

2010 Enrolled Actuaries Meeting

Questions to PBGC and Summary of Their Responses

April 2010

Summary of Discussions between the Enrolled Actuaries Program Committee
and Staff of the Pension Benefit Guaranty Corporation
on February 24, 2010

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on February 24, 2010, 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 following representatives of the Pension Benefit Guaranty Corporation 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

PPA: Premiums: Termination Premium Collection Experience

Please describe PBGC's collection experience regarding the \$1,250 per participant termination premium. In particular, please address the effect, if any, of the decision of the Second Circuit in *PBGC v. Oneida Ltd.*, 562 F.3d 154 (2d Cir. 2009) (holding that the termination premium is not a claim that can be discharged as part of a bankruptcy reorganization but, rather, must be paid in 100% dollars by the reorganized debtor).

RESPONSE

As to the Oneida case, on December 14, 2009, the U.S. Supreme Court denied Oneida's petition for certiorari, and the Second Circuit decision upholding PBGC's position on termination premiums in Chapter 11 reorganization proceedings remains good law. Accordingly, PBGC continues to pursue termination premiums in all cases in accordance with law. Because PBGC has collected termination premiums through agreements that typically resolve all of PBGC's claims against plan sponsors and controlled group members, the total amount of termination premiums paid is not readily ascertainable.

QUESTION 2

Premiums: Vesting for Premium Purposes of Contingent-Type Benefits

PBGC issued the following guidance regarding whether and when a contingent-type benefit is considered “vested” for variable-rate premium purposes in the preamble to its October 5, 1988, proposed rule implementing the variable-rate premium:

Finally, the PBGC has received inquiries as to whether to include contingent benefits, such as “30-and-out” and disability benefits, in determining a plan’s vested benefits. Unless a participant has met the requirements for and become entitled to receive a contingent-type benefit, the benefit is not a vested benefit for premium purposes. . . . Thus, 30-and-out benefits and disability benefits for which a participant is not immediately eligible as of the last day of the plan year preceding the premium payment year are not included in vested benefits as of that date.

PBGC incorporated this 1988 guidance into its Premium Payment Package for all premium payment years from 1998 through and including 2007, but not in its Comprehensive Premium Payment Instructions for post-2007 plan years.

The post-2007 instructions provide guidance on the meaning of “vested” that had been developed in connection with PBGC’s rulemaking implementing the PPA changes to the variable-rate premium. The instructions continue to provide that a disability benefit is not vested if the participant is not disabled. However, they do not include the broader statement from the pre-PPA premium instructions that, unless a participant has met the requirements for and become entitled to receive a contingent-type benefit (such as a “30-and-out” benefit), the benefit is not vested for premium purposes.

Is this broader statement from the pre-PPA premium instructions still valid for post-PPA plan years (*i.e.*, 2008 and beyond)?

RESPONSE

The current regulations on PBGC premiums provide only limited guidance about what constitutes “vesting” for premium purposes; contingent benefits in general are not addressed. Pending issuance of more comprehensive guidance on this matter, a reasonable interpretation of the statute and current regulation is acceptable.

QUESTION 3

Premiums: Determining value of vested benefits for variable-rate premium (VRP) purposes

- (a) If a plan provides an ancillary post-retirement death benefit (e.g., a flat \$5,000 death benefit) for all retirees regardless of the optional annuity form elected, is the value of that death benefit considered vested for VRP purposes with respect to participants who are already retired?
- (b) A calendar-year plan is amended in 2010 to provide a 10% ad hoc COLA, effective July 1, 2011, to retirees who began receiving payments before 2005. Is the COLA considered vested for 2011 VRP purposes, since participants who retired before 2005 must do nothing more than survive from Jan. 1, 2011 to July 1, 2011 to receive the COLA? Do IRC section 436 plan amendment restrictions affect the analysis (since the amendment cannot take effect if the AFTAP would be less than 80% after taking the COLA into account)? For example, if the employer must make a section 436 contribution by July 1, 2011 for the amendment to take effect, is the COLA treated as nonvested at January 1, 2011? Is the COLA vested if no IRC section 436 contribution or credit balance waiver will be required for the amendment to take effect?

RESPONSE

- (a) Yes. The premium regulation provides that a death benefit is not considered nonvested solely because the participant is still alive. The reason there is an exception for a pre-retirement ancillary death benefit provided in the premium regulations is because, in that case, the death benefit will not be paid in certain circumstances (for example, if the participant survives until retirement.) However, in the case of the post-retirement ancillary death benefit described above that is not the case. The benefit will be paid unless the plan is subsequently amended, and the regulation provides that a benefit is not considered nonvested solely because the plan could be amended to eliminate the benefit at a later date.
- (b) The rules for determining whether/when a mid-year amendment is reflected in the funding target falls under Treasury's jurisdiction. If the amendment is reflected in the funding target for purposes of determining the minimum required contribution, then it is reflected in the premium funding target to the extent vested.

QUESTION 4

Premiums: Valuing Social Security Supplements in Determining Premium Funding Target

Assume that a plan provides a temporary supplement of \$500 per month payable until age 62 for participants with at least 30 years of service. As of the UVB Valuation Date, Active Participant, Joe has 30 years of service. When determining the portion of the premium funding target attributable to Joe, is the temporary supplement considered vested and if so, how is it valued?

