

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

**Q&A Session with PBGC
May 7, 2008**

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:** Assume that a participant in a calendar-year plan terminates employment on November 15, 2007, with a right to a consensual lump sum that has a present value greater than \$5,000; that under the terms of the plan the participant's annuity starting date is December 1, 2007; that the participant elects the lump sum with spousal consent; and that the lump sum is paid on January 15, 2008. Is the plan treated as having benefit liabilities with respect to the participant as of December 31, 2007, for purposes of determining the flat-rate premium for the 2008 premium payment year? (The PBGC's response to Question 1 of the 2005 Blue Book made clear that a participant who is paid a nonconsensual lump sum after the premium snapshot date but whose cashout date precedes the premium snapshot date may be excluded from the flat-rate participant count where there is no more than a reasonable administrative delay between the cashout date and the date of actual payment.)

PROPOSED RESPONSE: In order for the plan to exclude the participant from the flat-rate participant count for the 2008 premium payment year, two conditions must be met: (i) the annuity starting date under the terms of the plan (December 1, 2007) must be a date on or before the premium snapshot date (proposed to be renamed the "participant count date" for 2008 and later premium payment years) (December 31, 2007), and (ii) there must be no more than a reasonable administrative delay between the annuity starting date and the date of actual payment (January 15, 2008) to the participant. Whether an administrative delay in payment is reasonable is based on the facts and circumstances in any particular case. These facts and circumstances include the reasonableness of the typical time period required by the plan to calculate the benefit amount in consensual lump sum cases, how the time period in the particular case compares to that typical time period, and any other facts and circumstances surrounding the delay in the participant's case.

PBGC premium compliance evaluations include examination of any delay in paying lump sums after the participant count date to participants who are excluded from the participant count.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 1 of the 2008 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 attempting to collect the termination premium, both in the bankruptcy context and the non-bankruptcy context (*e.g.*, where a distress termination is approved under Distress Test 3 ("inability to continue in business")). In particular, please address situation in which less than the full amount has been collected because of collectability issues, as well as situations that have been or may be resolved through settlements or litigation.

PROPOSED RESPONSE: ???

RESPONSE: The PBGC published the final regulation regarding the termination premium on December 17, 2007 (see 29 CFR §§ 4006.7, 4007.13). Employers are required to pay the termination premium in accordance with the statute and the regulations. The forms and instructions to pay the termination premium are available on PBGC website. The PBGC does not comment on settlements, since they are fact-specific. An issue involving the priority and treatment of the PBGC's claim for the termination premium is being litigated in *Oneida, Ltd. v. PBGC (In re Oneida, Ltd.)*, 383 BR 29 (Bankr. S.D.N.Y. Feb. 27, 2008). In that case, the bankruptcy court ruled that the termination premium is a pre-petition bankruptcy claim and was discharged under Oneida's plan of reorganization. PBGC expects to appeal the decision. [Ed. Note: The *Oneida* case is described further below in the response to Question 22.]

3. **QUESTION:** Assume that each member of the controlled group maintaining a plan qualifies for distress under Distress Test 1 (Liquidation), and that, therefore, if the termination is processed as a distress termination, there is no termination premium owed. Assume further, however, that the termination is instead processed as a consensual

involuntary termination under ERISA Section 4042. Would a termination premium be owed in such circumstances and, if so, who would pay it and when?

PROPOSED RESPONSE: In the circumstances described in the question, PBGC would not enforce any requirement that may exist to pay a termination premium.

RESPONSE: The statute provides that a termination premium is owed in the event of an involuntary termination. Therefore, technically the premium would apply, but facts and circumstances would determine whether the PBGC would attempt to collect it. If a termination in bankruptcy is contemplated, the plan sponsor and administrator should consult with the PBGC regarding this issue.

4. **QUESTION:** Please describe the PBGC's experience to date with any requests for exemption ("for good cause in appropriate circumstances" (29 CFR § 4007.3)) from the requirement to e-file premium information?

PROPOSED RESPONSE: ???

RESPONSE: The PBGC refers to its response in Q&A 4 of the 2008 Blue Book, which continues to reflect the current situation.

[Ed. Note, that response reads as follows: Less than one percent of filers requested exemptions from premium e-filing during the mandatory e-filing transition years (2006 for large plans and 2007 for small and medium plans). Most of those requests were granted for good cause. For these transition years, PBGC was lenient in its application of the "good cause" exemption because filing electronically was a significant change from past procedure. Now that filers have experience with the e-filing requirement, PBGC expects to take a stricter approach when reviewing exemption requests.] [Ed. Note : The Blue Books can be found on the PBGC's website at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html>]

STANDARD TERMINATIONS

5. **QUESTION:** In Technical Update 07-3 ("Minimum Lump Sum Assumptions for Terminating Single-Employer Plans; Effect of Pension Protection Act of 2006") (available at <http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16272.html>), PBGC provided guidance on lump sum valuation issues for single-employer plans that terminate in a standard termination with a termination date prior to, and a final distribution date on or after, the effective date of changes in the interest rate and mortality table used in calculating minimum lump sum values under the Pension Protection Act of 2006 ("PPA").

