persons who may be aggrieved by the initial determination?

PBGC'S MEETING RESPONSE: PBGC stated that it would decline to answer questions regarding ERISA "Title IV coverage" and church and governmental plans because the IRS has placed a moratorium on governmental plan determinations until it issues further guidance and the IRS is expected to issue a revenue procedure relating to church plan determinations. PBGC stated that it will wait until the IRS issues its guidance and revenue procedure before making any governmental and church plan determinations. However, PBGC stated that generally speaking:

- Plans which are properly determined to be church or government plans are not covered by Title IV and are not required to pay premiums. Benefits under such plans are not guaranteed by PBGC.

- The payment of premiums for a non-electing church plan or a government plan does not affect the plan's non-covered status.

... If a church plan makes an election to be covered, it is covered and PBGC guarantees benefits under it, subject to the phase-in rules including the provisions in section 4022(b) of ERISA applicable to newly-covered plans.

STANDARD TERMINATIONS

9. **QUESTION:** Please confirm the PBGC's guidance in Q&A 11 of the 2010 Blue Book, which pertains to the requirements set forth in 29 CFR §§ 4041.23(b)(4) and . 43(b)(5) regarding the appropriate wording to be included in a notice of intent to terminate ("NOIT"). Specifically, Blue Book Q&A 11 addressed a situation in which an NOIT is issued regarding a non-frozen plan whose sponsor is winding up its affairs after all operations have ceased and all employees have been terminated.

   PBGC'S MEETING RESPONSE: In response to Blue Book Question 11, PBGC's guidance was that the plan administrator must include in the NOIT one of the three statements set forth in 29 CFR § 4041.23(b)(4), as applicable, but that in the hypothetical situation described, the plan administrator could also include a statement that benefit accruals ceased when all employees were terminated in connection with the winding up of the affairs of the company. PBGC stated that it continues to agree with its response as reflected in Q&A 11 of the 2010 Blue Book.

10. **QUESTION:** Please confirm the PBGC's guidance in Q&A 13 of the 2010 Blue Book, which addressed the effect of ERISA section 4041(b)(5), a provision added by PPA section 409 ("Treatment of Certain Plans Where Cessation or Change in Membership of a Controlled Group"). Section 4041(b)(5) provides a special rule that, in specified circumstances, sets an interest rate floor to be used in determining whether a plan is "sufficient for benefit liabilities" in a standard termination under ERISA section 4041(b).

    PBGC'S MEETING RESPONSE: In response to Blue Book Question 13, PBGC stated that the intent and application of PPA section 409 are unclear, that PBGC had no plans to issue guidance under section 409, and that PBGC should be contacted regarding specific client situations if it appeared that the special rule could apply. PBGC indicated that it continued to agree with the guidance set forth in Q&A 13 of the 2010 Blue Book.

11. **QUESTION:** Please provide an update regarding PBGC's recent experience regarding standard termination audits, including common errors found and issues regarding PPA requirements with respect to the interest rate and mortality table used to determine lump sum amounts.

    PBGC'S MEETING RESPONSE: The last year analyzed was fiscal year 2009, during which PBGC audited approximately 270 plan termination filings. PBGC required corrective action with respect to approximately 16 percent of the plan terminations audited. The most common errors involved incorrect accrued benefit calculations, inaccurate lump sum calculations, missing participants' benefits not transferred to PBGC, attempted election of alternative treatment (which are similar to waivers) of benefits by individuals who were not majority owners, and missing election and spousal consent forms. PBGC indicated that the

additional discussion, details, and guidance set forth in its response at Q&A 12 of the 2010 Blue Book, continued to be accurate and timely.

12. **QUESTION:** Please provide an update regarding PBGC's experience under its audit initiative relating to plans that distribute plan assets in satisfaction of plan liabilities before or without filing a standard termination notice with PBGC. In particular, have there been cases in which PBGC has allowed a plan to purchase annuity contracts shortly before termination to lock in what were believed to be favorable interest rates and, if so, what were the circumstances resulting in PBGC's willingness to allow the purchase?

    PBGC'S MEETING RESPONSE: PBGC reported that the agency has conducted 140 audits relating to plans that engaged in such premature distributions during 2007, 2008 or 2009. Of these audits, 102 have been completed. Approximately 25 percent of the completed audits involved required corrective actions of one type or another. PBGC did not approve of pre-termination purchases of annuity contracts in any of these audits.

    PBGC pointed out that in November 2009, it solicited comments about the procedures that should be employed in such circumstances. (PBGC Request for Public Comment Regarding Purchase of Irrevocable Commitments Prior to Standard Termination, 74 Fed. Reg. 61074 (Nov. 23, 2009).) PBGC is now considering whether to provide guidance concerning this problem of premature distributions and what form such guidance should take.

DISTRESS AND INVOLUNTARY TERMINATIONS

13. **QUESTION:** Please confirm the PBGC's guidance in Q&A 14 of the 2010 Blue Book, which addressed record retention requirements with respect to documents needed to corroborate USERRA claims of current or former employees under the final PBGC USERRA regulations. (USERRA Benefits Under Title IV of ERISA, 74 Fed. Reg. 59093 (Nov. 17, 2009).

    PBGC'S MEETING RESPONSE: In response to Blue Book Question 14, PBGC indicated that sponsors of pension plans terminated in distress or involuntary termination (or their successors) would be expected to provide to PBGC only those records that would be provided in the normal course of the trusteeship process, such as "leave codes" indicating when a participant was on leave from employment and what type of leave. PBGC confirmed that it continued to agree with the guidance reflected in Q&A 14 of the 2010 Blue Book.

14. **QUESTION:** Assume that a premium filing for a plan is due after the date on which PBGC and the plan administrator have executed a termination and trusteeship agreement for the plan.

    (a) Is the former plan administrator required to submit the premium filing for the plan?

    (b) If the answer to (a) is yes, will PBGC pay for the expenses associated with making the filing?

PBGC'S MEETING RESPONSE:

(a) No.

(b) Not applicable.

15. **QUESTION:** PBGC often enters into bankruptcy settlements involving termination of multiple plans sponsored by the same controlled group and, for each plan, the settlement usually resolves a variety of claims that PBGC has made against the debtors related to the terminated plans (*e.g.*, plan termination liability, missed minimum funding claims, missed premium payments). Please explain how PBGC allocates its recoveries among the various claims and plans.

    PBGC'S MEETING RESPONSE: To allocate its recoveries among various claims and plans, PBGC follows PBGC Operating Policy 8.2-1: Valuation and Allocation of Recoveries (a copy of which is attached). This policy sets forth the methodology PBGC uses to determine how much of a combined recovery is allocable to the various claims asserted with respect to one or more plans, but also provides that PBGC has the flexibility to consider the facts and circumstances of a particular case. The policy is currently under review. PBGC does not know when a new or revised policy may be issued.

16. **QUESTION:** Please provide an update regarding PBGC's recent experience in connection with any requests that have been made, whether to PBGC or to the plan administrator or contributing sponsor, for information in accordance with PPA section 506 ("Disclosure of Termination Information to Plan Participants").

    PBGC'S MEETING RESPONSE: In the past year, the PBGC Disclosure Officer has received 2 requests from plan participants for information with respect to an administrative record regarding a terminated plan. In each case, PBGC provided the requested information as required by law. PBGC does not have any information regarding any such requests received by plan administrators.

17. **QUESTION:** Please provide an update regarding PBGC's recent experience in connection with applications for distress termination outside of bankruptcy under Distress Test 3 ("Continuation in Business") or Distress Test 4 ("Unreasonably Burdensome Pension Costs").

    PBGC'S MEETING RESPONSE: Since October 1, 2009, 8 distress terminations have been approved, of which 6 were Test 3 terminations; there were no Test 4 terminations; PBGC staff at the meeting did not know how many cases were pending or if any were denied; the number of distress terminations is up from prior years.

