



2012 Blue Book

Questions to the PBGC
and Summary of their Responses

March 2012



enrolledactuaries.org

Summary of Discussions between the Enrolled Actuaries Program Committee
and Staff of the Pension Benefit Guaranty Corporation
on February 1, 2012

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on February 1, 2012, 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: Administration Proposal

The Administration has proposed that PBGC be allowed to set its own premiums based on the financial health of the employer and the circumstances of the individual plan. Please provide an update on this proposal, including anything you can share about the issues and options under consideration.

RESPONSE

On February 13, 2012, the President released his Fiscal Year 2013 federal budget. Included in the budget is a proposal to provide the PBGC Board of Directors the authority to adjust premiums and to direct PBGC to take into account the risks that different sponsors pose to their retirees and to PBGC.¹ The proposal provides safeguards that would ensure that reforms are undertaken responsibly during challenging economic times, including the requirement for a year of study and public comment before any implementation, and the gradual phasing-in of any premium increases.

In February 2, 2012 testimony² before the Health, Employment, Labor and Pensions Subcommittee, House Committee on Education and the Workforce, PBGC Director Josh Gotbaum explained the basis of the premium reform proposal as follows:

“Unfortunately, neither the level nor the form of premiums has kept up with changes in retirement plans. For some companies and plans, our premiums are far lower than any private insurance company would charge. . . .

But what's just as disturbing is that financially sound companies are asked to make up the difference. And if Congress were to increase those premiums just to cover the actions of other companies, it would make the situation worse. Think how hard it is to convince companies to keep their plans while you're asking them to pay for the losses of others.

We recognize that there are many issues involved in making PBGC responsible for establishing premiums that are both fair and financially sufficient. The Administration proposed a range of safeguards to allay the legitimate concerns of businesses and plans that rates might rise too quickly or unfairly. No increases at all would be permitted until after a year of consultation with the affected constituencies. No increases would be allowed without a vote of PBGC's board. The increase on any individual company or plan would be strictly limited and all increases would be phased in over a period of years as the Board may determine. Furthermore, unlike the current variable rate premium, the Board would be charged, to the extent feasible, with setting premiums to minimize increases during times when the economy or markets are weak.”

¹ <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/labor.pdf> (page 147)

² <http://www.pbgc.gov/news/testimony/page/tm020212.html>

QUESTION 2

Premiums: Refunds Based on Recharacterization of Contributions

In a [policy statement](#)³ issued on December 22, 2011 (76 Fed. Reg. 79714), PBGC stated that it “has received a number of amended premium filings, showing increased assets and decreased Variable Rate Premiums (VRPs), supported by amended Schedules SB (or B) that reflect recharacterization of contributions, and submitted with a view to obtaining premium refunds,” and that “PBGC has in practice accepted such amended filings and granted the refunds.” PBGC then stated that, “upon further consideration of the matter, however, PBGC has concluded that in general, such amendments should be rejected and the associated premium refunds denied,” but also made clear that “PBGC’s consideration of amended premium filings takes into account the facts and circumstances of each case.”

The following questions relate to that policy statement:

- (a) Will the new policy of generally rejecting such amendments and denying the associated premium refunds apply to requests made before the new policy was announced?

RESPONSE — Refund requests that were pending on December 22, 2011 will generally be denied. PBGC has no plans to recoup amounts that were already refunded. Similarly, if, in lieu of requesting a refund, the plan established a credit and has already used it (e.g., to offset the 2011 VRP that was due October 15, 2011), PBGC has no plans to retroactively revoke that credit.

- (b) If the reason for a recharacterization of contributions is not to obtain a premium refund, but rather to ensure that a violation of minimum funding rules does not retroactively arise after discovering an error, would PBGC accept the recharacterization of contributions as valid and accept an amended filing and grant a request for an associated premium refund?

RESPONSE — The policy statement was focused on situations where the purpose of the amended filing was to obtain a refund, not on this hypothetical situation. As stated in the policy statement, “PBGC’s consideration of amended premium filings takes into account the facts and circumstances of each case.” If you believe there are circumstances that PBGC should consider in reviewing the amended filing, you should include that information in your filing⁴. Although PBGC is not prepared to speculate on the outcome of a hypothetical situation in this area, we expect most amended premium filings based on recharacterized contributions will be rejected.

- (c) Assume that the reason for a recharacterization of contributions is not to obtain a premium refund, but rather to offset what would otherwise be a newly-identified premium underpayment for that same year. Under these circumstances, would PBGC accept the recharacterization of contributions as valid and treat the associated reduction in the premium amount owed as an offset against an unrelated increase in the premium amount owed that is reported to PBGC as part of the same amended filing?

RESPONSE — The answer is the same as (b). However, we note that in this scenario, the recharacterization was done solely to reduce the amount of premium owed, which is the type of situation the policy statement was focused on.

³ <http://www.pbgc.gov/documents/2011-32804.pdf>

⁴ When an amended filing results in a premium decrease, the plan is required to provide an explanation (see line 19c of illustrative form).

- (d) If a Schedule B (or SB) for a plan year is amended to increase assets as a result of recharacterized contributions and the premium filing for that same plan year is not amended accordingly, should actuaries or plan administrators be concerned about the discrepancies in the asset values between the two filings?