(a) The Technical Update provides in footnote 4 that PBGC would not take into account a post-termination amendment that substitutes the PPA assumptions for the pre-PPA assumptions governing minimum lump sum values even if the amendment increases benefits

for some participants. Would the PBGC take into account such an amendment to the extent it increases benefits for some participants, where the amendment is adopted on or before the plan's termination date?

(b) Assume that a plan with a pre-2008 plan year termination date is amended, on or before that termination date, to incorporate the PPA requirements governing minimum lump sum values for post-2007 plan year distributions, and distributes benefit liabilities during the 2008 plan year through purchase of an irrevocable commitment that preserves the participant's right to elect a lump sum upon retirement (*e.g.*, in 2025). Is the irrevocable commitment required to provide for the use of the pre-PPA assumptions, or the PPA assumptions, governing minimum lump sum values?

PROPOSED RESPONSE:

(a) No. This is indicated in the paragraph containing footnote 4, which states “plan provisions [incorporating PPA requirements] (regardless of whether they were added to the plan before, or on or after, the plan's termination date) are not effective for a plan with a termination date before the beginning of its 2008 plan year . . .”

(b) This issue is not addressed by the Technical Update 07-3. Applying the principles in the technical update (*i.e.*, use of pre-PPA lump sum assumptions in cases in which the plan termination date is prior to 2008) to the purchase of an irrevocable commitment that preserves the participant's right to elect a lump sum upon retirement would not be inconsistent with the technical update.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 6 of the 2008 Blue Book (and as expanded by the parenthetical in proposed response (b), above). With respect to a plan with a pre-2008 plan year termination date, the adoption of an amendment substituting the PPA lump sum assumptions for the pre-PPA lump sum assumptions cannot increase or decrease benefits.

[Ed. Note : The Blue Books can be found on the PBGC's website at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html>]

6. **QUESTION:** Technical Update 07-3 states that it “does not address the assumptions that apply where a plan has a termination date in one plan year after the effective date of the PPA lump sum assumptions and makes distributions in a subsequent plan year; *i.e.*, whether the applicable interest rate percentage (the phase-in) and the applicable mortality table used in determining minimum lump sums are those in effect on the plan's termination date or those in effect on the distribution date,” and further states that “PBGC intends to issue future guidance on these issues.” When does PBGC anticipate issuing this guidance?

PROPOSED RESPONSE: ???

RESPONSE: The PBGC expects to issue guidance later this year, and will be coordinating with IRS in the development of the guidance. The PBGC acknowledges that the guidance will impact the cost of benefit distributions for plans that terminate in 2008 and that it would be helpful to have guidance well before the end of the year.

7. **QUESTION:** Please describe PBGC's experience in connection with the audit initiative it announced on December 6, 2006, 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: ???

RESPONSE: The audit initiative has uncovered this problem primarily among small plans (20 or fewer participants). In one-quarter of the cases, compliance action was taken. In those cases, the error involved failure to pay the proper benefit and the audit resulted in higher payments to affected participants. The PBGC staff is not aware of any enforcement action taken in situations in which the proper benefits were paid, but distributions were made prior to the permitted distribution period in the standard termination. The audit initiative has not been in place long enough for PBGC to assess its impact as a deterrent.

FOLLOW-UP QUESTION: Has the PBGC had experience with large plans purchasing annuity contracts shortly prior to termination (for example, to lock in favorable interest rates for the benefit of the plan and plan participants)?

RESPONSE: The PBGC does have experience with plan sponsors requesting guidance in this area. In those situations, the PBGC has responded by sharing general principles, but has not indicated a specific period of time in advance of termination that would take such an annuity purchase outside of potential concern. Although further guidance on this issue may be provided in the future, it is unlikely to be considered prior to completion of guidance under the Pension Protection Act of 2006. ("PPA").

DISTRESS AND INVOLUNTARY TERMINATIONS

8. **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.

PROPOSED RESPONSE: ???

RESPONSE: The PBGC's response remains the same as indicated in the 2007 JCEB Q&A session with the PBGC. [Ed. Note, Question and Answer 19 of the 2007 JCEB Q&A session, which is on the ABA's website at <http://www.abanet.org/jceb/qanda.html>, reads as follows: "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)."]

9. **QUESTION:** Please describe PBGC’s 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”)?

PROPOSED RESPONSE: ???