18. **QUESTION:** Assume that certain expenses are or may be incurred (*e.g.*, to respond to a PBGC request for participant or benefit information) for a plan that is undergoing, or that has undergone, a distress or involuntary termination, and that the expenses would have been properly payable from plan assets when the plan was ongoing. Assume further that PBGC has become trustee of the plan pursuant to ERISA Section 4042 before the expenses have been paid. Will PBGC pay these expenses, whether out of plan assets or other funds?

PBGC'S MEETING RESPONSE: Until the plan is terminated and PBGC is appointed as the plan's trustee (whether by agreement between the plan administrator and the PBGC or by a court order), reasonable and necessary expenses generally are paid from plan assets, provided that the plan document so permits. This applies even for expenses incurred after the plan's termination date. If such expenses have not been paid before PBGC has been appointed as the plan's trustee, PBGC will generally pay the expenses if it determines them to be reasonable and necessary. However, reasonable and necessary services may be performed by service providers and paid for out of the PBGC funds during the period immediately following trusteeship. Reasonable and necessary services are those required for PBGC to operate the trusteed plan, typically when third parties continue to administer terminated pension plans during the limited period before PBGC is able to exercise control or to acquire the assets. PBGC ensures that a reasonable amount is being charged for these services. It is recommended that PBGC be consulted before any expenses are incurred for the period after PBGC has been appointed trustee of the plan.

PBGC REPORTING

19. **QUESTION:** Please confirm the PBGC's guidance in Q&A 17 of the 2010 Blue Book, which concerned plans that are frozen for participation and therefore can experience only decreases, but not offsetting increases, in their active participant counts. Blue Book Question 17 was whether PBGC would be willing to grant case-by-case reporting relief for such plans when they crossed over a regulatory threshold for an active participant reduction reportable event under appropriate circumstances (*e.g.*, if overall employment levels within the controlled group had not experienced a comparable decline or had increased).

    PBGC'S MEETING RESPONSE: PBGC's guidance regarding Blue Book Question 17 was that, when considering whether to grant a request for a waiver under its reportable events regulation, PBGC considers facts and circumstances on a case-by-case basis, and the fact that a plan is frozen does not necessarily indicate that a large reduction in active participants is not cause for concern. PBGC indicated that it continues to agree with the guidance set forth in Q&A 17 of the 2010 Blue Book.

20. **QUESTION:** Please confirm the PBGC's guidance in Q&A 18 of the 2010 Blue Book, which asked for the current status for the 2010 plan year of PBGC's reportable events guidance regarding the 2009 plan year in Technical Updates 09-1 (on post-PPA determinations of funding based waivers and extensions, and the advance reporting threshold test) and 09-3 (on missed quarterly contributions for small plans)?

    PBGC'S MEETING RESPONSE: PBGC's guidance regarding Blue Book Question 18 was that, in Technical Update 09-4 (available at http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16998.html), PBGC extended the guidance in Technical Updates 09-1 and 09-3 to the 2010 plan year pending finalization of PBGC's proposed rule regarding reportable events, which will supersede both Technical Updates. PBGC confirmed that it continues to agree with the response set forth in Q&A 18 of the 2010 Blue Book.

21. **QUESTION:** Please confirm the PBGC's guidance in Q&A 19 of the 2010 Blue Book, which addressed a situation in which a mandatory reduction of a carryover or prefunding balance (*i.e.*, a "deemed election") under final Treasury regulations retroactively created a late quarterly contribution by rendering invalid a prior election to apply a credit balance against the quarterly required contribution and thus retroactively created a "missed" quarterly contribution. Blue Book Question 19 asked whether such an event could cause a PBGC Form 10 or Form 200 to be considered not timely filed.

    PBGC'S MEETING RESPONSE: PBGC's guidance in response to Blue Book Question 19 generally was that, because the deadline for reporting a missed contribution that does not exceed $1 million is 30 days after the plan administrator or contributing sponsor knows or has reason to know that the contribution has been missed, although a quarterly contribution might be "retroactively missed," the report of the missed contribution would not necessarily be "retroactively untimely." With respect to a missed contribution that exceeds (whether alone or in combination with other missed contributions) $1 million, PBGC's guidance was that the due date for notice to PBGC is 10 days after the contribution is missed, and therefore the notice to PBGC will be considered late unless it is made within 10 days of the due date for the contribution; however, PBGC also stated that it would consider a request to waive penalties for late reporting in such a case. PBGC indicated that it continued to agree with the guidance it gave in Q&A 19 of the 2010 Blue Book.

22. **QUESTION:** As a follow-up to Question 21, in order to reduce burdens on employers, would PBGC be willing to consider granting an automatic penalty waiver, instead of requiring submission of a formal request for a penalty waiver, in the circumstances described in Question 21, at least where the plan meets a specified funding threshold?

    PBGC'S MEETING RESPONSE: PBGC said that it did not think that an automatic waiver is a good idea, and instead suggested that the sponsor file the Form 10 or Form 200 along with a cover letter asking for a waiver of the penalty and explaining the circumstances. PBGC said that the agency had looked favorably upon such waiver requests in the past.

23. **QUESTION:** Please confirm the PBGC's guidance in Q&A 20 of the 2010 Blue Book, which addressed a situation where an election to apply a credit balance against a quarterly required contribution is made, but not made by the due date for the quarterly. Final Treasury regulations implementing PPA treat such an election as untimely. Blue Book Question 20 asked whether PBGC would treat a quarterly installment as missed for purposes of reportable events (Form 10) and Form 200 if an election to use credit balance was not made by the quarterly installment due date.

    PBGC'S MEETING RESPONSE: In its response to Blue Book Question 20, PBGC said that it is within Treasury's, not PBGC's, jurisdiction to determine whether a quarterly installment was "missed," and that the Treasury rules apply with respect to reportable events (Form 10) and Form 200 filing requirements. PBGC stated that it agrees with its response as reflected in Q&A 20 of the 2010 Blue Book.

24. **QUESTION:** Please confirm the PBGC's guidance in Q&A 22 of the 2010 Blue Book, which addressed issues regarding PBGC's section 4010 regulation. Under the regulation,

only plans that are maintained by the filer (or any member of the filer's controlled group) on the last day of the information year are considered for purposes of the gateway tests. Question 22 asked for guidance regarding how the gateway tests and other section 4010 provisions would be applied with respect to a seller and a buyer in a corporate transaction occurring on the last day of the information year which results in both a change of sponsor and a change in controlled group.

PBGC'S MEETING RESPONSE: In its response to Blue Book Question 22, the PBGC indicated that both the seller and the buyer must count the plan for purposes of the gateway tests, but that, under certain circumstances, PBGC would be likely to grant requests for complete or partial waivers with respect to reporting requirements. The PBGC stated that it agrees with the response as reflected in Q&A 22 of the 2010 Blue Book.

25. QUESTION: As a follow-up to Question 24, assume that the information year for both the seller and the buyer is the calendar year, and that the documentation relating to the corporate transaction makes it clear that the stated effective date of the change in plan sponsorship is December 31 and that it takes effect at the "stroke of midnight" between information years, *i.e.*, that the seller is the sole sponsor of the plan for all of December 31 and that the buyer is the sole sponsor of the plan for all of January 1.

(a) Would PBGC still treat the buyer as the sponsor of the plan on December 31 for purposes of the 4010 gateway test and for purposes of the requirement to report actuarial information under Section 4010?

(b) If the response to Question 24(a) is yes, would the response change if the documentation relating to the corporate transaction referred to the effective date as "January 1" rather than as "December 31"?

