

2008 Enrolled Actuaries Meeting

Questions to the PBGC and Summary of Their Responses

April 2008

Summary of Discussions between the Enrolled Actuaries Program Committee
and Staff of the Pension Benefit Guaranty Corporation
on February 14, 2008

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on February 14, 2007, with representatives of the Enrolled Actuaries Program Committee. Included also are summaries of the responses to those questions. The summary responses to the questions are intended to reflect as accurately as possible the statements made by the government representatives. However, those responses are merely the current views of the individuals and do not represent the positions of the Pension Benefit Guaranty Corporation or of any other governmental agency and cannot be relied upon by any person for any purpose. Moreover, PBGC has not in any way approved this booklet or reviewed it to determine whether the statements herein are accurate or complete.

The following representatives of the Enrolled Actuaries Program Committee took part in the discussions:

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The Program Committee would like to thank the practitioners who submitted questions for this booklet.

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QUESTION 1

Premiums: Reasonable Delay in Payment of Consensual Lump Sum

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.)

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

QUESTION 2

Premiums: Applicability of Yield Curve Election to VRP

The preamble to the proposed rule implementing the new PPA funding rules states that, where a plan sponsor elects to use the full yield curve the amount of the funding target calculated in accordance with such an election “applies for all purposes, including determining the adjusted funding target attainment percentage under section 436 and the applicable limitations under section 404” (72 Fed. Reg. 74215, 74220 (Dec. 28, 2007)). Would an election to use the full yield curve apply for purposes of determining the standard premium funding target for purposes of the PBGC’s variable-rate premium?

RESPONSE

No. The preamble language in Treasury’s proposed regulation does not override the statutory § 4006 language requiring that the interest rate used for variable-rate premium (VRP) purposes “shall be equal to the first, second, or third segment rate which would be determined under section 303(h)(2)(C) if section 303(h)(2)(D) were applied by using monthly yields . . . rather than the average of such yields for a 24-month period.”

Note that under the proposed premium regulation, an election could be made to use the alternative premium funding target, in which case the discount rate used to determine the premium funding target would be identical to the discount rate used to determine the funding target for minimum funding purposes. If such an election were in effect, a plan using the full yield curve for minimum funding purposes would also use it for VRP purposes.

QUESTION 3

Premiums: Termination Premium Collection Experience

The preamble to the PBGC's final rule implementing the termination premium stated that, in light of the "specific intent" of Congress "to avoid a limited recovery of the termination premium in bankruptcy and to ensure a full recovery post-bankruptcy," it would be "inappropriate for PBGC to adopt a policy of routinely settling termination premium claims for less than the full amount" (72 Fed. Reg. 71222, 71227 (December 17, 2007)). Please describe the PBGC's experience to date attempting to collect the termination premium through settlements or litigation, 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")).

RESPONSE

PBGC has published a final rule on the termination premium, referenced above. Contributing sponsors of plans subject to the termination premium (and their controlled group members) must pay the termination premium in accordance with the statute and regulation and may incur late payment charges (interest and penalties) if they fail to pay timely. The form and instructions for this purpose are available at <http://www.pbgc.gov/practitioners/premium-filings/content/page16329.html>

PBGC generally does not comment on or discuss enforcement efforts or settlements, which depend heavily on the specific facts of each case.

There is litigation on the termination premium in a case commenced in the U.S. Bankruptcy Court for the Southern District of New York involving Oneida Ltd. After Oneida emerged from bankruptcy, it brought an adversary action in the bankruptcy court that confirmed its plan of reorganization, asserting that the termination premium is actually a pre-petition "claim" under the Bankruptcy Code and thus was discharged. PBGC asserts that the termination premium is a post-bankruptcy obligation where a pension plan is terminated by a reorganizing debtor. In the fall of 2007, the parties filed competing motions for summary judgment, and the bankruptcy court held a hearing on November 13, 2007. On February 27, 2008, the court ruled against PBGC, holding that the termination premium is a pre-petition bankruptcy claim. PBGC expects to appeal the decision. See Question 18 for more information on this case.

In addition, PBGC has asserted claims for the termination premium in cases involving liquidating, as distinguished from reorganizing, plan sponsors. In *In re USA Commercial Mortgage*, a Chapter 11 case in Las Vegas, Nevada, the liquidating trustee has objected to PBGC's assertion that the claim for termination premiums is entitled to tax priority under the Bankruptcy Code. PBGC expects that the matter will be heard by the bankruptcy court in April.