RESPONSE: The PBGC has received one request (in this case, from a labor union) and generally followed the procedures in the proposed regulations by providing a copy of the administrative record within the applicable time frame. [Ed. Note, see Proposed Regulations 29 CFR §§ 4041.51, 4042.4, 4042.5, Federal Register, Vol. 72, No. 233, page 68542, December 5, 2007]. The PBGC has had no experience with such requests made to the plan administrator or contributing sponsor. The statute and the regulations provide that a court may limit disclosure of trade secrets and confidential commercial or financial information to authorized representatives of the participants or beneficiaries that agree to ensure the confidentiality of such information. The PBGC recognizes that there is an issue regarding whether a court may limit the disclosure of confidential information of an employer in connection with a non-union plan where there may be no “authorized representative” within the meaning of the statute. The PBGC noted that this issue was raised in the legislative process, but the statute does not contain any express provision in this regard. The PBGC also noted that it did not intend the proposed regulations to be construed to address this issue.

10. **QUESTION:** Please describe PBGC’s experience in connection with its policy against “follow-on” plans, whether in the context of litigation or negotiation or otherwise.

PROPOSED RESPONSE: ???

RESPONSE: The PBGC declines to answer regarding its experience in this regard, but notes that the test set forth in the LTV litigation remains applicable.

FOLLOW-UP QUESTION: If the employer adopts a defined contribution plan, can that be a follow-on plan?

RESPONSE: Generally a garden-variety defined contribution plan (that is, not a target benefit plan or cross-tested plan) would not raise an issue in this regard.

FOLLOW-UP QUESTION: If an employer waits 5 years before adopting a new plan, is that sufficient to preclude the new plan from constituting a “follow-on” plan?

RESPONSE: There is no bright line test in this regard, but the longer the period between the plan termination and the establishment of the new plan, the lower the concern, and the shorter the time period, the greater the concern.

11. QUESTION: A PBGC Appeals Board decision issued on September 26, 2007, held that a private equity fund that was unincorporated and that had a controlling interest (at least 80%) in one of its portfolio companies was a “trade or business”—rather than, as the private equity fund had argued, a passive investment vehicle that was not conducting a “trade or business”—and therefore was exposed to ERISA Title IV joint and several controlled group liability for the underfunding upon termination of the pension plan of that portfolio company. The Appeals Board had based its determination that this private equity fund was a “trade or business” on the test announced in *Commissioner v. Groetzinger*, 480 U.S. 23 (1987), *i.e.*, (1) whether a taxpayer is engaged in an activity with “the primary purpose of income or profit” and (2) whether the act is conducted with “continuity and regularity.” However, in its response to Question 19 of the 2008 Blue Book, PBGC stated, without any reference to the *Groetzinger* test, that “a private equity fund is a trade or business under common control with a plan sponsor if the fund meets the bright-line test of 80% or greater ownership of the plan sponsor.” Is it PBGC’s position that every private equity fund, regardless of its primary purpose or level of activities with respect to a portfolio company, would constitute a “trade or business” under the *Groetzinger* test?

PROPOSED RESPONSE: No. Although it is likely that a private equity fund would constitute a “trade or business” under the *Groetzinger* test, whether it does would necessarily depend on the facts and circumstances.

RESPONSE: The PBGC agreed with the proposed response. Moreover, the PBGC noted that responses in the Blue Book merely reflect the views of the PBGC staff, and do not constitute the official position of PBGC. In this case, the Blue Book response was intended simply to reflect the staff experience that it is likely that a private equity fund will be a “trade or business” under the *Groetzinger* test, absent unusual facts and circumstances, not a view that all private equity funds categorically are trades or businesses.

[Ed. Note : The Blue Books can be found on the PBGC’s website at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html>]

12. QUESTION: How would Section 409 of PPA (which, with respect to certain fully funded plans where a person has left the controlled group, establishes a 2-year floor on interest rates for determining, *inter alia*, whether the plan may be terminated in a standard termination) affect PBGC's claims if the plan in question terminates within, or after, the 2-year period described in that section?

PROPOSED RESPONSE: ???

RESPONSE: The PBGC declined to answer.

ANNUAL EMPLOYER REPORTING (ERISA SECTION 4010)

13. QUESTION: PPA Section 505(a) changes the primary reporting trigger for ERISA Section 4010 reporting from whether aggregate unfunded vested benefits on a PBGC premium basis exceed \$50 million to whether any *one* plan maintained by the controlled group has a funding target attainment percentage below 80%. Under PBGC's pending proposed rule, controlled groups with aggregate underfunding not exceeding \$15 million will be exempt from filing based on this revised trigger. What effect does PBGC anticipate that these changes will have on the number and nature of controlled groups required to file?

PROPOSED RESPONSE: ???

RESPONSE: It is very difficult to estimate this impact, especially since the basis for measuring the funding status also changed as a result of PPA. Under PPA, it is now based on funding target attainment percentage, which depends not only on a plan's actual funding status, but also on whether an employer elects to waive any credit balances it may have available.