PROPOSED RESPONSE:

(a) No. If the documentation relating to the corporate transaction makes it clear that the change in plan sponsorship takes effect at the "stroke of midnight" between information years, PBGC would treat the seller as the sole sponsor of the plan on December 31 for purposes of the 4010 gateway test and for purposes of the requirement to report actuarial information under Section 4010.

(b) Not applicable.

PBGC'S MEETING RESPONSE: PBGC declined to answer this question.

26. QUESTION: Please provide an update regarding PBGC's experience in connection with requests for waivers or extensions under ERISA section 4010.

PBGC'S MEETING RESPONSE: For information years beginning in 2009 and plan years ending in 2009, PBGC granted 6 extensions and 5 waivers. A delay in finalization of financial statements is the most common reason that PBGC granted an extension request. An impending plan termination is the most common reason that PBGC granted a waiver request.

PENALTIES

27. **QUESTION:** Please provide an update regarding PBGC's recent experience in connection with assessment and waiver of late information penalties under ERISA Section 4071.

    PBGC'S MEETING RESPONSE: The penalties PBGC assessed in 2009 were for failing to make reportable event filings or section 4010 filings. In some cases, PBGC determined that it would not assess penalties based on mitigating circumstances, and in other cases, PBGC waived penalties where a sponsor's request for reconsideration provided information that demonstrated that a waiver was warranted. In all cases where a waiver was not granted, the assessed penalties were paid. In the last 12 months, in addition to penalties assessed with respect to reportable event filings and section 4010 filings, PBGC has assessed one penalty regarding the failure to timely file a Form 501 in a standard termination case. During the same time frame, PBGC has not assessed any penalties with respect to premium filings. PBGC staff present at the JCEB meeting did not have data on penalties that may have been assessed with respect to 4063(a) notices regarding 4062(e) events, or Form 200 violations.

28. **QUESTION:** Please provide an update regarding PBGC's recent experience in connection with waivers of late premium payment penalties under ERISA Section 4007.

    PBGC'S MEETING RESPONSE: PBGC stated that the answer set forth in Q&A 5 of the 2010 Blue Book remained apposite. PBGC's guidance regarding this similar Blue Book question was that PBGC has granted waivers in cases where "reasonable cause" existed, meaning that the failure to timely pay resulted from circumstances beyond a premium payer's control and could not be avoided by the exercise of ordinary business care and prudence. Examples of circumstances that were and were not found to constitute "reasonable cause" are discussed in Blue Book Q&A 5.

ERISA SECTIONS 4062(e), 4063, AND 4064

29. **QUESTION:** ERISA section 4062(e) applies 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 provide an update regarding PBGC's experience and enforcement plans in connection with finding out about 4062(e) events and pursuing and resolving 4062(e) liability.

    PBGC'S MEETING RESPONSE: PBGC learns about possible section 4062(e) events through its monitoring efforts and through filings under ERISA sections 4043 and 4063(a). There has been a notable increase in section 4063(a) filings since PBGC issued its regulations regarding liability under section 4062(e). In the last six months, PBGC has entered into 14 section 4062(e) settlements, obtaining $180 million in protection. PBGC has a flexible approach in structuring settlements in a manner that fits with each employer's business plans; PBGC believes that its flexible approach helps the parties reach settlements. PBGC had 128 active (actual or potential) section 4062(e) cases as of December 31, 2009. As noted above in response to Question 27, PBGC staff present at the JCEB meeting did not have data on penalties that may have been assessed with respect to 4063 or 4062(e) notices.

30. **QUESTION:** Assume that the sponsor of a plan that has an ERISA section 4062(e) event makes an escrow payment to PBGC pursuant to ERISA section 4063, that the plan terminates in a distress or involuntary termination during the five-year period following the event, and that PBGC treats the escrowed payments as if they were plan assets in accordance with ERISA Section 4063(c)(3)(B). Is PBGC's claim for unfunded benefit liabilities net of the amount of the escrowed payments, *i.e.*, are the assets used to determine unfunded benefit liabilities inclusive of the escrowed payments?

    PBGC'S MEETING RESPONSE: If a plan terminated within the five-year period following a 4062(e) event, PBGC would follow ERISA Section 4063(c)(3)(B) and treat any escrowed payments of 4062(e) liability as if they were plan assets.

31. **QUESTION:** Please confirm the PBGC's guidance in Q&A 25 of the 2010 Blue Book, which addressed various questions regarding the interpretation and application of ERISA section 4062(e), which provides that employers that "cease operations at a facility in any location," may face liabilities if more than 20 percent of the employees who are plan participants are terminated as a result of the cessation of operations.

    PBGC'S MEETING RESPONSE: PBGC said that it agreed with its answer to Blue Book Question 25, which was that it is developing a proposed regulation that would provide guidance regarding ERISA section 4062(e) and that PBGC expected to publish this proposed regulation in 2010.

    SUBSEQUENT EVENT: In August 2010, PBGC published a proposed rule that would provide guidance on the applicability and enforcement of ERISA section 4062(e). (PBGC Proposed Rule: Liability for Termination of Single-Employer Plans; Treatment of Substantial Cessation of Operations, 75 Fed. Reg. 48283 (Aug. 10, 2010).)

32. **QUESTION:** Please confirm the PBGC's guidance in Q&A 28 of the 2010 Blue Book, which addressed a situation where a substantial employer withdraws from a multiple-employer plan and satisfies its liability under ERISA section 4063 through an escrow payment to PBGC. The question discussed was how PBGC would determine the liability of the withdrawn employer for the plan underfunding under section 4064 if the plan terminated in a distress or involuntary termination within five years of the employer's withdrawal.

    PBGC'S MEETING RESPONSE: PBGC's guidance regarding Blue Book Question 28 was that ERISA section 4063(c)(3)(B) provides that upon plan termination, PBGC shall "treat any escrowed payments under this section as if they were plan assets and apply them in a manner consistent with this subtitle" [governing "Liability"], and that PBGC would determine the best method to do that in the event such a situation arises. PBGC confirmed that it continues to agree with the guidance set forth in Q&A 28 of the 2010 Blue Book.

33. **QUESTION:** Does PBGC have the same ability to settle claims for liability under ERISA Section 4062(e) that it has to settle claims for unfunded benefit liabilities under ERISA Section 4062(b)? In particular, does PBGC have the ability to settle claims for liability under ERISA Section 4062(e) for an amount that is less than the amount of liability PBGC believes has been incurred?

PROPOSED RESPONSE: Yes. Section 4067 of ERISA explicitly authorizes PBGC to make arrangements with any contributing sponsors and members of their controlled groups who are or may become liable under §4062, 4063, or 4064 for payment of their liability.

PBGC'S MEETING RESPONSE. PBGC has the authority to make appropriate arrangements with employers to settle liabilities. PBGC will continue, on a case-by-case basis, to discuss with liable employers arrangements that are workable given the business plans of employers and that protect the insurance program. There is typically a lot of discussion back and forth between PBGC and liable employers regarding what would constitute an appropriate resolution. If an employer demonstrates that a particular resolution would put it into bankruptcy, that resolution would not be in PBGC's interest. However, PBGC believes that all kinds of things result in bankruptcy and, in their experience, PBGC is not the cause of bankruptcy filings.

34. **QUESTION:** Does PBGC view the liability that arises under ERISA Section 4062(e) as being joint and several among all members of the applicable controlled group? If so, or if not, how does PBGC decide which entity or entities to pursue for the liability?

    PBGC'S MEETING RESPONSE: Yes, ERISA imposes liability on the sponsor and all members of its controlled group on a joint and several basis. Consequently, PBGC has the discretion to pursue any or all of those entities. The allocation of the liability is typically resolved in settlement negotiations with PBGC.

35. **QUESTION:** Company A's operations are located in a single facility that contains its corporate offices, its manufacturing operations, its distribution operations, and its warehouse/storage operations. Company A sponsors an underfunded defined benefit plan (the "Plan") insured by the PBGC.