QUESTION 4

Premiums: Exemptions from E-Filing Requirement

PBGC's regulations now mandate e-filing of premium information, subject to PBGC's authority to grant exemptions from the e-filing requirement "for good cause in appropriate circumstances" (29 CFR § 4007.3). Please describe the PBGC's experience to date with any such exemption requests.

RESPONSE

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.

QUESTION 5

Premiums: PBGC Audit and Enforcement Plans

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

RESPONSE

PBGC continues to enforce premium requirements as part of its Premium Compliance Evaluation Program, which covers both flat-rate and variable rate premiums. PBGC uses computer matching and electronic data analysis to identify plans for audit, including potential on-site evaluations. PBGC is in the process of modifying its screening procedures to reflect the changes made by PPA 2006. PBGC is also reviewing its Premium Compliance Evaluation Program, particularly with respect to changes to the variable rate premium starting with 2008 plan years.

QUESTION 6

Standard Terminations: Lump Sum Amendments

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 PPA 2006.

- (a) The Technical Update provides in footnote 4 that PBGC would not take into account a post-termination amendment that substitutes the PPA 2006 assumptions for the pre-PPA 2006 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 2006 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?

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 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.

QUESTION 7

Standard Terminations: Post-Distribution Certification

In the response to Question 6 of the 2007 Blue Book, PBGC stated that it interpreted 29 CFR § 4041.24(a), which requires the issuance of a Notice of Plan Benefits to each person (other than the PBGC and any employee organization) who is an affected party as of the proposed termination date, as not requiring issuance of such a notice to a participant whose benefits are paid out in accordance with 29 CFR § 4041.22 on or before the due date for issuing the Notice of Plan Benefits. Is such a participant to be included among the participants whose distributions of benefit liabilities are certified to and described (by category and amount) in the post-distribution certification (PBGC Form 501)?

RESPONSE

Such a participant must be included among those whose distributions of benefit liabilities are to be so certified and described, unless the participant's benefits are paid out prior to the plan's termination date.

QUESTION 8

Penalty Policy: Disclosure of Termination Information

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

RESPONSE

PBGC's current policy on the assessment of penalties under ERISA 4071 and part 4071, which authorizes PBGC to assess a penalty of up to \$1,100 a day if material information is not timely provided, covers the information required to be provided to participants under PPA 506. PBGC is reviewing its current penalty policy to see if it should be updated and simplified. However, until this policy is revised, PBGC will apply the current policy to penalties for violating PPA 506 and will generally follow the guidelines. As always, PBGC will look at the facts and circumstances of each case and may adjust the penalty amounts up or down, depending on such facts and circumstances.

QUESTION 9

Reportable Events: Technical Update 07-2

The following questions relate to PBGC Technical Update 07-2 (“Funding-Related Determinations for Reporting under Parts 4010 and 4043; Effect of the Pension Protection Act of 2006; Transitional Guidance”) (available at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16267.html>). In brief, Technical Update 07-2 generally provided that, for information years beginning before 2008 under the employer reporting regulation (29 CFR Part 4010) and for event years that begin in 2008 under the reportable events regulation (29 CFR Part 4043, subparts A, B, and C), certain premium-related determinations are made without regard to the PPA 2006 changes to the variable-rate premium (VRP) rules that went into effect starting with the 2008 plan year.

- (a) Technical Update 07-2 permits the use of certain pre-PPA 2006 rules for waivers under the reportable events regulation that are tied to premium-related determinations for the event year. The Technical Update explicitly mentions waivers, but does not explicitly mention extensions. May these same rules be used for purposes of the extensions that are tied to premium-related determinations for the plan year *preceding* the event year?
- (b) The methodology described in Technical Update 07-2 for making premium-related determinations for an event year beginning in 2008 under the reportable events regulation explicitly refers to two terms defined in the regulation: “vested benefits amount” and “unfunded vested benefits.” Premium-related determinations in the regulation that are based on the “vested benefits amount” are also based on a third defined term—the “fair market value of the plan’s assets.” Does the PBGC intend that the same rules (i.e., disregarding the PPA 2006 changes to the VRP rules that went into effect starting with the 2008 plan year) be used when determining “the fair market value of the plan’s assets” for an event year beginning in 2008 under Technical Update 07-2? (This could affect whether contributions made during the 2008 plan year for the 2007 plan year must be discounted.)
- (c) According to the PBGC’s response to Question 15 of the 2006 Blue Book, where the plan year that contains the testing date ends on or after January 1, 2006, the mortality tables to be used under the reportable events regulation when determining UVBs based on the 4010 Optional Assumptions are those used under 29 CFR Part 4044, Subpart B, for post-2005 valuation dates. The chart in part III.C. of Technical Update 07-2 provides for use of the § 412(l)(7)-1 tables without indicating that an exception applies when using the 4010 Optional Assumptions. Does the PBGC intend that the § 412(l)(7)-1 tables or the 29 CFR Part 4044, Subpart B, tables be used when determining UVBs based on the 4010 Optional Assumptions under Technical Update 07-2 for event years beginning in 2008?