14. PBGC Technical Update 96-3 ("Annual Financial and Actuarial Information Reporting"), issued on March 15, 1996, provides extensive guidance regarding reporting requirements under ERISA Section 4010 and PBGC's implementing regulations. PBGC has a "Note about Technical Update 96-3" on its website (<http://www.pbgc.gov/practitioners/reporting-and-disclosure/content/page14529.html>) stating as follows:

Since the time this technical update was published, the 4010 regulation has been amended, so some of the guidance provided in this Technical Update no longer applies. Specifically, the reference to optional assumptions in Q&A 12 is invalid for information years ending on or after December 31, 2005.

(a) Aside from the reference to optional assumptions in Q&A 12, what other portions of the guidance in Technical Update 96-3 are invalid for information years ending on or after December 31, 2005, or would become invalid for information years ending on or after December 31, 2007, if the provisions of the proposed rule (73 Fed. Reg. 9243) that PBGC issued on February 20, 2008, were adopted in a final rule?

(b) In particular, please address Q&A 4, which responds as follows to the question whether "an entity or a plan [must] be included in the annual information report if the entity or the plan is no longer in the controlled group as of the last day of the information year": "No. Controlled group members and their plans are determined as of a 'snapshot' taken on the last day of the information year." Is this guidance still valid, and would it continue to be valid assuming implementation of PBGC's February 20, 2008, proposed rule? Does this guidance apply both for purposes of determining which controlled group members are to be included in the report and for purposes of determining whether a report is required?

PROPOSED RESPONSE: ???

RESPONSE: The guidance in Q&A 4 addresses which controlled group members and plans are to be included only for purposes of determining the content of the report, not for purposes of determining whether a report is required. Since the issuance of Technical Update 96-3, PBGC's regulations have been revised to provide that identifying information is required on all entities (other than exempt entities) that were controlled group members anytime during the information year and all plans that were maintained by any member of the controlled group (including any exempt entity) anytime during the information year. Neither Technical Update 96-3 nor the existing regulations (nor the recent proposed regulation implementing the PPA changes to section 4010) specifically address which controlled group members and plans are to be taken into account when determining whether a report is required. Final regulations to be issued later this year may clarify that, for determining whether a report is required, only controlled group members and plans as of the end of the information year are taken into account.

- 15. QUESTION:** Please describe PBGC's experience in connection with requests for waivers or extensions under ERISA Section 4010, including examples of situations where relief has been granted or denied.

PROPOSED RESPONSE: ???

RESPONSE: Generally, such waivers are not granted, although in certain cases in which some of the required financial information is not available, the PBGC has allowed some of the exhibits to be provided after the main filing. In addition, the PBGC has allowed some of the employers in a multiple-employer plan not to file where another employer has already made a filing with sufficient information. The proposed regulations also reflect some possible situations in which waivers or extensions under ERISA Section 4010 may be available.

ERISA SECTION 4062(e) AND 4063 EVENTS

- 16. QUESTION:** In its response to Question 22 of the 2007 Blue Book and to Question 33 of the 2007 Q&A session with JCEB, PBGC stated that a spinoff of a portion of a multiple-employer plan to a substantial employer of that plan constitutes a withdrawal that needs to be reported under ERISA Section 4063. Assume a multiple-employer plan, Plan AB, in which two employers, Employer A and Employer B, participate. Assume further that these two employers, both of which are substantial employers, decide that they no longer want to participate in a multiple-employer plan and that, effective January 1, 2008, Plan AB is split into two plans: Plan A, which is maintained solely by Employer A, and Plan B, which is maintained solely by Employer B. How should it be determined whether Employer A, or Employer B, or both, have withdrawn from Plan AB within the meaning of ERISA Section 4063?

PROPOSED RESPONSE: ???

RESPONSE: Although the PBGC staff is not aware of having previously encountered such a case, its inclination is that the split of a multiple employer plan between two employers

probably should be reported as if both employers withdrew. Employers are encouraged to contact the PBGC to discuss such scenarios. Even if the transaction is documented so that only one of the plans is the surviving entity, it would be appropriate to discuss the situation with the PBGC. The PBGC staff is always willing to discuss practical approaches to complicated issues.

[Ed. Note : The Blue Books can be found on the PBGC's website at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html>]

17. QUESTION: ERISA Section 4063(a) requires notification to PBGC of a Section 4062(e) event within a 60-day period.

(a) When does the 60-day period start to run in the following situations?

(1) Assume an employer ceases operation on December 31, 2007, but the first date on which at least 20% of the plan's active participants have been separated from employment as a result of the cessation is March 31, 2008.

(2) Assume an employer ceases operation on March 31, 2008, but the first date on which at least 20% of the plan's active participants have been separated from employment as a result of the planned cessation was December 31, 2007.

(b) 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 comply with the ERISA Section 4063(a) reporting requirement when a Section 4062(e) event occurs?