    Company A ceases its manufacturing operations and most of its distribution operations. As a result, all of its employees in the manufacturing operations, most of its employees in its distribution and warehouse/storage operations, and many of its employees in its corporate offices are terminated. However, Company A continues to maintain some operations and employees at the facility.

    As a result of these terminations, more than 20% of the Plan's active participants are separated from employment. This active participant reduction is timely reported to PBGC as a reportable event described in 29 CFR § 4043.23. During the course of the terminations and after more than 20% of active participants have been terminated, Company A files a voluntary petition seeking relief under Chapter 11 of the Bankruptcy Code and timely files another reportable event notice with PBGC under 29 CFR § 4043.35.

    (a) Would the cessation of manufacturing operations and the significant paring down of the other referenced operations (all housed in the same facility) constitute a substantial cessation of operations at a single facility as described in section 4062(e) of ERISA (a "4062(e) Event") that would trigger reporting requirements under section 4063(a) of ERISA?

    (b) If this is a 4062(e) Event, must Company A file a separate report with PBGC under ERISA Section 4063(a)?

PROPOSED RESPONSE:

(a)

(b) If this is a 4062(e) Event, given the filings previously made and assuming PBGC's active involvement in the bankruptcy, PBGC would be very unlikely to require the reporting of the 4062(e) Event under ERISA Section 4063.

PBGC'S MEETING RESPONSE: PBGC is developing a proposed regulation on the enforcement of section 4062(e), which they expect to publish in 2010. With respect to (b), PBGC referred to Q&A 21 of the 2007 Blue Book and said that the required reporting under section 4063(a) is independent of section 4043 requirements.

SUBSEQUENT EVENT: In August 2010, PBGC published a proposed rule that would provide guidance on the applicability and enforcement of ERISA section 4062(e). (PBGC Proposed Rule: Liability for Termination of Single-Employer Plans; Treatment of Substantial Cessation of Operations, 75 Fed. Reg. 48283 (Aug. 10, 2010).)

MINIMUM FUNDING WAIVERS

36. QUESTION: Please provide an update regarding PBGC's role and recent experience in connection with minimum funding waiver requests involving amounts in excess of $1 million.

PBGC'S MEETING RESPONSE: Funding waiver applications are submitted to the IRS, but must be reported to be PBGC pursuant to PBGC's reportable events regulations. In addition, IRS must consult with PBGC if the request is in excess of $1 million. IRS and PBGC have developed procedures in which PBGC recommends approval or denial and, if it recommends approval, any applicable conditions. PBGC asks for five-year projections for all members of the controlled group to demonstrate temporary substantial business hardship. PBGC also requests five year required minimum funding contribution projections in order to evaluate whether an employer can afford to make pension contributions in the future. PBGC also asks for information on collateral that the applicant can offer and evaluates the collateral on both a fair market value and a liquidation basis. In some cases, PBGC has accepted collateral and letters of credit from controlled group members and from individuals. PBGC has also agreed to accept subordinate liens in some cases.

PBGC has been working with IRS to streamline the waiver process. While there have not been many waiver requests lately, review under the streamlined, coordinated process is a lot quicker.

In response to a follow-up question by the JCEB, PBGC stated that it recognizes that, while an existing funding waiver agreement may prohibit reducing a credit balance, PPA may have created situations where the employer is required to "burn" a credit balance under Section 436 (*e.g.*, because it is a collectively bargained plan and a restriction would go into place without the "burn"). PBGC said that a company in that situation should contact PBGC to work out the issue.

MISSING PARTICIPANTS PROGRAM

37. QUESTION: PPA expanded the missing participants program to cover (among other things) terminating defined contribution plans. Does PBGC intend to issue regulations to implement this program? Are there any issues of particular concern that could complicate the implementation or administration of this program?

PBGC'S MEETING RESPONSE: PBGC is working on proposed regulations. The Spring 2010 Regulatory Agenda states that those regulations are targeted for publication in October 2010. It would be premature to discuss issues that could complicate the implementation or administration of the program.

LITIGATION AND GENERAL MATTERS

38. QUESTION: Please describe PBGC litigation in the past year that has established precedent that would be of interest to employee benefits attorneys.

PBGC'S MEETING RESPONSE: PBGC provided the following handout summarizing litigation matters. PBGC also indicated that the Court of Appeals for the DC Circuit has summarily affirmed the district court's decision in *Montgomery v. PBGC*.

Adey v. PBGC, 2010 WL 892229 (N.D. W. Va. Mar. 9, 2010), *appeal docketed sub nom. Crane v. PBGC*, No. 10-1397 (4th Cir.) – Participants in the terminated Weirton Steel pension plan challenged PBGC's determination that they did not qualify for 30-and-out benefits, and questioned the authority of the chairman of the plan's administrative committee to sign the agreement terminating the plan. After holding that a deferential standard of review applied to PBGC's benefit determinations, and that review was limited to the administrative record, all but one of the plaintiffs dropped out of the lawsuit. The court held that PBGC's denial of benefits to the remaining plaintiff was not arbitrary or capricious and was fully supported by the record. The court dismissed the allegation regarding the trusteeship agreement because that count had not been pursued. The plaintiff has appealed this decision to the Fourth Circuit, where he is proceeding *pro se*.

In re Wolverine Proctor & Schwartz, 2010 WL 1236298 (D. Mass. Mar. 12, 2010), *aff'g* 2009 WL 1271953 (Bankr. D. Mass. May 5, 2009), *appeal docketed*, No. 10-1334 (1st Cir.) – The district court affirmed the bankruptcy court's approval of PBGC's settlement of its bankruptcy claims with the Chapter 7 trustee of Wolverine, Proctor & Schwartz, overruling the objection of a putative creditor. The court rejected the creditor's challenge to the use of PBGC's regulations, rather than a so-called "prudent investor" approach, to calculate PBGC's claim for pension underfunding. Following *Raleigh v. Illinois Dep't of Rev*., the court held that the substantive non-bankruptcy law controlled the amount of liability. Here, the substantive law is ERISA's definition of unfunded benefit liabilities, which includes PBGC's regulatory assumptions. The court also reaffirmed the principle that ERISA preemption prevents participants in a terminated plan from recovering directly from the plan sponsor. The creditor has appealed this decision to the First Circuit.

Stephens v. US Airways Group, 2010 WL 958069 (D.D.C. Mar. 17, 2010) – A group of retired pilots sued US Airways over lump sum benefits they received before the plan terminated, challenging their payment without interest up to 45 days after the plan's benefit commencement date. The pilots argued that the delay violated both the plan's benefit commencement provision and ERISA's actuarial equivalence provision. PBGC, which assumed defense of the case after plan termination, argued that "commencement" and "payment" are different, citing Q&As provided in IRS regulations. The court agreed, and found that the delay was reasonable. The court also suggested that the pilots were simply asking for interest – which is different from actuarial equivalence – and found that they had not shown an entitlement to interest.

US Airline Pilots Ass'n v. PBGC, ___ WL _____, No. 09-1675 (JR) (D.D.C. Mar. 16, 2010) – A union representing retired pilots sued PBGC, asserting that the agency failed to investigate and rectify possible wrongdoings by the former fiduciaries of the US Airways pilots plan, which terminated in 2003. The suit seeks to have a "special trustee" appointed to fulfill the duties that PBGC purportedly refused to perform, and in a motion for preliminary injunction, the union sought a special trustee on a temporary basis, pending the outcome of the litigation. The court denied the preliminary injunction, finding that the pilots had not demonstrated irreparable harm or a likelihood of success on the merits. Moreover, the court held that appointing a special trustee would open the door to frequent disruptions of PBGC's business.