RESPONSE

Technical Update 07-2 does not explicitly address these questions. Applying the principle in the technical update — of “using the rules for determining the VRP under the law in effect before PPA 2006” — to extensions and asset determinations would not be inconsistent with the technical update. The chart in part III.C. of the technical update should not be understood to prohibit the use of any valuation approach that would otherwise be legally permissible.

QUESTION 10

Other Reporting: Enforcement Policy for Section 4062(e) Events

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

RESPONSE

PBGC learns about section 4062(e) events from notices filed by plan administrators as well as third-party sources. PBGC evaluates each case based on the facts and circumstances and resolves the liability accordingly.

QUESTION 11

Other Reporting: Substantial Cessation of Operations

The following questions relate to ERISA section 4062(e):

- (a) In the response to Question 21 of the 2007 Blue Book, PBGC stated that, if a section 4062(e) event occurs, reporting is required under ERISA section 4063(a) regardless of the size of the plan. Is such reporting also required regardless of the funding level of the plan?
- (b) Suppose that before the cessation of operations at a facility, only a few active employees remain, but the plan continues to cover many retired employees. Would that impact the application of section 4062(e)?
- (c) Assume that an event described in ERISA section 4062(e) occurs for a plan that is undergoing a standard termination, and that the deadline for the plan administrator to provide PBGC with notice of the 4062(e) event under ERISA section 4063(a) is on or after the date the plan's assets have been distributed, pursuant to the standard termination, in satisfaction of all benefit liabilities through priority category 6 of ERISA section 4044. Is the plan administrator required to provide PBGC with such notice?

RESPONSE

- (a) Yes. There is no exemption from reporting a section 4062(e) event under section 4063(a) based on the plan's funding level.
- (b) Under the statute, neither the absolute number of active employees nor the number of active employees in proportion to the number of total participants is relevant; what matters is the percentage of active employees who are participants in the plan who are separated from employment as a result of a cessation of operations at a facility.
- (c) PBGC generally would not enforce the notice requirement in these circumstances.

QUESTION 12

Other Reporting: Substantial Cessation of Operations

Assume that a Section 4062(e) event occurs for a plan, with the facility closing, to be effective October 31, 2008, publicly announced by the contributing sponsor on July 1, 2008; the separations from employment of the plan's active participants commencing on September 1, 2008, and continuing through and including December 31, 2008; the operations not ceasing until December 31, 2008; and the 20% threshold under Section 4062(e) being crossed on December 15, 2008. When does the 60-day period for the notice of the Section 4062(e) event under ERISA Section 4063(a) start to run?

RESPONSE

PBGC evaluates each case based on the facts and circumstances. PBGC encourages employers to contact the PBGC's Department of Insurance Supervision and Compliance before any section 4062(e) event to discuss the situation and any potential liability.

QUESTION 13

Other: Maximum Guaranteed Benefit (Lump Sum Restrictions)

In Technical Update 07-4 (“Present Value of the Maximum PBGC Guaranteed Benefit under IRC Section 436(d)(3)(A)(ii) and ERISA Section 206(g)(3)(C)(i)(II)”) (available at <http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16287.html>), PBGC provided guidance on determining the present value of the maximum guaranteed benefit for purposes of the PPA limitations on lump sums and other “prohibited payments” for plans with an adjusted funding target attainment percentage of at least 60% but less than 80%. The Technical Update states that PBGC will issue a table, to be updated annually, that will show, for the calendar year, the applicable present value amount based on the age of the participant. When using this table:

- (a) Is age to be determined based on attained age or age nearest birthday?
- (b) How is age to be determined for a participant who is between ages on the annuity starting date?