RESPONSE

Joe has satisfied the eligibility criteria with respect to the temporary supplement and therefore, the value of the supplement is included in the premium funding target. The methodology used for this calculation must be the same as the methodology used to determine the funding target for purposes of determining the minimum required contribution. For information on how to value temporary supplements, see Treas. Reg. § 1.430(d)-1(c)(1)(ii)(D).

QUESTION 5

Premiums: Experience with Waivers of Late Payment Penalties

Please describe PBGC's recent experience in connection with waivers of late premium payment penalties under ERISA section 4007.

RESPONSE

PBGC considers requests for waivers of late premium payment penalties in accordance with the appendix to PBGC's regulation on Payment of Premiums (29 CFR Part 4007). In most cases, PBGC has denied requests for waivers. For example, PBGC has denied requests for waivers in cases of failure to understand and apply the new rules on due dates based on plan size and on the determination of variable-rate premiums; forgetting to pay by the due date; or reliance on a negligent outside advisor. Most of the cases for which PBGC has granted requests for waivers have involved "reasonable cause," that is, where failure to pay results from circumstances beyond a premium payer's control and could not be avoided by the exercise of ordinary business care and prudence. Examples have been natural disasters and sudden death of a person responsible for acting, such as a plan administrator.

QUESTION 6

Premiums: Interest on Premium Overpayments

PPA section 406 allows PBGC to pay, “subject to regulations prescribed by [PBGC],” interest on overpayments made by premium payors, effective with respect to interest accruing for periods beginning not earlier than PPA’s August 17, 2006 enactment date. Does PBGC believe it needs to adopt regulations to be able to pay such interest? What are PBGC’s plans to pay such interest, and for what periods, either with or without implementing regulations?

RESPONSE

PBGC plans to issue regulations implementing its authority to pay interest on premium overpayments to a designated payor and to coordinate the development of those regulations with the development of information systems supporting such payments. Work in this area is ongoing. PBGC does not currently intend to pay interest on overpayments in the absence of implementing regulations. No determination has yet been made regarding whether such regulations would apply retroactively. On PBGC’s Fall 2009 Regulatory Agenda, this regulatory item is listed as being in the “Long-Term Actions” stage of rulemaking¹. For PBGC’s complete Fall 2009 Regulatory Agenda and related information, See <http://www.reginfo.gov/public/do/eAgendaMain>.

¹ An item generally appears in the Long-Term Actions stage of rulemaking if the next action is undetermined or will occur more than 12 months after publication of the Agenda.”

QUESTION 7

Premiums: Statute of Limitations on Premium Refund/Credit Requests

PBGC's Comprehensive Premium Payment Instructions for the 2010 premium payment year state (at p. 47) that "[a] request for a refund must be made within the period specified in the applicable statute of limitations (generally six years after the overpayment was made)."

- (a) If a premium refund (or credit) request is made within that period and is pending at the time the applicable statute of limitations period for filing a lawsuit ends, will PBGC rely on the statute of limitations as a basis for denying the request?
- (b) Would PBGC rely on the statute of limitations as an affirmative defense if it were to deny such a refund or credit request (*i.e.*, one that was pending with PBGC when the statute of limitations ran out) on the merits and the matter ended up in litigation?

RESPONSE

- (a) No.
- (b) In such a situation, PBGC would not expect to rely on the statute of limitations as an affirmative defense, but cannot rule out the possibility that a case could arise in which the equities would weigh in favor of PBGC relying on such a defense.

QUESTION 8

Premiums: Alternative Premium Funding Target Election

Consider a plan for which:

- The 2009 comprehensive premium filing has already been filed.
 - At the time the filing was made, the sponsor had not yet decided what discount rate to use for funding purposes, and therefore determined and paid the 2009 variable rate premium (VRP) based on the standard premium funding target; the same method used for the 2008 VRP.
 - After the filing was made, the sponsor elected to use the October 2008 full yield curve to determine the minimum required contribution for 2009 (as is permitted under the final Treasury 430 regulation).
 - Had the October 2008 full yield curve been used to determine the premium funding target, the 2009 VRP would have been much lower.
- (a) Can the 2009 filing be amended to reflect an election to use the alternative premium funding target (i.e., recalculate the VRP based on the October 2008 full yield curve) and by doing so generate a refund or credit?
- (b) If the answer to (a) is no, what happens if the 2009 filing was amended (as described in (a))?

RESPONSE

- (a) The answer depends on whether the VRP due date for 2009 has passed. The deadline for making an election to use the alternative premium funding target for a particular plan year is the VRP due date for that year. That is also the due date for the comprehensive filing. Because these due dates are the same, by the time a filing is made, it is often too late to amend it to reflect an election. However, if the comprehensive filing was submitted early and the due date has not yet passed, then it is not too late to amend the filing and make the election to use the alternative premium funding target.
- (b) If a filing is amended to reflect an election to use the alternative premium funding target after the VRP due date, the election is invalid (i.e., it does not take effect). The filing must be amended again so that the most recent version of the 2009 filing (in PBGC's system and in the plan administrator's records) is correct.

If the plan administrator of a plan described in (b) wants to use the alternative premium funding target for the following plan year, he/she must make the election in conjunction with the next year's filing. In other words, a late election for 2009 does not serve as an election for 2010.

Note — PBGC received several post-due date amended filings (i.e., filings with an invalid election) and is in the process of contacting filers to alert them to the problem. If your client is in this situation, there is no need to wait for PBGC to contact them before rectifying the situation.