Davis v. PBGC, 571 F.3d 1288 (D.C. Cir. 2009) – A group of retired participants in a terminated pension plan sued PBGC, contending that the agency erred in making benefit determinations and breached its fiduciary duty. The participants sought a preliminary injunction prohibiting PBGC from recouping benefit overpayments from them while the suit was pending. The district court denied the injunction, and the D.C. Circuit affirmed, holding that the participants had failed to demonstrate a substantial likelihood of success on the merits or that they would be irreparably harmed absent the injunction. The court held that PBGC's interpretations of ERISA are entitled to *Chevron* deference, notwithstanding the participants' contention that PBGC, as trustee of the terminated plan, had a conflict of interest because of its financial interest as guarantor.

Oneida, Ltd. v. PBGC, 562 F.3d 154 (2d Cir. 2009), *cert. denied*, 2009 WL 3316342 (Dec. 14, 2009) – The debtor filed an adversary proceeding against PBGC, seeking a declaration that the statutory termination premiums it incurred by terminating its pension plan were pre-petition bankruptcy claims that were discharged through its reorganization. The bankruptcy court agreed, and the parties appealed directly to the Second Circuit. The court of appeals reversed, holding that the "obvious purpose of [section 4006(a)(7)(B) of ERISA] is to prevent employers from evading . . . termination premium[s] while seeking reorganization in bankruptcy." The court held that non-bankruptcy law (in this case, ERISA) determines the nature and timing of an obligation, and that ERISA specifically states that termination premiums for a plan terminated during reorganization do not apply until the debtor emerges from bankruptcy.

Paulsen v. CNF, Inc., 559 F.3d 1061(9th Cir. 2009), *cert. denied*, 2010 WL 58395 (Jan. 11, 2010) – Participants in a terminated pension plan brought suit against the former parent of the plan sponsor, the plan's administrative committee, and the plan actuary, alleging fiduciary breach under ERISA and actuarial malpractice under state law. The court ordered joinder of PBGC as an essential party. The participants alleged that PBGC committed fiduciary breach by failing to sue the plan actuary. The district court dismissed the complaint against PBGC, and the Ninth Circuit affirmed. Focusing on PBGC's unique role and varied statutory duties, the court of appeals held that PBGC's discretionary decision not to pursue claims for fiduciary breach is not subject to judicial review. The court also agreed with PBGC's view that any proceeds of a participant suit for fiduciary breach relating to a terminated plan would go first to PBGC, and not directly to participants. As a result, the participants lacked standing to bring those claims.

Sara Lee Corp. v. American Bakers Ass'n Retirement Plan, 2009 WL 4289713 (D.D.C. Dec. 1, 2009) – The court upheld PBGC's determination re-classifying a pension plan as a multiple-employer plan, applying the deferential "arbitrary and capricious" standard. The court held that the agency's determination was based on a consideration of the relevant factors and did not reflect a clear error of judgment.

Montgomery v. PBGC, 601 F. Supp. 2d 139 (D.D.C. 2009) – A participant in a terminated pension plan sued PBGC to challenge the agency's denial of his application for benefits. The participant argued that PBGC should have taken into account his total hours worked, rather than his years of service. Granting PBGC's motion for summary judgment, the court held that PBGC did not abuse its discretion in denying benefits when, under the unambiguous terms of the plan, the participant failed to meet the vesting requirement.

United Steelworkers, Int'l, AFL-CIO v. PBGC, 602 F. Supp. 2d 1115 (D. Minn. 2009) – The union challenged PBGC's benefit determinations under the Thunderbird Mining pension plan, alleging that participants were wrongly denied shutdown benefits. PBGC moved to dismiss or transfer the case to the District of Columbia because, under section 4003(f) of ERISA, the appropriate court for an action against PBGC is either where termination proceedings are taking place, where the plan has its principal office, or the District of Columbia. Because the pension plan had terminated and closed its principal office years before, the court, emphasizing its duty to follow the plain language of ERISA, agreed with PBGC that the District of Columbia was the only court in which the action could have been brought, and transferred the case there.

PBGC v. Boury, Inc., 2009 WL 3334924 (N.D. W. Va. Oct. 14, 2009) – PBGC sued the sponsor of a terminated pension plan and its controlled group members to enforce the agency's lien under section 4068(a) of ERISA. The court dismissed the case after entering a consent judgment in PBGC's favor, under which the plan sponsor and its controlled group members were ordered to sell real property within a time certain and pay PBGC a portion of the sale proceeds. The sale did not occur within the time certain and PBGC was not paid; instead, a local land commissioner sold the property to a third party in a "tax sale" under West Virginia law. After granting PBGC's motion to reopen the case, the court held that PBGC's lien survived the "tax sale" because section 4068(b) of ERISA, which states that a

lien continues until the liability is satisfied or becomes unenforceable by reason of lapse of time, preempts state law. The court also held that the provisions of the Internal Revenue Code governing the discharge of certain federal tax liens do not apply to federal liens arising under ERISA.

Carstens v. Michigan Dep't of Treasury, 2009 WL 2581504 (W.D. Mich. Aug. 18, 2009) – The former sponsor of a terminated pension plan sued the state of Michigan and PBGC in Michigan state court for a declaratory judgment regarding ownership of unclaimed property. PBGC removed the case to federal district court. PBGC then moved to dismiss or transfer the case to the District of Columbia because, under section 4003(f) of ERISA, the appropriate court for an action against PBGC is either where termination proceedings are taking place, where the plan has its principal office, or the District of Columbia. Because the pension plan had terminated and closed its principal office years before, the court agreed with PBGC that the District of Columbia was the only court in which the action could have been brought, and transferred the case there.

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.

PBGC'S MEETING RESPONSE: No.

40. QUESTION: Please provide an update regarding the cases PBGC has been involved in over the past year under its "Early Warning" or "Risk Mitigation" program.

PBGC'S MEETING RESPONSE: In response, PBGC referred to Q&A 32 of the 2010 Blue Book, which contains a discussion of FY 2009 "Risk Mitigation" cases, and also sets forth PBGC's recommendation that plan sponsors and their advisors discuss potential transactions with PBGC well in advance in order to allow PBGC time to complete its investigation and avoid delaying the closing. PBGC repeated that it has substantial flexibility to structure settlements that both protect pension plans and fit within the parameters of companies' business plans.

41. QUESTION: It was reported in late 2008 that PBGC had launched an initiative to consider restoring terminated plans to companies that may be able to afford to maintain plans that had previously been terminated and trusteed by PBGC. In response to a question at the 2009 JCEB-PBGC meeting, PBGC staff stated that this initiative was PBGC's current operating procedure. Please describe the program and PBGC's experience under it to date.

PBGC'S MEETING RESPONSE: PBGC's review has not led to any attempt to restore a plan.

42. QUESTION: Please describe any decisions of PBGC's Appeals Board that would be of interest to employee benefits attorneys.

PBGC'S MEETING RESPONSE: The answer is the same as that set forth in Q&A 33 of the 2010 Blue Book. These decisions are available on PBGC's website, which has a search feature. The Appeal's Board decision in a US Airways Pilots case from 2008 ("Davis") is now in litigation and might be of interest. PBGC also stated that it is adding cases to its website, but they have to be redacted, and that PBGC has made arrangements for PBGC Appeals Board decisions to be included in Westlaw.

43. **QUESTION:** During the past year, has PBGC seen any pattern in plan freezing, termination of frozen plans, or growth of cash balance plans?

PBGC'S MEETING RESPONSE: The answer is the same as that set forth in Q&A 35 of the 2010 Blue Book, in which PBGC set forth available information for plan years beginning in 2008 with respect to frozen plans, hybrid plans, and the termination of frozen plans.