PROPOSED RESPONSE:

(a) The 60-day period starts to run on the later of the date on which operations cease or the date on which at least 20% of the plan's active participants have been separated from employment as a result of the cessation of operations. Therefore, the 60-day period starts to run on March 31, 2008, in both of the situations described in the question.

(b) Yes.

RESPONSE: The PBGC does not necessarily agree with the proposed response in (a). The situation should be evaluated on a facts and circumstances basis, and the employer should contact the PBGC to discuss the matter.

The PBGC generally agrees with the proposed response in (b).

18. QUESTION: Please describe PBGC's experience and current enforcement plans regarding the liability provisions of ERISA Section 4062(e) and the related notice provisions of ERISA Section 4063(a).

PROPOSED RESPONSE: ???

RESPONSE: There is a noticeable increase in enforcement. PBGC learns of potential Section 4062(e) situations from its monitoring efforts and from ERISA Section 4063(a) filings. The PBGC has settled 5 cases under Section 4062(e) in the last 6 months, resulting in over \$100,000,000 in settlement payments. The PBGC has structured settlements to take into account companies' business conditions and plans. The PBGC staff was not aware, however, of any cases in which a mere notice failure resulted in enforcement through the assessment of penalties.

EARLY WARNING/RISK MANAGEMENT PROGRAM

19. 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 Mitigation" program, including a description of the results of that involvement. How does the level of activity under this program compare to prior years?

PROPOSED RESPONSE:

RESPONSE: In fiscal year 2007, the PBGC identified and investigated more than 200 transactions. It sought protection in 8 cases and obtained approximately \$1.3 billion in 4 cases. The PBGC encourages plan sponsors to discuss potential transactions with it well in advance, as the PBGC had substantial flexibility to structure settlements.

VALUATION AND PAYMENT OF BENEFITS

20. QUESTION: PPA Section 701 added ERISA Section 204(b)(5)(B)(vi), which requires hybrid plans with variable indices to determine the interest crediting rate and conversion rate that apply if the plan terminates as the average of the rates used under the plan during the 5-year period ending on the termination date. If the requirement is not met, the hybrid plan is treated as failing to meet the age discrimination requirements of ERISA Section 204(b)(1)(H).

- a. Does the 5-year average rule apply in the case of an equity index?
- b. Is the "5-year period ending on the termination date" measured in plan years, calendar years or months?
- c. Will this provision change how PBGC values cash balance plans and provides information to participants as to their benefits?

PROPOSED RESPONSE: ???

RESPONSE:

- a. Yes, although PBGC is awaiting guidance from IRS regarding the application of this provision.
- b. The “5-year period ending on the termination date” may be determined in accord with the plan provisions, to the extent that those provisions comply with the statute. As a default, the PBGC is considering use of a monthly period.
- c. Yes this 5-year averaging will change how PBGC values benefits, since the fixed rate will enable PBGC to determine the benefits that will be paid in the future without awaiting the future performance of variable indices.

21. QUESTION: PPA Section 701 also added ERISA Section 204(b)(5)(B)(i), which requires hybrid plans to utilize an interest crediting rate which is not greater than a market rate of return, in order to avoid violating the age discrimination requirements. If PBGC trustees a cash balance plan that has an interest crediting rate above the market rate:

- a. Will PBGC lower the rate to a market rate? If so, when is the market determined? At the date of plan termination or, even though the rate is not a variable rate, as the average of the last 5 years?
- b. If this above market rate is a variable rate, will PBGC only adjust the rate for years beginning on or after January 1, 2008 or will it also adjust earlier years in determining the five year average?

PROPOSED RESPONSE: ???

RESPONSE: The PBGC has not yet finalized its approach with respect to these issues, as it is awaiting final guidance from the IRS.

LITIGATION AND GENERAL MATTERS

22. 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.

PROPOSED RESPONSE:

RESPONSE:

Beck v. PACE Int’l Union, 127 S.Ct. 2310 (2007): The Supreme 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 unanimously rejected the Ninth Circuit’s conclusion that merger is a permissible method of termination, accepting PBGC’s

argument that merger is an alternative to, rather than an example of, plan termination. The Court noted that it has “traditionally deferred to the PBGC when interpreting ERISA,” and found PBGC’s construction to be “eminently reasonable.” PBGC, the Department of Labor and the Solicitor General appeared as amici curiae in the case.

Oneida, Ltd. v. PBGC (In re Oneida, Ltd.), 383 BR 29 (Bankr. S.D.N.Y. Feb. 27, 2008): Oneida filed an adversary proceeding in bankruptcy court against PBGC, seeking a declaration that the new statutory termination premium imposed in 2006 was a pre-petition bankruptcy claim that was discharged when the company emerged from bankruptcy. PBGC asked the district court to withdraw the reference, as resolving the matter would require consideration of both the Bankruptcy Code and ERISA. The district court denied the motion, and both parties moved for summary judgment in the bankruptcy court, which was argued on November 14, 2007. On February 27, 2008, the bankruptcy court ruled that the termination premium is a pre-petition bankruptcy claim and was discharged under Oneida’s plan of reorganization. PBGC expects to appeal the decision.