QUESTION 9

Premiums: PBGC Comprehensive Premium Filing Box 5 -- Alternative Premium Funding Target Election

- (a) Assume a plan administrator erroneously checks box 5 (the election to use the alternative premium funding target) on the 2009 premium filing, but in box 7d1 correctly indicates that the standard method was used (the standard method was also used in 2008). May the administrator correct this error after the variable-rate premium (VRP) due date by changing box 5 in an amended filing? Or does box 5 govern, requiring the sponsor to make a corrected filing using the alternative method to determine the variable-rate premium?
- (b) Assume a plan administrator elected to use the alternative method to determine the 2008 variable-rate premium, checking box 5 and correctly completing line 7. In the 2009 filing, the administrator failed to follow the instructions and checked box 5 again. May this error be corrected on an amended filing? If the error is not corrected, is the 5-year lock-in period extended by a year?

RESPONSE

- (a) The election (i.e., box 5) governs. The filing must be amended and the VRP recalculated using the same discount rate used to determine the minimum required contribution for the 2009 plan year.
If additional premiums are due, late payment charges (interest and penalties) will be assessed. In such cases, PBGC will consider a request to waive penalties, but does not have the authority to waive interest. The decision as to whether penalties are waived is based on the relevant facts and circumstances.
- (b) It is not necessary to amend the 2009 filing. The clock does not get re-started. Making an election when one is already in effect has no effect.

QUESTION 10

Premiums: Alternative Premium Funding Target Election/ Impact on Subsequent Year

Consider a calendar year plan for which the October 2008 full yield curve was used to determine the funding target for purposes of determining the 2009 minimum required contribution and an election to use the alternative premium funding target was in effect for 2009. Therefore, the October 2008 full yield curve was used to determine the 2009 variable rate premium (VRP).

Final Treasury regulations permit sponsors to change the discount rate basis for 2010 for funding purposes. Final PBGC regulations mandate that an election to use the alternative premium funding target must remain in effect for at least five years.

If the 2010 funding discount rate(s) are the smoothed segment rates for January 2010, what discount rates should be used to determine 2010 VRPs?

- (a) The October 2009 full yield curve, or
- (b) The January 2010 smoothed segment rates?

RESPONSE

The correct answer is (b). The election to use the alternative premium funding target for VRPs is not tied to a particular discount rate or discount rate methodology. The election simply means that the discount rates used to determine the minimum required contribution (MRC) are also used to determine the VRP.

If the election was in effect for 2009, it remains in effect for 2010. That means the 2010 VRP will be determined using the same discount rate(s) that will be used to determine 2010 MRC, even if those rates are different than what was used for the 2009 MRC.

QUESTION 11

Standard Terminations: Cessation of Accruals Information for Non-Frozen Plan with No Active Participants

The notice of intent to terminate (“NOIT”) that must be issued in a standard termination is required to include one of the following three statements regarding the cessation of accruals:

- (1) that “[b]enefit accruals will cease as of the termination date, but will continue if the plan does not terminate”;
- (2) that “[a] plan amendment has been adopted under which benefit accruals will cease, in accordance with ERISA section 204(h) , as of the proposed termination date or a specified date before the proposed termination date, whether or not the plan is terminated”; or
- (3) that “[b]enefit accruals ceased, in accordance with ERISA section 204(h), as of a specified date before the notice of intent to terminate was issued.”

See 29 CFR § 4041.23(b)(4). The same requirement applies to the NOIT in the case of a distress termination; see 29 CFR § 4041.43(b)(5).

In the case of a non-frozen plan where the sponsor is winding up its affairs after operations have ceased and all employees have terminated employment, the only one of the above three statements that might apply is the first one, and it could be misleading. In such circumstances, may the plan administrator instead or also state in the NOIT that benefit accruals ceased when all employees were terminated in connection with the winding up of the affairs of the company?

RESPONSE

The plan administrator must include in the NOIT one of the three statements described above, whichever is applicable. However, in the case of a non-frozen plan where the sponsor is winding up its affairs after operations have ceased and all employees have terminated employment, the plan administrator may also include a statement in the NOIT that benefit accruals ceased when all employees were terminated in connection with the winding up of the affairs of the company.

QUESTION 12

Standard Terminations: Audits

Please describe PBGC's recent experience with audits of standard terminations, including the level of compliance, common errors found, and any issues with the PPA changes in the interest rate and mortality table used in calculating minimum lump sum amounts.

RESPONSE

PBGC audited approximately 270 plan termination filings in fiscal year 2009, of which 75% were plans with 300 or fewer participants. PBGC is continuing to audit the termination of all plans with more than 300 participants. Of the audited plans, PBGC required corrective action in approximately 16% of the cases. The most common errors involved incorrect accrued benefit calculations, inaccurate lump sum calculations, missing participants' benefits not transferred to PBGC, attempted election of alternative treatment ("waiver") of benefits by individuals who were not majority owners, and missing election and spousal consent forms.

Accrued benefit calculation errors generally resulted from plans –

- not fully vesting terminated participants who had not incurred a five-year break in service and had not received a distribution of the entire benefit as of the date of plan termination;
- in the case of a restated plan, not protecting benefits accrued under prior plan provisions until the later of the effective date or the adoption date of the restated plan;
- not paying the top heavy benefit if greater than the accrued benefit; or
- incorrectly taking into account service or compensation in the calculation of the benefit.