8.2-1 Valuation and Allocation of Recoveries

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Contact	ASK OPSS

In this policy

A. Background

B. Scope and Effective Date

C. Definitions

D. Valuation Date

E. Valuing Recoveries

F. PBGC Claims

G. Allocations of Recoveries

H. Special Rules

I. Case Processing

J. Example

A. Background

PBGC asserts claims for Due and Unpaid Employer Contributions ("DUEC"), Unfunded Benefit Liabilities ("UBL"), and unpaid premiums against the contributing sponsor and its controlled group members with respect to all terminated plans sponsored by the controlled group. The total value of PBGC's recoveries is allocated among these claims pursuant to the rules in this Policy.

The DUEC claim is a plan asset (i.e., an account receivable). The portion of the recovery allocated to the DUEC claim can affect (1) the value of plan assets allocated under ERISA § 4044, (2) the determination of the Section 4062(c) Ratio used to calculate DUEC recovery amounts for plans with Unfunded Nonguaranteed Benefits ("UNGB") that do not exceed $20 million, and (3) the amount of PBGC's employer liability claim for unfunded benefit liabilities under ERISA § 4062(b).

The portion of the recovery allocated to the UBL claim can affect (1) the payment of the plan's UNGB under ERISA § 4022(c), (2) the determination of the Small Plan Average Recovery Ratio ("SPARR") used to determine payment of UNGBs under plans with UNGBs that do not exceed $20 million, and (3) PBGC's net losses for financial statements.

Unpaid premiums owed to PBGC are an asset (i.e., an account receivable) of the PBGC's revolving fund. The portion of the recovery allocated to the unpaid premium claim affects PBGC's financial statements.

Two separate interest rates are used in valuing recoveries, to recognize the time difference between the Date of Plan Termination and the Valuation Date. Generally, the value of terminated plans' recoveries is discounted from the Valuation Date to the Date of Plan Termination, using the PBGC First Select Rate, 29 C.F.R. § 4004 Appendix B (used to calculate the value of plan benefits for the statutorily mandated allocation of Plan assets; see 29 U.S.C. § 1344). The First Select Rate matches the value of the recovered amounts with the value of plan benefits under the statutory allocation.

In appropriate cases, generally in nonbankruptcy cases and where it is determined to apply interest under the facts and circumstances of the case, the amount of PBGC claims is adjusted for the time between Date of Plan Termination and the Valuation Date, using the interest rate used by PBGC for calculating interest on claims for due unpaid employer contributions, liability under ERISA § 4062(b) (see 29 C.F.R § 4062.7), or late premium payments -- in all cases the rate established pursuant to IRC § 6621, 26 C.F.R. § 301.6621.

The values determined under this Policy may differ from those used for financial statement purposes under generally accepted accounting principles.

B. Scope and Effective Date

This Policy applies to the valuation and allocation of recoveries for plans with termination initiation dates after December 17, 1987 (see the Pension Protection Act enacted in the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203). This Policy is effective July 17, 2008.

C. Definitions

Date of Plan Termination (DOPT) means the date determined in accordance with ERISA § 4048.

Due and unpaid employer contributions (DUEC) means the amounts required to be contributed to the plan pursuant to ERISA § 302 and § 303 and IRC § 412 and § 430, less amounts actually contributed.

Premium means any unpaid premium amount required to be paid to the PBGC pursuant to ERISA § 4006 and § 4007 and applicable regulations.

Recovery Valuation Group (RVG) means the interdepartmental group responsible for reviewing all large and complex recovery valuations as described in ***Section I*** of this Policy.

Termination Initiation Date (TID) means

a. for a distress termination under ERISA § 4041(c), the last date on which any notice of intent to terminate is issued to any affected party other than the PBGC; and

b. for a PBGC-initiated termination under ERISA § 4042, the date on which the PBGC issues a notice of determination that the plan will be terminated (or, in the absence of such a notice, the date on which the PBGC's Director, or his or her designee, authorizes the initiation of proceedings to terminate the plan under ERISA § 4042).

D. Valuation Date

1. **General Rule.** Recoveries are valued and allocated among PBGC's claims as of the Valuation Date. The Valuation Date is the earlier of
    a. The date when all significant uncertainties as to the value of the recoveries are removed; or
    b. The last day of the 16th full calendar month following the date of trusteeship of the plan.
2. **Multiple Valuation Dates.** There may be more than one valuation date if significant uncertainties are removed at different dates for different parts of a recovery (e.g., settlements with more than one party at different times). In these cases, the Valuation Date for each part of the recovery will be determined separately.
3. **Excessive Uncertainties.** In rare and unusual circumstances where excessive uncertainties make it unreasonable to value recoveries at the end of the 16th full month after the month of trusteeship, the Benefits Administration and Payment Department ("BAPD") and the Office of Chief Counsel ("OCC") may prepare a recommendation to the RVG to delay the Valuation Date. The RVG is responsible for determining whether there are excessive uncertainties for purposes of the recovery valuation and allocation and whether to delay the Valuation Date. A determination to delay the Valuation Date shall include a description of the conditions needed for the valuation (e.g., obtaining certain information, the occurrence of an event, the issuance of a court decision) and the recovery will be valued at a future appropriate date.

4. **Certain Valuation Dates.** In rare cases, PBGC's staff may be able to reasonably assign a monetary value to a recovery but may not be able to reasonably estimate when the distribution to PBGC of that recovery will take place. In such a case, the RVG shall value the recovery using an estimated payment date that is two years after the last day of the 16th full calendar month following the date of trusteeship of the subject plan or plans. In a case that may reasonably have a monetary value assigned to a portion, but not all, of the recovery, the RVG may, in its sole discretion, value that portion of the recovery in accordance with this paragraph, based on that case's facts and circumstances. The recovery for unsecured PBGC claims valued in accordance with this paragraph shall be adjusted from the estimated payment date to the Valuation Date when the staff first is able to reasonably assign the monetary value to the recovery or a portion of the recovery, as the case may be, using the PBGC First Select Rate referenced in ***Section A*** of this policy, as in effect on the Valuation Date.

E. Valuing Recoveries

1. **General Rule.** PBGC will value the combined recoveries on claims for DUEC, employer liability and unpaid premiums on a facts and circumstances basis. All components of the recovery (including any contingent assets such as an interest in the future profits of a firm) shall be included. In appropriate cases, the valuation may include estimated amounts.
2. **Offset for Expenses.** In appropriate cases the value of a recovery can be reduced by clearly identifiable, commercially reasonable expenses incurred in obtaining the recovery, e.g., expenses that would reasonably be incurred in seeking recoveries outside of bankruptcy. These would include expenses related to assistance from outside parties, such as outside counsel, industry specialists, investment bankers, expert witnesses and actuarial contractors with respect to expenses associated with collecting recoveries. Recoveries shall not be reduced by PBGC's direct or indirect internal administrative or overhead expenses (e.g., salaries of PBGC employees). PBGC staff shall provide (1) a brief description of the service provided in obtaining the recovery, (2) the amount of payment and (3) the date of payment. Each expense amount shall be brought forward with interest (i.e., the PBGC first select interest rate).

F. PBGC Claims

1. **Claim Amounts.** The amounts used for the DUEC, UBL and premium claims shall be the best available amounts as of the time the allocation is done. In bankruptcy cases all claims shall be classified by priority.
2. **Secured Claims.** The value of a secured claim depends upon facts and circumstances. Where appropriate, the value of the secured claim may include interest through the Valuation Date. However, in no event shall the amount allocated to a particular secured claim exceed the value of the collateral.
3. **Premium Claims.** Premium claims do not include penalties, and are treated as general unsecured claims.
4. **Other Plan Claims.** In general, where a plan has claims other than DUEC claims (e.g., amounts required to be contributed to the plan pursuant to legal commitments such as plan agreements, trust agreements, or collective bargaining agreements; or a fiduciary breach claim), these claims are treated in the same way as DUEC claims. However, a different treatment may be appropriate depending on facts and circumstances.