RESPONSE

The Technical Update does not provide rules for determining age for purposes of looking up values on the table. Given the Technical Update’s silence, sponsors should adopt a reasonable methodology and use it consistently. Sponsors may determine age in a manner consistent with current plan practice for other calculations or adopt another methodology for this purpose.

For sponsors that want to use only integral ages for this purposes, it would be reasonable to use either attained age or age nearest. For sponsors that prefer to use age in years and months, it would be reasonable to interpolate the amounts shown on the table or to create an expanded table based on the methodology summarized in the Technical Update.

QUESTION 14

Other: Collection from Foreign Entities

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

RESPONSE

Controlled group liability for employer liability extends to foreign entities that are members of the sponsor's controlled group, as explained in PBGC Opinion Letter 97-1. That same reasoning has applied to liability for unpaid contributions and premiums. PBGC pursues enforcement against foreign controlled group members and has made recoveries in a number of cases involving foreign entities.

QUESTION 15

Other: Voluntary Correction Program

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

RESPONSE

PBGC does not have, and has no present plans to institute, a formal “voluntary correction program” for late information filings. PBGC considers the facts and circumstances of each case (including voluntary correction) when assessing and waiving penalties for failure to submit required information timely. The volume of penalty cases has not been high enough to suggest that this approach is either inefficient or ineffective in accommodating the legitimate interests and concerns of filers or that a formal “voluntary correction program” is needed. PBGC recognizes that the changes made by the Pension Protection Act of 2006 (like any changes in the law) may create issues regarding both the triggers for reporting and the data to be reported, and will monitor information filings and public inquiries about information filings with a view to providing clarifications and/or changing its procedures — perhaps to include the creation of a “voluntary correction program” — if appropriate.

QUESTION 16

Other: “Risk Mitigation” Program

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?

RESPONSE

PBGC has made numerous inquiries to plan sponsors under its Early Warning Program over the past year. The cases were generally similar to the examples described in PBGC Technical Update 00-03. The level of activity over the past year is consistent with that for the prior several years.

QUESTION 17

Other: “Risk Mitigation” Program

- (a) The criteria in PBGC Technical Update 00-3 (“PBGC’s Early Warning Program”, available at <http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu12795.html>) for when the PBGC will contact a company for further information about a transaction are tied to current liability, a concept that will no longer be relevant for most plans after 2007. Has the PBGC decided on a substitute measure to be used for this purpose for post-2007 plan years and, if so, what is it?
- (b) PBGC Technical Update 00-3 provides that the PBGC will contact a company for further information about a transaction only if: (1) the company has a below investment-grade bond rating and sponsors a pension plan that has current liability in excess of \$25 million, or (2) the company (regardless of its bond rating) sponsors a pension plan that has current liability in excess of \$25 million and that plan has unfunded current liability in excess of \$5 million. Does this mean that the PBGC will not contact a company for further information about a transaction if these tests are not met, even if the company is a filer under ERISA section 4010?

RESPONSE

PBGC has not fully evaluated the effect of PPA on the thresholds provided in Technical Update 00-3. At this time we are not in a position to say whether the decision to contact a company will be impacted by its having been a 4010 filer.

QUESTION 18

Other: Litigation Issues

Please describe PBGC litigation in the past year that has established precedent that would be of interest to enrolled actuaries.

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.), No. 06-10489 (ALG) (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.

Response to Question 18 continued

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.

Response to Question 18 continued

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.

QUESTION 19

Other: Private Equity Fund as "Trade or Business" for Controlled Group Purposes

Can unincorporated private equity funds be subject to ERISA joint and several controlled group liability for underfunding when a pension plan sponsored by a company in their portfolio is terminated?

RESPONSE

Yes. Applying PBGC's longstanding interpretation of the controlled group rules, 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. The PBGC Appeals Board has so held (available at [http://www.pbgc.gov/apbleaders/Decision--\(Liability within a group of companies\) 2007-09-26.pdf](http://www.pbgc.gov/apbleaders/Decision--(Liability%20within%20a%20group%20of%20companies)%202007-09-26.pdf)).

QUESTION 20

Other: OMB “Good Guidance” Initiative

Has PBGC implemented the good guidance practices adopted by OMB?

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>.

QUESTION 21

Other: Coverage – Paying Premiums to Obtain PBGC Coverage

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?

RESPONSE

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

QUESTION 22

Other: Availability of Draft Forms

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?

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.