In general, mistakes in lump sum valuations resulted from the use of the wrong interest rate or mortality assumptions. In a few plans the definition of "Applicable Interest Rate" did not comply with the Code, resulting in an invalid look back month. It is helpful if plans clearly define the "Stability Period" and "Look back Month" in their plan documents. In addition, in FY 2009, PBGC pursued enforcement action in two plans that terminated in the 2007 plan year and used the PPA Applicable Interest rate and mortality in the valuation of lump sums.

PBGC continues to see plans that roll over missing participants' benefits to Individual Retirement Accounts instead of either purchasing irrevocable commitments (and submitting the information to PBGC) or transferring the designated benefit to PBGC. Occasionally, PBGC finds that designated benefits have not been calculated in accordance with PBGC's Missing Participants regulation, or that interest is not paid to the extent designated benefits are sent to PBGC more than 90 days after the distribution deadline.

QUESTION 13

Standard Terminations: Effect of PPA Interest Rate Floor

PPA section 409 (“Treatment of Certain Plans Where Cessation or Change in Membership of a Controlled Group”) added a new ERISA section 4041(b)(5), which provides a special rule that, in specified circumstances, sets an interest rate floor to be used in determining whether a plan is “sufficient for benefit liabilities” in a standard termination under ERISA section 4041(b). However, to complete a standard termination, the plan must be “sufficient for benefit liabilities” based on the cost of irrevocable commitments and of other permitted forms of distribution (principally lump sums).

- (a) Does the new PPA section 409 interest rate floor have any effect on a standard termination, including the manner or cost of distributing benefits in satisfaction of all benefit liabilities?

- (b) If the answer to (a) is no, what is the effect of the new section 409 interest rate floor that is to be used in determining whether a plan is “sufficient for benefit liabilities” in a standard termination?

RESPONSE

The intent and application of PPA section 409 are unclear. Currently, PBGC has no plan to issue guidance under section 409. If you have a specific client situation where you believe these rules may apply, please contact PBGC.

QUESTION 14

Distress or Involuntary Terminations: USERRA Benefits in Terminated Plans.

Will sponsors of pension plans terminated in distress or involuntary termination (or their successors) be expected to provide records to PBGC to corroborate USERRA claims of current or former employees under the final regulations published November 17, 2009?

RESPONSE

With respect to USERRA claims of current or former employees under final regulations published November 17, 2009, sponsors of pension plans terminated in distress or involuntary termination (or their successors) would be expected to provide to PBGC only those records that would be provided in the normal course of the trusteeship process, such as "leave codes" indicating when a participant was on leave from employment and what type of leave.

QUESTION 15

Distress or Involuntary Termination: Experience with Distress Terminations Outside of Bankruptcy

Please describe PBGC's experience over the past year in connection with applications for distress termination outside of bankruptcy under Distress Test 3 ("Continuation in Business") or Distress Test 4 ("Unreasonably Burdensome Pension Costs").

RESPONSE

The number of applications by controlled groups for distress terminations under Distress Test 3 increased sharply in FY09; in fact the filings have about doubled from the prior year. Since it takes some time to process such an application, PBGC staff cannot indicate the disposition of the filings. As in the past, there have been virtually no distress terminations under Distress Test 4.

QUESTION 16

Distress or Involuntary Terminations: "Follow-On" Plan Policy

In connection with PBGC's policy against "follow-on" plans:

- (a) If the employer adopts a defined contribution plan, can that be a "follow-on" plan?
- (b) If an employer waits five years before adopting a new plan, is that sufficient to preclude the new plan from constituting a "follow-on" plan?

RESPONSE

- (a) PBGC has taken the position that a replacement or "follow-on" plan is abusive if, in combination with PBGC guarantees, it provides participants substantially the same benefits they would have received had no termination occurred. A defined contribution plan could run afoul of the "substantially the same benefits" test in a number of ways, even if not explicitly designed to make up for past losses.
- (b) There is no bright line test, but the longer the period between the plan termination and the establishment of the new plan, the lower the concern; the shorter the time period, the greater the concern.

QUESTION 17

Reportable Events: Active Participant Reductions Where No Significant Overall Reductions

Many PBGC-covered plans are frozen for participation and therefore can experience only decreases, but not offsetting increases, in their active participant counts. Assume that such a plan crosses over either or both of the thresholds for an active participant reduction reportable event (under 80% of the count at the beginning of the current plan year or 75% of the count at the beginning of the prior plan year) under 29 CFR § 4043.23, but that the overall employment levels within the controlled group have not experienced a comparable decline and may have remained level or even increased. In the circumstances just described, would PBGC be willing to grant case-by-case reporting relief for such plans (e.g., by waiving reporting going forward unless overall employment levels decline to specified levels)?

RESPONSE

When considering whether to grant a request for a waiver under its reportable events regulation, PBGC considers facts and circumstances on a case-by-case basis. The fact that a plan is frozen does not necessarily indicate that a large reduction in active participants is not cause for concern.

QUESTION 18

Reportable Events: Interim Guidance Pending Rulemaking

On November 23, 2009, PBGC issued a proposed rule that would make significant changes to its reportable events regulations. Pending finalization of that proposed rule, what is the status for the 2010 plan year of PBGC's guidance in Technical Updates 09-1 (on post-PPA determinations of funding based waivers and extensions, and the advance reporting threshold test, for reportable event purposes for event years beginning in 2009) and 09-3 (on missed quarterly contributions for small plans for the 2009 plan year)?

RESPONSE

In Technical Update 09-4, PBGC extended the guidance in these two Technical Updates to the 2010 plan year pending finalization of the proposed rule. Technical Update 09-4 is available at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/tu16998.html>.