   In cases involving recovery of plan assets other than DUEC, the amount of each class of asset recovery should be separately identified. Thus, even if DUEC and other claims of the same priority have shared in recoveries or been combined as "DUEC" in the application of the ***formula G.2(d)(i)***, they should be separated in the report of allocation results.
5. **Interest.** Except for certain secured claims, interest is generally not applied to PBGC's claims in bankruptcy cases after the petition date. In nonbankruptcy cases, and in bankruptcy cases where it is determined to apply interest under the facts and circumstance of the case, the claim amounts shall be brought forward to the Valuation Date with interest as prescribed under IRC § 6621.

G. Allocations of Recoveries

1. **In General.** The allocation of recoveries to claims for DUEC, UBL and unpaid premiums occurs as of the Valuation Date under the methodology described in this Paragraph G. Notwithstanding the foregoing, where it is determined that the allocation rules in Paragraph G should not apply to the facts and circumstances of a particular case, recoveries may be allocated on a facts and circumstances basis. The RVG must concur in any facts and circumstances allocation.
2. **Method for Allocating Recoveries to Claims**
    a. **Secured Claims.** Recoveries shall be allocated as of the Valuation Date first to any secured claims in order of their priority. If the value of the recovery is not sufficient to cover secured claims of equal priority, the value shall be allocated pro-rata based on the amounts of such secured claims. In no event shall the amount allocated to a particular secured claim exceed the value of the security (or, if less, of the secured claim).
    b. **Priority Bankruptcy Claims.** Any recovery value remaining after the allocation to secured claims shall be allocated as of the Valuation Date to priority bankruptcy claims in order of their priority. Except in highly unusual circumstances, the UBL claim for purposes of this allocation shall be treated as having no priority. If the value of the recovery is not sufficient to cover claims of equal priority, the value shall be allocated pro-rata based on the amounts of such claims.
    c. **Adjust UBL Claim.** Since DUEC recovery affects the amount of the remaining UBL, the UBL claim must be adjusted to reflect any DUEC recoveries in Subparagraphs 2(a) and 2(b) above. First, discount the recovery for DUEC determined in Subparagraphs 2(a) and 2(b) above to DOPT using the PBGC first select rate under 29 CFR § 4044, appendix B, in effect as of DOPT. Second, reduce the UBL as of DOPT by the DUEC Recovery as of DOPT. Bring the adjusted UBL forward to the Valuation Date with interest as prescribed under IRC § 6621 unless it has been determined not to apply interest (e.g., most bankruptcy cases).
    d. **Allocate Pro-Rata to Remaining Claims.** Allocate the remaining recovery amount pro-rata among DUEC, UBL and Unpaid Premium claims as of the Valuation Date.
        i. **Pro-Rata Allocation to General Unsecured DUEC.** Determine the amount of the recovery for DUEC as of the Valuation Date using the following equation:

$$\text{DUEC Recovery} = \frac{\left[TC - \sqrt{\left(TC^2 - 4 \times TR \times DUEC \times MULT\right)}\right]}{2 \times MULT}$$

Where:

- **TC** equals total amount of claims (DUEC, UBL and Unpaid Premiums) as of the Valuation Date to which the recovery is being allocated.
- **TR** equals total net recovery (determined as of the Valuation Date) being allocated.
- **DUEC** equals the total DUEC claims as of the Valuation Date to which the recovery is being allocated.
- **"MULT"** equals (DISCTRT x IRSRATE) where:
    - **DISCTRT** is the discount factor needed to value DUEC recoveries as of the Termination Date. For example, for a termination date three years before the Valuation Date and a discount rate of 6.5%, DISCTRT would be $1/(1.065)^3$, or 0.827849.
    - **IRSRATE** is the multiplier needed to calculate the amount of a Valuation Date claim given the amount of the claim on the plan's termination date. The IRSRATE multiplier will reflect the IRS rates issued under IRC § 6621 as in effect for the period between the plan's termination date and the Valuation Date. This rate will ordinarily have changed several times during that period. Interest using these

rates is compounded daily; thus, a claim of $1 million on the termination date would grow, during a year in which the IRC § 6621 rate was 8%, to $1,083,278 ($\$1{,}000{,}000 \times (1 + .08/365)^{365}$). (In general, the IRSRATE multiplier will be 1.0 in bankruptcy cases.)

- **Multiple Termination Dates.** If recoveries are being allocated to two or more plans with different termination dates, the "MULT" factor in the denominator of the equation is modified as follows:

$$MULT = \frac{(DUEC_1 \times DISCTRT_1 \times IRSRATE_1) + \ldots + (DUEC_n \times DISCTRT_n \times IRSRATE_n)}{DUEC}$$

Where:

- **$DUEC_1$** through **$DUEC_n$** are the amounts of the valuation date DUEC claims for $Plan_1$ through $Plan_n$, including any interest between the respective termination date for each plan and the valuation date.
- **$DISCTRT_1$** through **$DISCTRT_n$** are the discount factors needed to value recoveries on $DUEC_1$ through $DUEC_n$ as of their plan's respective termination dates.
- **$IRSRATE_1$** through **$IRSRATE_n$** are the multipliers needed to calculate the amount of a valuation date claim given the amount of the claim on the plan's termination date.

ii. **Adjust UBL Claim.** Since DUEC recovery affects the amount of the remaining UBL, the UBL claim must be adjusted to reflect any DUEC recovery determined in Subparagraph 2(d)(i) above. First, discount the recovery for DUEC in Subparagraph 2(d)(i) above to DOPT using the PBGC first select rate under ERISA § 4044 in effect as of DOPT. Second, reduce the UBL as of DOPT by the DUEC Recovery as of DOPT. Bring the adjusted UBL forward to the Valuation Date with interest as prescribed under IRC § 6621 unless it has been determined not to apply interest (e.g., most bankruptcy cases).

iii. **Allocate Remaining Recovery Amount Pro-Rata.** Allocate the remaining recovery amount pro-rata as of the Valuation Date between the remaining non-DUEC claims (in most cases this will be the general unsecured UBL and premium claims).

e. **Discount Recoveries to DOPT.** Discount the recovery for each claim from the Valuation Date to DOPT using the first select rate under ERISA § 4044, provided the DOPT is on or after November 1, 1993.

3. **Multiple Settlements.** When PBGC recoveries on its claims result from settlements with more than one company or bankruptcy estate and each settlement has the same valuation date, the recovery values shall be combined and allocated to PBGCs various claims as of the valuation date.

4. **Multiple Valuation Dates.** If there are multiple Valuation Dates (e.g., different settlements with different controlled group members), perform the allocation as outlined in the Example attached to this Policy.

H. Special Rules

1. **Large Plan Exception.** In the rare case where the value of a recovery changes significantly between the valuation date with respect to a plan subject to the large plan rule of ERISA § 4022(c)(3)(C) and the date PBGC computes the total Section 4022(c) amount for the plan, the Chief Operating Officer may decide to revalue the recovery as of a later date for the purpose of determining Title IV benefits and the total Section 4022(c) amount for the plan.

2. **Mistake of Fact or Extraordinary Material Change of Circumstances.** Subsequent adjustments to the value of recoveries shall be made only in situations in which the valuation was based on a material mistake of fact or if there has been an extraordinary material change of circumstances. An example of such a mistake would be an employer's having substantial assets that were not taken into account at the time the recoveries were valued. An example of an extraordinary material change of circumstances would be a substantial unexpected recovery in a legal action pertaining to a terminated and trusteed pension plan. The RVG has sole discretion in determining whether a valuation was based on a material mistake of fact or whether there has been an extraordinary material change of circumstances concerning a valuation, and whether or not to adjust the recovery value. Where the RVG concludes that there has been a material mistake of fact or an extraordinary material change of circumstances, and that the valuation ought to be changed, the RVG shall determine an adjusted recovery value, subject to the approval of the Chief Operating Officer.
3. **Subsequent Insufficiencies.** In the case of a plan that is sufficient at PBGC rates as of the termination date and subsequently becomes insufficient as described in ERISA § 4041(c)(3)(C)(ii), the value of PBGC's net recoveries on its claims for DUEC, unfunded benefit liabilities and unpaid premiums shall be determined as of the date of the subsequent insufficiency as described in ERISA § 4062(b)(1)(B) (using as the discount rate the PBGC first select rate in effect as of that date).