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 represented 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 the company, 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.

In re Rhodes, No. 04-78434 (Bankr. N.D. Ga. Jan. 25, 2008): The bankruptcy court held that PBGC’s regulation governs the amount of the agency’s claim for unfunded benefit liabilities, refusing to recompute the amount using a “prudent investor” rate. PBGC argued that a bankruptcy claim is determined according to the substantive non-bankruptcy law under which it arises, and thus, that PBGC properly calculated its claim for pension underfunding pursuant to ERISA and its regulations. The court agreed, finding that no Bankruptcy Code provision would empower it to disregard PBGC’s regulation and recalculate its claim. The court became the fourth bankruptcy court in a row so to rule (following courts in *US Airways*, *UAL*, and *High Voltage*), and expressly rejected the reasoning of several previous decisions to the contrary (*Chateaugay*, *CF&I*, and *In re CSC Industries*).

Sara Lee Corp. v. American Bakers Ass’n, 512 F.Supp.2d 32 (D.D.C. 2007): PBGC made an administrative determination classifying a pension plan to which more than one employer contributed as a multiple-employer plan, rather than an aggregate of single-employer plans, as the agency had determined some 29 years earlier. Several contributing employers and the plan trustees challenged PBGC’s determination. The district court held that the deferential “arbitrary and capricious” standard applied to PBGC’s reclassification of the plan, but held in abeyance its decision with respect to PBGC’s motion for summary judgment until it was assured that the administrative record was complete. That issue is pending with the magistrate judge.

Chao v. USA Mining, Inc., 2007 WL 208530 (E.D. Tenn. Jan. 24, 2007): The court granted summary judgment in favor of the Secretary of Labor and PBGC against an individual and three corporations for fiduciary breaches against certain terminated pension plans. Together with the plans’ former trustee, the individual had caused the plans to fruitlessly “invest” millions of dollars of plan

assets in the corporate defendants, which were owned by the individual defendant. The court ruled in favor of PBGC and the Department of Labor on all counts, finding that the terminated plans were entitled to damages in the full amount of all transactions that took place after the individual became a plan fiduciary, and permanently enjoined the individual from becoming a plan fiduciary.

Koehler v. PBGC, No. 06-1421 (N.D. Ohio Apr. 4, 2007), *appeal pending*, No. 07-03630 (6th Cir.): The 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 the company and subsequently by PBGC. They asserted that PBGC had breached its fiduciary duties by failing to pay the claimed benefits. None of the participants had appealed their benefit determinations to the PBGC Appeals Board. The district court dismissed the complaint based upon the participants' failure to exhaust their administrative remedies. The participants appealed to the Sixth Circuit.

Dumas v. PBGC, 2007 WL 1099542 (N.D. Ind. Apr. 9, 2007), *aff'd per curiam*, 2007 WL 3328179 (7th Cir. Nov. 9, 2007): A participant challenged his benefit determination, asserting that according to a PBGC communication addressing the maximum guarantee limit, he was entitled to the maximum amount as his pension. After submitting the administrative record, PBGC argued on summary judgment that the maximum guarantee limit is merely a cap on a participant's entitlement under the plan, not a separate source of benefit entitlement. The court agreed and granted summary judgment to PBGC. The Seventh Circuit affirmed.

Becker v. Weinberg Group, Inc. Pension Trust, 473 F. Supp. 2d 48 (D.D.C. 2007): A participant asserted that the plan administrator underpaid her benefits during a standard termination. The participant asked the court to direct PBGC to audit the plan and, as necessary, nullify the termination. PBGC moved to dismiss, arguing that there was no ripe claim against it, and that its decision not to halt a termination or select a plan for audit is committed to the agency's prosecutorial discretion. The court agreed, finding that PBGC's decision not to act was a "single-shot non-enforcement decision," which is not reviewable.

PBGC v. In re Falcon Prods., Inc. (In re Falcon Prods., Inc.), 497 F.3d 838 (8th Cir. 2007), *aff'g* 354 B.R. 889 (E.D. Mo. 2006): The Eighth Circuit held that it was unnecessary to address whether ERISA mandates a plan-by-plan or aggregate approach in assessing the debtors' distress termination application for its three pension plans. Relying instead on the bankruptcy court's finding that the debtor could not survive outside of Chapter 11 bankruptcy without a potential multi-million-dollar investment — which was expressly conditioned on termination of the pension plans — the court of appeals affirmed that termination of all three Falcon pension plans was warranted.