QUESTION 19

Reportable Events: Reportable event created by mandatory credit balance reduction

When a required contribution is not timely made, reporting to PBGC is required under ERISA 4043. PBGC Form 10 is generally used for this report. In addition, if the aggregate amount of missed contributions exceeds \$1 million, reporting to PBGC is required under ERISA 303(k) and IRC 430(k). PBGC Form 200 is used for this report.

Under final Treasury regulations, a mandatory reduction of a carryover or prefunding balance (i.e., a deemed election") can retroactively create a late quarterly contribution by rendering invalid a prior election to apply a credit balance against the quarterly required contribution and retroactively create a "missed" quarterly contribution. Can such an event cause a Form 10 or Form 200 to be considered not timely filed?

RESPONSE

The answer differs depending on which reporting requirement applies. PBGC's regulation on Reportable Events and Certain Other Notification Requirements (29 CFR Part 4007) provides guidance on these issues. Specifically:

- ERISA section 4043 — the deadline for reporting a missed contribution under section 4043(a) of ERISA is 30 days after the plan administrator or contributing sponsor knows or has reason to know that the contribution has been missed. If the plan administrator or contributing sponsor had no way of knowing that the forfeiture would occur, the 30-day clock starts ticking on the day the carryover or prefunding balance was forfeited. Thus, while a quarterly contribution might be "retroactively missed," the report of the missed contribution would not necessarily be "retroactively untimely."
Note also that if the missed quarterly contribution is made before the 30-day clock runs out, reporting under 4043 is waived (see 29 CFR § 4043.20).
- ERISA section 303(k) & IRC section 430(k) — With respect to notice of large aggregate missed contributions, the due date for notice to PBGC is 10 days after the contribution is missed. There is no waiver if the missed contribution is made up during that 10-day period. If a forfeiture of a carryover or prefunding balance creates a retroactively missed quarterly contribution that alone (or in combination with other missed contributions) exceeds \$1 million, the notice to PBGC will be considered late unless it is made within 10 days of the due date for the contribution. In such a case, PBGC would consider a request to waive penalties for late reporting.

QUESTION 20

Reportable Events: Late election to cover a quarterly with credit balance

When a required contribution is not timely made, reporting to PBGC is required under ERISA 4043. PBGC Form 10 is generally used for this report. In addition, if the aggregate amount of missed contributions exceeds \$1 million, reporting to PBGC is required under ERISA 303(k) and IRC 430(k). PBGC Form 200 is used for this report.

Before PPA, quarterly contributions were not considered late if a credit balance existed that covered them. Final Treasury regulations implementing PPA treat an election to apply credit balance to cover a quarterly required contribution as not timely made if the election is not made by the due date of the contribution.

There appears to be no increased risk to PBGC if an election to apply credit balance against a quarterly required contribution is made, but not made by the due date for the quarterly. Q&A 27 in the 2009 Blue Book discusses the implications of this guidance for liens and Form 200 filing requirements (applicable if the total of missed contributions, including interest, is at least \$1,000,000). In that Q&A, PBGC notes that it is not its role to determine whether a quarterly installment was "missed."

For purposes of reportable events and Form 200, does PBGC intend to treat a quarterly installment as missed if an election to use credit balance was not made by the quarterly installment due date?

RESPONSE

It is not PBGC's role to determine whether a quarterly installment was "missed." That falls within Treasury's jurisdiction. At the time the 2009 Blue Book was issued, Treasury had not yet issued a final regulation on this issue and therefore it was not entirely clear when a quarterly installment was considered missed (or late). Since that time, Treasury has issued a final regulation in which they made clear when a quarterly installment is considered late. Now that there is definitive guidance, those rules apply with respect to reportable events (Form 10) and Form 200 filing requirements.

QUESTION 21

Other Reporting: 4010 Filing threshold for plans with delayed PPA funding

PBGC's section 4010 regulation provides that the provisions of sections 104, 105, 106 and 402(b) of PPA are generally disregarded for section 4010 reporting. For plans to which such sections apply, how should the funding target attainment percentage (FTAP) be determined for purposes of the section 4010 80% FTAP gateway test? Specifically, should the value of plan assets used to determine the FTAP be reduced by any credit balance as of the valuation date?

RESPONSE

PBGC's section 4010 regulation does not address the issue of how the funding target attainment percentage (FTAP) is determined for plans subject to sections 104, 105, 106 and 402(b) of PPA. In particular, the regulation is silent as to whether the credit balance is treated as if it were a carryover balance and thus subtracted from assets when determining the FTAP. Final Treasury regulations under IRC section 430 provide that the FTAP for these plans be determined using unreduced assets.

Pending issuance of PBGC guidance on this issue, the definition of FTAP provided in final Treasury regulations under IRC section 430 may be used for purposes of the section 4010 80% FTAP gateway test.

QUESTION 22

Other Reporting: 4010 – Acquisitions/Divestitures on last day of information year

Under PBGC's section 4010 regulation, only plans that are maintained by the filer (or any member of the filer's controlled group) on the last day of the information year are considered for purposes of the gateway tests. Plans that have been transferred outside of the filer's controlled group during the information year are not considered.

Suppose a corporate transaction occurs on the last day of the information year resulting in a change of sponsor and that the new sponsor (i.e., the buyer) is not in the prior sponsor's (i.e., the seller) controlled group.