I. Case Processing

1. **Responsibilities.** BAPD has lead responsibility for completing the recovery valuation and allocation process. DISC and OCC shall provide assistance on financial, legal, and other matters as appropriate.
2. **Recovery Valuation Group**
    a. The Recovery Valuation Group (RVG) reports to the Chief Operating Officer ("COO") and provides general oversight of the Recovery Valuation Process. The RVG consists of representatives from the COO's office, the Chief Insurance Program Officer's office, the Benefits Administration and Payment Department, the Department of Insurance Supervision and Compliance, the Legislative and Regulatory Department, the Office of Chief Counsel, and the Financial Operations Department. The RVG Chairperson is designated by the Chief Operating Officer.

    b. RVG concurrence is required for the following cases:

        1) Cases that, as of the DOPT, involve total UBL of more than $25 million for all terminated plans sponsored by the same controlled group (using the best available data as of the valuation date and assuming a zero value for DUEC);

        2) Cases presenting issues that are significant, complex or novel.

        3) Cases involving a Valuation Date later than the end of the 16th full month after the month of plan trusteeship, and requests to delay the Valuation Date beyond the 16th full month.

    c. Any issues unresolved by the RVG shall be referred to the Chief Operating Officer for resolution.

J. Example

Example: Allocation of Combined Recoveries from a Bankrupt Entity In A Case Involving Two (2) Plans with Different Termination Dates and Two (2) Valuation Dates

	Assumptions	Plan 1	Plan 2
1	Dates of Plan Termination	End of Year 1	End of Year 2
2	Initial Select Rates	4%	5%
3	First Valuation Date	End of Year 3	End of Year 3
4	Discount Factor as of First Valuation Date	.92456	.95238

5	Second Valuation Date		End of Year 4	End of Year 4
6	Discount Factor as of Second Valuation Date		.88900	.90703
7	First Combined Recovery (RECOV-1)	$ 300		
8	Second Combined Recovery (RECOV-2)	$ 600		

Claims (as of each plans DOPT)	Plan 1	Plan 2	Combined
Unsecured DUEC	$ 400	$ 800	$1,200
Unsecured UBL (assuming $ 0 DUEC)	$2,000	$3,200	$5,200
Premiums	$ 20	$ 100	$ 120
Total Claims (TC)	$2,420	$4,100	$6,520

Procedure:

Calculate Total Amount to Be Paid to Unsecured DUEC Claims:

1. Use the formula to calculate the total DUEC recovery for both plans on both dates:

$$\text{Total DUEC Recovery} = \frac{\left[\$6{,}520 - \sqrt{\left((\$6{,}520)^2 - 4 \times \$900 \times \$1{,}200 \times .91505\right)}\right]}{2 \times .91505} = \$169.69$$

Where: TC = $6,520

TR = $ 900

DUEC = $1,200

and MULT =

$$\frac{\$300 \times (\$400 / \$1{,}200) \times .92456 + \$300 \times (\$800 / \$1{,}200) \times .95238}{\$900}$$

$$+ \frac{\$600 \times (400 / \$1{,}200) \times .88900 + \$600 \times (\$800 / \$1{,}200) \times .90703}{\$900}$$

= .91505

2. Assign the combined DUEC recovery between the two valuation dates:

   DUEC Recovery, Plan 1, First Valuation = $ 169.69 x ($ 300/$ 900) x ($ 400/$ 1,200) = $ 18.85

   DUEC Recovery, Plan 2, First Valuation = $ 169.69 x ($ 300/$ 900) x ($ 800/$ 1,200) = $ 37.71

   DUEC Recovery, Plan 1, 2nd Valuation = $ 169.69 x ($ 600/$ 900) x ($ 400/$ 1,200) = $ 37.71

   DUEC Recovery, Plan 2, 2nd Valuation = $ 169.69 x ($ 600/$ 900) x ($ 800/$ 1,200) = $ 75.42

   Total DUEC Recovery for Plan 1 = $ 56.56

   Total DUEC Recovery for Plan 2 = $ 113.13

3. Assign the remaining recoveries ($ 900 - $ 169.69 = $ 730.31) to the reduced UBL Claims and the premium claim:

   The combined reduced UBL Claims are $ 5,200 - $ 169.69 x .91505 = $ 5,044.73.

The reduced UBL Claim for Plan 1 is \$ 2,000 - \$ 18.85 x .92456 - \$ 37.71 x .88900 = \$ 1,949.05

The reduced UBL Claim for Plan 2 is \$ 3,200 - \$ 37.71 x .95238 - \$ 75.42 x .90703 = \$ 3,095.68

The combined premiums claims are \$ 120.

The total remaining claims are \$ 5,164.73.

Recovery on Plan 1's UBL Claim, First Valuation = $\frac{\$730.31 \times \$1{,}949.05 \times \$300}{\$5{,}164.73 \times \$900} = \$91.87$

Recovery on Plan 1's UBL Claim, Second Valuation = $\frac{\$730.31 \times \$1{,}949.05 \times \$600}{\$5{,}164.73 \times \$900} = \$183.73$

Recovery on Plan 2's UBL Claim, First Valuation = $\frac{\$730.31 \times \$3{,}095.68 \times \$300}{\$5{,}164.73 \times \$900} = \$145.91$

Recovery on Plan 2's UBL Claim, Second Valuation = $\frac{\$730.31 \times \$3{,}095.68 \times \$600}{\$5{,}164.73 \times \$900} = \$291.83$

Recovery on Plan 1's Premiums Claim, First Valuation = $\frac{\$730.31 \times \$20.00 \times \$300}{\$5{,}164.73 \times \$900} = \$0.94$

Recovery on Plan 1's Premiums Claim, Second Valuation = $\frac{\$730.31 \times \$20.00 \times \$600}{\$5{,}164.73 \times \$900} = \$1.88$

Recovery on Plan 2's Premiums Claim, First Valuation = $\frac{\$730.31 \times \$100.00 \times \$300}{\$5{,}164.73 \times \$900} = \$4.71$

Recovery on Plan 2's Premiums Claim, Second Valuation = $\frac{\$730.31 \times \$100.00 \times \$600}{\$5{,}164.73 \times \$900} = \$9.43$

4. Discount the DUEC, UBL, and premiums recoveries to DOPT:

   Combined discount factor for Plan 1 = 300/900 x .92456 + 600/900 x .88900 = .90085

Combined discount factor for Plan 2 = 300/900 x .95238 + 600/900 x .90703 = .92215

Total Discounted DUEC recoveries, Plan 1 = $ 56.56 x .90085 = $ 50.95

Total Discounted DUEC recoveries, Plan 2 = $113.13 x.92215 = $ 104.32

Total Discounted UBL recoveries, Plan 1 = ($ 91.87 + $ 183.73) x .90085 = $ 214.20

Total Discounted UBL recoveries, Plan 2 = ($ 145.91 + $ 291.83) x .92215 = $ 403.66

Total Discounted premiums recoveries, Plan 1 = ($ 0.94 + $ 1.88) x .90085 = $ 2.54

Total Discounted premiums recoveries, Plan 2 = ($ 4.71 + $ 9.43) x .92215 = $ 13.14