Chao v. Johnston, 2007 WL 2847548 (E.D. Tenn. July 9, 2007): The defendant had served as an attorney and escrow agent for the chief executive officer of USA Mining, Inc. and was the conduit through which many of the pension plan assets were dissipated. PBGC and the Department of Labor sued, seeking to recover his profits. The defendant moved to dismiss, claiming that he was not a fiduciary of the pension plan, and thus not liable for any of the fiduciary breaches. The district court denied the defendant's motion, holding that PBGC and DOL had adequately alleged that even though he was not a fiduciary, he had knowingly participated in the breaches, thus satisfying the standard for liability.

PBGC v. Durango Ga. Paper Co., 2007 WL 3047329 (11th Cir. Oct. 19, 2007), *aff'g per curiam* 2006 WL 3762085 (S.D. Ga. Dec. 20, 2006): The former plan sponsor challenged the termination date agreed to by PBGC and Durango. The court held that when a pension plan is terminated 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.

23. 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.

PROPOSED RESPONSE: ???

RESPONSE: The PBGC has not pursued any litigation under ERISA section 4069(a) in the past year and declines to discuss any possible settlements.

24. QUESTION: What are the legal issues, if any, that may arise under Title IV of ERISA when an entity that is not and never has been an employer (or part of the employer's controlled group) with respect to a pension plan's participants seeks to assume that pension plan? In addition to any such legal issues, what are the policy issues that may arise under Title IV of ERISA in connection with such an assumption?

PROPOSED RESPONSE: ???

RESPONSE: The PBGC declined to answer.

25. 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.

PROPOSED RESPONSE: ???

RESPONSE: The PBGC does a significant amount of electronic data analysis with respect to information received as a part of the ERISA Filing Acceptance System (EFAST), including Schedule B to Form 5500, and of premium filing information. Those plans for which the information seems anomalous get greater scrutiny. W-2 filing information could be used to estimate the flat rate premium, and the PBGC can also take data from other sources and estimate the variable premium. The PBGC acknowledges that the time lag to obtain the information for analysis is significant; generally, 18 months from the filing.

The PBGC adopted final changes to its regulations, at 29 C.F.R. 4007.10, to clarify and strengthen recordkeeping and audit provisions. For example, the revised regulations make clear PBGC's broad interpretation of the "records" that must be retained and provide that PBGC may require that the operation of any system used by the plan administrator to determine premiums or premium-related information be demonstrated so that its effectiveness, and the reliability of the

results produced, can be assessed. The changes also provide for faster on site production of records and allow the PBGC to presumptively establish a plan's variable-rate premium from other sources where the plan's records fail to establish it. If the plan administrator has determined that no premiums are due, information justifying that conclusion should be retained.

The PBGC indicated that Section 4010 is another problem area, particularly in the case of large funding waivers and large missed contributions. They noted that there is an abbreviated form required to be filed if the sponsor is no longer required to file under Section 4010. They are not yet imposing penalties for the failure to file this abbreviated form. They noted they did not receive any comments on timing issues in connection with Section 4010 regulations.

26. 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 defined contribution plans? As part of the response, please address any issues that are likely to cause difficulty or generate controversy in connection with PPA rulemakings.

PROPOSED RESPONSE: ???

RESPONSE: The PBGC's regulatory agenda is now available on the website maintained by OMB at <http://www.reginfo.gov/public/do/eAgendaMain>. The PBGC has adopted two final regulations regarding premium issues under the PPA. Proposed regulations have been issued with respect to Section 4010 (Annual Financial and Actuarial Information Reporting) and Sections 4041 and 4042 (Disclosure of Termination Information). Proposed regulations are in the process of being developed regarding a variety of PPA issues, including payment of interest on premium overpayments, and the expanded missing participants program.

27. QUESTION: Has PBGC implemented the good guidance practices adopted by OMB?

PROPOSED RESPONSE: Yes. PBGC has adopted procedures for approval of significant guidance documents in accordance with OMB's "Final Bulletin for Good Guidance Practices." In addition, PBGC now has a page on its Web site with links to significant guidance documents approved under the new procedures, as well as past guidance that PBGC determined is significant guidance under OMB's Bulletin. The Web site also provides a means for submitting comments on any significant guidance document that PBGC has issued. To date, PBGC has issued three significant guidance documents (all of which are technical updates) under the new procedures.

The significant guidance Web page is at: <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/sguidance.html>.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 20 of the 2008 Blue Book. In addition, the PBGC noted that if it gets requests for formal guidance, including through its website portal, that will allow it to be more responsive and prioritize guidance

projects. Also, the PBGC noted that regulatory agendas are posted on the OMB/GSA website at <http://www.reginfo.gov/public/DO/E/agenda>

[Ed. Note : The Blue Books can be found on the PBGC's website at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html>]

- 28. QUESTION:** Section 4021 of ERISA describes what plans are and are not covered by the PBGC pension plan termination insurance program under Title IV of ERISA. For example, under section 4021(b), coverage is not provided for government plans, substantial owner plans, or certain small professional service plans.