- (a) Do both the seller and buyer count the plan for purposes of the gateway tests?
- (b) If both the buyer and the seller file 4010 information, do both filers include actuarial information (i.e., Schedule P) for the plan in question?

RESPONSE

- (a) In the situation noted above, both the seller and the buyer must count the plan for purposes of the gateway tests. However, if both the buyer and the seller are required to file 4010 information and the only reason the seller is required to file 4010 information is because the transferred plan is counted, it is likely that PBGC would grant a request from the seller to waive the filing requirement entirely.
- (b) In the situation noted above, both the seller and the buyer are required to report actuarial information (i.e., Schedule P) for the plan in question. However, it is likely that PBGC would grant a request to waive reporting of actuarial information with respect to the transferred plan for one of the filers.

QUESTION 23

Other Reporting: Enforcement Policy for 4062(e) Events

ERISA section 4062(e) applies when an employer ceases operations at a facility and, as a result, more than 20 percent of employees covered by its defined benefit pension plan separate from employment. Please describe PBGC's experience and enforcement plans in connection with finding out about such events (including its policy on penalties for reporting failures) and pursuing the related liability. In particular, please provide information on the number of such events over the past year and how PBGC has dealt with them, including a brief description of the kinds of settlements PBGC has entered into.

RESPONSE

PBGC learns of potential ERISA section 4062(e) events from its monitoring efforts and through notices filed under ERISA sections 4043 and 4063(a). Since the publication in 2006 of PBGC's regulation on calculation of liability pursuant to section 4062(e), PBGC has seen a noticeable increase in self-reporting under section 4063(a). PBGC's existing penalty policy applies to failures to file under ERISA section 4063(a). PBGC assesses penalties for such failures or takes other appropriate actions.

During FY 2009, PBGC's Insurance Programs Office (IPO) settled eleven cases. The settlements provided protection valued at about \$240M, in total, for pension plans covering about 30,000 participants. As of September 30, 2009, IPO was working on 97 cases. PBGC works with companies to structure flexible settlements that fit within the parameters of their business plans.

QUESTION 24

Other Reporting: Experience with Waivers and Extensions

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.

RESPONSE

In recent years, PBGC has gotten very few requests for 4010 waivers, so its experience is quite limited. In one recent situation, a waiver was requested and granted because the only plan with an FTAP less than 80% was being transferred outside of the controlled group on the last day of the plan year and the credit balance was large enough that, if waived, would result in an FTAP above 80%.

PBGC received some requests for waivers in situations where the "4010 funding shortfall" was more than \$15 million, but the only plan with an FTAP below 80% was a small plan. Such requests were not granted.

PBGC usually receives a handful of requests for extension of the filing deadline for 4010 information because certain financial information is not available. Some of the reasons given have been that the controlled group included foreign subsidiaries; there were companies with different fiscal years in the controlled group, etc. In such cases, if an extension was granted, the extension did not apply to the entire report, but rather to a very limited number of required data items. In many such cases, PBGC required the filer report certain substitute information that was available (e.g., monthly management reports, liquidity reports, etc.) as a condition of the limited extension.

QUESTION 25

Other Reporting: Section 4062(e) Events

Pension plan sponsors that “cease operations at a facility in any location,” resulting in termination of more than 20% of the employees who are plan participants may face liabilities under ERISA section 4062(e).

- (a) Does “cease” mean a 100% total stoppage?
- (b) If a shutdown occurs in multiple stages over an extended period, does liability arise at the end of the process?
- (c) What if some “operations at a facility” are terminated, but others continue?
- (d) Does it matter whether the operations are related (for example, different parts of the same product line)?
- (e) Does it matter whether the buildings are located close together?
- (f) How do the rules apply to M&A transactions (such as asset or stock sales)?

RESPONSE

PBGC is developing a proposed regulation that would provide guidance on the applicability and enforcement of ERISA section 4062(e). The proposed regulation may address some or all of the issues raised in this question. PBGC expects to publish this proposed regulation in 2010.

QUESTION 26

Other Reporting: 4062(e) – Treatment of Contributions Receivable

In determining the unfunded benefit liability (UBL) of a plan that has experienced a 4062(e) event, does PBGC include contributions that will be made after the event date in plan assets? For example, if, for a calendar year plan, a 4062(e) event occurs in July, 2009 and the minimum required contribution for 2008 is made in September, 2009, what value of assets is used to determine the UBL?

RESPONSE:

Historically, PBGC has not included contributions receivable when determining the UBLs of a plan that has experienced a 4062(e) event. In the example above, PBGC would use the fair market value of assets on the event date without any adjustment for contributions made after that date.

PBGC is developing a proposed regulation that would provide guidance on the applicability and enforcement of ERISA section 4062(e). The proposed regulation may address the issue raised in this question. PBGC expects to publish this proposed regulation in 2010.

QUESTION 27

Other: Experience with Private Equity Funds as Controlled Group Members

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. Please describe PBGC’s experience since the issuance of this Appeals Board decision in dealing with situations where a private equity fund does or might have such liability.

RESPONSE

Subsequent to the Appeals Board decision, PBGC has continued to refer to applicable law to determine whether a private equity fund is part of a controlled group. Several matters including the case that was before the Appeals Board have been resolved to PBGC’s satisfaction, and there has been no other litigation to date.

QUESTION 28

Other: Overlapping Liabilities under ERISA Sections 4063 and 4064

Assume that a substantial employer withdraws from a multiple-employer plan and satisfies its liability under ERISA section 4063 through an escrow payment to PBGC. Assume further that the plan terminates in a distress or involuntary termination within the five year period beginning on the date of the withdrawal and, as a result, PBGC treats the escrowed payments as if they were plan assets. How would PBGC determine the liability of the withdrawn employer for the underfunding upon plan termination under section 4063? In particular, what credit would the withdrawn employer get for the payment it made under section 4063?

RESPONSE

ERISA section 4063(c)(3)(B) provides that upon plan termination, PBGC shall "treat any escrowed payments under this section as if they were plan assets and apply them in a manner consistent with this subtitle" [governing "Liability"]. PBGC will determine the best method to do that in the event such a situation arises.

QUESTION 29

Other: Relevance of 2001 Penalty Policy Proposal

On January 12, 2001, PBGC issued a proposed rule (66 FR 2856) that, among other things, provided guidance on:

- (a) the meaning of "reasonable cause" for penalty waivers (both for premium underpayment penalties under ERISA section 4007 and for late information penalties under ERISA section 4071), and
- (b) the guidelines for assessing penalties under ERISA section 4071.

In Q&A 18 of the 2001 Blue Book, PBGC stated that the proposed rule was "largely reflective of the PBGC's current practices" and that "it is likely that current case-by-case penalty determinations will be generally consistent with the proposal." Since then, however, PBGC has finalized its penalty policy guidance for premium underpayment penalties (71 F.R. 66867, Nov. 17, 2006), but not for late information penalties. Is it still true that the 2001 proposed guidance on late information penalties is largely reflective of PBGC's current practices and that current case-by-case late information penalty determinations will be generally consistent with the 2001 proposal?

RESPONSE

As a general matter, the 2001 proposed rule is largely reflective of PBGC's current practices. PBGC considers the facts and circumstances of each case to ensure that the penalty fits the violation.

QUESTION 30

Other: Experience with Assessments and Waivers of ERISA Section 4071 Penalties

Please describe PBGC's recent experience in connection with assessment and waiver of late information penalties under ERISA section 4071.

RESPONSE

In 2009, PBGC assessed penalties for failing to make reportable event or section 4010 filings, notified some late filers that it would not assess penalties based on mitigating circumstances particular to each filer's matter, and waived penalties where a sponsor's request for reconsideration of a penalty assessment included information that warranted such a waiver. In general, all penalty assessments in 2009 in which reconsideration was not sought were paid.

In the last 12 months, PBGC has not assessed any penalties under section 4071 for other failures (e.g., failure to report premium information, failure to make required disclosures/filings with respect to standard terminations, etc.)

QUESTION 31

Other: PBGC's Role and Experience with Minimum Funding Waivers

Please describe PBGC's role and recent experience in connection with minimum funding waiver requests involving amounts in excess of \$1 million, including the criteria PBGC considers in evaluating such requests and options for addressing the requirement to provide security to ensure repayment of the waived amount.

RESPONSE

Although applications for minimum funding waivers are submitted to IRS, PBGC's reportable events regulations provide that plan sponsors must notify PBGC of all funding waiver requests. ERISA requires that IRS consult with PBGC on funding waiver requests for \$1 million or more. PBGC and IRS have developed procedures whereby PBGC submits a written response to IRS which recommends approval or denial of the waiver request. If PBGC's recommendation is to approve the waiver request, PBGC requests security (i.e., collateral) and other conditions as appropriate.

When evaluating minimum funding waiver requests for \$1 million or more, PBGC reviews a plan sponsor's controlled group financial projections and the projected required minimum funding contributions for reasonableness in determining whether the hardship the company is experiencing is temporary and whether a company can afford to make the pension contributions in the future.

In many cases, the funding waiver request does not include all of the data required under IRS Revenue Procedure 2004-15, Internal Revenue Bulletin 2004-7. Specifically, required data that is often omitted or incomplete include:

- 5-year financial projections for all members of the plan sponsor's controlled group including detailed underlying assumptions and explanations regarding how projections may differ from historical financial results
- 5-year required minimum funding projections for the pension plan both assuming a waiver is approved and assuming a waiver is denied
- Options for collateral the plan sponsor can provide to secure the amount of the waiver

PBGC evaluates the collateral offered to secure a waiver by analyzing the value of the collateral, both on a fair market basis and on a liquidation basis. PBGC also considers any existing security interests that have been perfected against such collateral and may agree to secure the collateral in a subordinate position. In the past, PBGC has accepted liens on personal and real property of the plan sponsor, of members of its controlled group, and of entities outside of the plan sponsor's controlled group; in some instances, PBGC has accepted security in the form of letters of credit, escrow accounts, and other such forms of security.

QUESTION 32

Other: "Risk Mitigation" Program

Please provide an update on the number and kinds of cases 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 (e.g., the number and types of settlements reached). How does the level of activity under this program compare to prior years? What kinds of protection does PBGC generally look for in settlements under this program?

RESPONSE

During FY 2009, PBGC's Department of Insurance Supervision and Compliance (DISC) identified more than 540 transactions that potentially posed an increased risk of long run loss to the pension insurance program. DISC determined that 75 transactions warranted further investigation. In two cases, PBGC obtained protection for the pension plans for a total of \$819 million. The level of activity for 2009 was more than the prior year.

PBGC encourages plan sponsors and their advisors to discuss potential transactions with PBGC well in advance in order to allow PBGC time to complete its investigation and avoid delaying the closing. PBGC has substantial flexibility to structure settlements that mitigate risk to the pension plans while still working within the parameters of companies' business plans.