Under Internal Revenue Code Section 404(a)(7)(C)(iv) as added by the Pension Protection Act of 2006, single-employer plans covered by ERISA section 4021 are not taken into account in determining the limit on deductions for plan contributions for plan sponsors maintaining a combination of defined contribution and defined benefit plans. Thus, a sponsor's deductible limit might increase if a non-covered plan became a covered plan.

If a plan is excluded from coverage under section 4021, may it become covered by paying premiums to PBGC?

PROPOSED RESPONSE: No. See § 4007.9(b) of PBGC's regulation on Payment of Premiums (29 CFR Part 4007).

RESPONSE: The PBGC agrees with the response as reflected in Q&A 21 of the 2008 Blue Book. In addition, the PBGC indicated that with respect to a determination regarding whether a plan is a church plan, the PBGC follows the lead of the other agencies (IRS and DOL).

[Ed. Note : The Blue Books can be found on the PBGC's website at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html>]

- 29. QUESTION:** Are draft PBGC forms — such as those for premiums, annual employer reporting, or reportable events — available to the public before PBGC issues them in final form?

PROPOSED RESPONSE: Yes. When PBGC makes material changes to an information collection (such as forms and instructions for filing information with PBGC), it submits the information collection to the Office of Management and Budget (OMB) for approval. PBGC also notifies the public how to obtain a copy of the materials (including the draft forms and instructions) submitted to OMB and invites public comment. The notification may be part of a proposed rule or in a stand-alone notice published in the Federal Register. The public may obtain the draft forms and instructions by following the instructions in the applicable proposed rule or notice. For example, when PBGC published its proposed rule on the variable rate premium on May 31, 2007, the rule stated:

PBGC is submitting the information requirements under this proposed rule to the Office of Management and Budget for review and approval under the Paperwork Reduction Act. The OMB control number for this collection of information is 1212-0009. Copies of PBGC's request may be obtained free of charge by contacting the Disclosure Division of the Office of the General Counsel of PBGC, 1200 K Street, NW., Washington, DC 20005, 202-326-4040.

RESPONSE: The PBGC agrees with the response as reflected in Q&A 22 of the 2008 Blue Book. The PBGC also notes that it is working towards posting draft forms submitted to OMB on the PBGC website.

[Ed. Note : The Blue Books can be found on the PBGC's website at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html>]

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

PROPOSED RESPONSE: ???

RESPONSE: There is a data lag of about 2 years for this information, since it comes from the Form 5500. The approximate percentage of plans undergoing a "hard freeze" (*i.e.*, cessation of benefit accruals) in 2003 was 9%, in 2005 was 14½% and in 2006 was 16½%. The rate of plan freezes seems to be slowing, however. Also, most of the plans that are frozen are relatively small plans. The PBGC should receive better data about freezes, including on "soft freezes" (*i.e.*, halting new entrants into a plan) starting with the 2008 Form 5500. The termination of frozen plans has appeared to be relatively constant, with approximately 20% of frozen plans being terminated in any given year. The PBGC has not yet seen any impact from PPA regarding plan freezes and terminations, but notes that the growth of hybrid plans appears to be continuing.

31. ADDITIONAL QUESTION: The IRS proposed rule on minimum funding requirements released April 9 says if a plan sponsor desires to use a credit balance to satisfy minimum funding requirement with respect to a quarterly contribution, it must make the election by the due date for that quarterly contribution. Although the rule is only in proposed to be effective in 2009, it is not clear whether in order to comply with the statute in 2008 is reasonable not to follow the proposed rule in 2008. In general, under IRC Section 412(n) and ERISA Section 302(f) a lien which is enforceable by the PBGC arises on the assets of an employer which does not make a timely quarterly contribution and the amount in arrears is at least \$1,000,000. In addition, such an employer is obligated to file a Form 200 to notify the PBGC of such a missed contribution. How does the PBGC intend to enforce the lien provision and related Title IV provisions in 2008 with respect to a plan sponsor who has a credit balance available, but does not make an election to use it by the time a quarterly contribution is due?

PROPOSED RESPONSE: ???

RESPONSE: It is role of the IRS, not the PBGC, to determine what steps are needed to utilize a credit balance to satisfy a quarterly contribution for 2008. Without guidance from the IRS, the PBGC is not in a position to determine whether a quarterly payment has been missed in such a situation. The PBGC staff understands that the IRS currently is not going after such sponsors for missed quarterly contributions. Moreover, the PBGC generally does not plan to attempt to perfect in 2008 any liens that may have come into existence as a result of such a situation. There is no provision for waiving the Form 200 notice requirement, however, and the PBGC suggests that employers contact the PBGC Department of Insurance & Compliance if such a situation arises.