QUESTION 33

Other: PBGC Administrative Decisions of Interest

Please describe any decisions of PBGC's Appeals Board that would be of interest to enrolled actuaries.

RESPONSE

Most PBGC Appeals Board decisions are available on PBGC's Website at <http://www.pbgc.gov/practitioners/law-regulations-informal-guidance/content/page15626.html>. There is a search feature that can be used to find decisions that address topics and issues you may be interested in. One decision of note is the Consolidated Appeal regarding the Retirement Income Plan for Pilots of U.S. Airways, issued on February 29, 2008. The decision addresses several issues, including the treatment of 415(b) increases in priority category-3. The pilots have challenged the decision in the U.S. District Court for the District of Columbia.

QUESTION 34

Other: Litigation Issues

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

RESPONSE

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

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

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

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

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

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

PBGC v. Boury, Inc., 2009 WL 3334924 (N.D. W. Va. Oct. 14, 2009) – PBGC sued the sponsor of a terminated pension plan and its controlled group members to enforce the agency's lien under section 4068(a) of ERISA. The court dismissed the case after entering a consent judgment in PBGC's favor, under which the plan sponsor and its controlled group members were ordered to sell real property within a time certain and pay PBGC a portion of the sale proceeds. The sale did not occur within the time certain and PBGC was not paid; instead, a local land commissioner sold the property to a third party in a "tax sale" under West Virginia law. After granting PBGC's motion to reopen the case, the court held that PBGC's lien survived the "tax sale" because section 4068(b) of ERISA, which states that a lien continues until the liability is satisfied or becomes unenforceable by reason of lapse of time, preempts state law. The court also held that the provisions of the Internal Revenue Code governing the discharge of certain federal tax liens do not apply to federal liens arising under ERISA.

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

In re Wolverine Proctor & Schwartz, 2009 WL 1271953 (Bankr. D. Mass. May 5, 2009), *appeal docketed*, No. 1:09-cv-11038 (D. Mass. Jun. 15, 2009) – PBGC settled its claims for termination liability with the liquidating trustee of the former plan sponsor. A creditor objected to the settlement on grounds that the so-called "prudent investor" rate should have been used to calculate PBGC's claim for the plan's unfunded benefit liabilities, and that PBGC was precluded from recovering more than what it set forth in its original proof of claim. Following *Raleigh v. Illinois Dep't of Rev.*, the court held that the substantive non-bankruptcy law controlled the amount of liability. Here, the substantive law is ERISA's definition of unfunded benefit liabilities, which includes PBGC's regulatory assumptions. And citing PBGC's amended claim, and that PBGC had reserved its right to "amend, modify and supplement [its original] proof of claim and/or to file additional proofs of claim," the court held that the amount of PBGC's original proof of claim was immaterial. Accordingly, the court overruled the creditor's objection.

QUESTION 35

Other: Recent DB Plan Trends

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

RESPONSE

Information about frozen plans is now reported as part of the annual comprehensive premium filing, so we have more detailed information to share than we did in prior years. But, because it's the first year this data has been collected, it's too soon to comment on trends. A summary of the data reported for plan years beginning in 2008 follows:

Frozen plans

As of the beginning of the 2008 plan year, 10.5% of participants in DB plans were in plans for which accruals had ceased completely (i.e., "hard freeze for all"). These plans represent 21% of the covered DB plans. They are mostly small plans. For example, of the "hard frozen for all" plans, 60% have fewer than 100 participants and 83% have fewer than 500 participants.

Another 7% of participants in DB plans were in plans for which accruals have ceased for some, but not all, participants. We do not have data to determine the extent to which these plans are "hard frozen". For example, in some cases, the freeze might apply to participants who work in a certain location and in others it might apply to all but certain grandfathered participants. It's important to note that the 7% number noted above represents all participants in the plan, not just those for whom accruals have ceased. So, it would be an overstatement to simply add this number to the "hard frozen for all participants" number.

Another 3.5% of the participants in DB plans are in plans for which there is some other sort of freeze in effect either for all or some of the participants (e.g., a plan for which the only accruals are salary upticks in the final average pay plan.)

Please note – PBGC's 2008 premium database is not yet 100% complete. It includes all plans with 100 or more participants and most small plans. However, the due date for 2008 premiums for small plans with plan years that begin late in the year has not yet passed, so data for those plans is outstanding. We estimate that about 2,500-3,000 small plans fall into that category out of a total of about 28,000 single-employer plans.

Hybrid plans

Data about the prevalence of hybrid plans comes from Form 5500. Data from Form 5500 are two years old and do not provide a particularly insightful look at current trends in the pension world, but they are our primary source of plan characteristic data.

Preliminary data for PBGC-insured single-employer plans from the 2007 Form 5500 indicates that, as of the end of 2007, hybrid plans represented about 10% of single-employer DB plans (the corresponding percentage for the prior year was 8.3%.) Although the total percentage of plans that are hybrid plans has increased, the percentage of participants in hybrid plans has remained fairly constant. This indicates that the incidence of recent conversions to hybrid plans is more prevalent among small plans. That said, hybrids plans are still much more prevalent among large plans. For example, although hybrid plans represent about 10% of single-employer DB plans, if you consider only plans with more than 5,000 participants that number increases to 33%.

Termination of frozen plans

The termination of frozen plans has appeared to be relatively constant, with approximately 20% of frozen plans being terminated in any given year.