RESPONSE — PBGC has no intention of challenging the validity of a premium filing solely because the asset value does not match the asset value reported on an amended Schedule B (or SB) that reflects recharacterized contributions. However, IRS has told PBGC that they have concerns about recharacterized contributions. No inference should be made from our response as to whether the Schedule SB amendment noted above would be acceptable.

- (e) Does the policy statement apply to a situation where Schedule SB is amended to report additional contributions that have not previously been reported on a different year's Schedule SB?

For example, suppose the 2011 valuation was not yet final when the 2010 Schedule SB was filed and that contributions made in April and July 2011 were not reported on the 2010 SB, and thus not included in plan assets for purposes of the 2011 Comprehensive Premium Filing. When the valuation is finalized in November 2011, it turns out the April and July contributions were larger than necessary to satisfy the 2011 quarterly contribution requirement. The sponsor wants to treat the excess as 2010 contributions instead of 2011 contributions, so the Enrolled Actuary amends the 2010 Schedule SB in November 2011. At that time, the 2011 Comprehensive Premium has already been filed, but the 2011 Schedule SB has not. If an amended 2011 Comprehensive Premium Filing is submitted to reflect the final 2011 asset value, will PBGC reject the amended filing?

RESPONSE — The policy statement does not apply to the scenario described above. In the example provided, the contributions made in April and July 2011 weren't "recharacterized" because those contributions hadn't previously been "characterized".

QUESTION 3

Premiums: Treatment of "At-Risk" Load in Determining Variable Rate Premium (VRP)

If a plan is in at-risk status for two of the prior four years, the funding target for purposes of IRC 430 includes a load equal to four percent (4%) of the funding target plus \$700-per-participant. Does that load apply when determining the premium funding target for purposes of determining the VRP? If the answer is "yes", is the load for premium purposes the same or different from the load included for IRC 430 purposes?

RESPONSE

Yes, the load applies. The \$700-per-participant part of the load included in the premium funding target is the same amount that is included in the funding target for IRC 430 purposes. The 4% part of the load is applied only to the premium funding target, so in general, that part of the load will generally be lower for premium purposes than it is for funding purposes.

QUESTION 4

Premiums: Death Benefits in Vested Benefits for Variable Rate Premium (VRP) Purposes

Are the following benefits vested, and therefore included in the premium funding target?

- (a) An ancillary pre-retirement death benefit that pays \$10,000 on death while active or terminated vested?
- (b) An ancillary pre-retirement death benefit that pays \$10,000 on death while active?

RESPONSE

- (a) The premium regulation provides that, with the exception of the return of mandatory employee contributions, a participant's pre-retirement lump-sum death benefit is not vested if the participant is living. In Q&A 3 of the 2010 Blue Book, PBGC staff explained that the reason for that provision is because there are circumstances in which that death benefit will not be paid (for example, if the participant survives until retirement.) So, the answer depends on whether there's a similar death benefit that would be paid after the participant starts receiving retirement benefits. For example, if the plan also provides an ancillary post-retirement death benefit that pays \$10,000 on death, then the value of the pre-retirement death benefit is included in the premium funding target. But, if the death benefit is paid only if the participant dies while still actively employed, then it is not.

Note – Q&A 26 discusses how/where on Schedule SB to report the non-vested portion of the funding target for inactive participants

- (b) The same concept applies. The value of the ancillary pre-termination death benefit described in (b) above is not included in the premium funding target unless there is a similar ancillary death benefit payable in the event of death after termination regardless of whether death occurs before or after benefits commence.

QUESTION 5

Premiums: Mid-Year Amendments in Vested Benefits for Variable Rate Premium (VRP) Purposes

2010 Blue Book Q&A 3 provides that if a calendar-year plan is amended in 2010 to provide a 10% ad hoc cost-of-living adjustment (COLA), effective July 1, 2011, that COLA is treated as a vested benefit for 2011 VRP purposes if it is included in the January 1, 2011 funding target (which it typically would be unless prevented from taking effect by §436), because retirees must do nothing more than survive from January 1, 2011 to July 1, 2011 to receive the COLA.

Would the answer be different if the amendment had been adopted in 2011 (after the valuation date) instead of 2010? The amendment may be reflected in the 2011 §430 funding target, because the plan sponsor may have made a §412(d)(2) election to reflect it or because it may have been required to be reflected under the special rule of §1.430(d)-1(d)(2).

RESPONSE

No. The answer would not be different if the amendment had been adopted after the valuation date.

QUESTION 6

Premiums: My PAA Enhancements

Has there been any MyPAA enhancements since last year that would be of interest to Enrolled Actuaries?

RESPONSE

One new validation/warning message may be of particular interest to Enrolled Actuaries — If the alternative premium funding target is being used to determine the variable-rate premium and the plan uses 24-month smoothed segment rates (as opposed to the full yield curve), My PAA now validates whether the reported segment rates are acceptable given the reported UVB valuation date. For example, if the reported UVB valuation date is January 1, 2012, the system checks to see if the three segment rates reported are the three smoothed segment rates for January 2012, December 2011, November 2011, October 2011, or September 2011 and issues a warning message if other rates are reported.

In addition, the error checking features available for filings imported into My PAA after being created using private sector software have been expanded and are now similar to those used for filings created directly in My PAA (i.e., screen-prepared filings). Uploaded filings continue to bypass the error checking features within My PAA.

Last, but not least, system performance has been improved (e.g., screens load more quickly).

QUESTION 7

Standard Terminations: Referrals to Other Federal Agencies

When PBGC reviews a Standard Termination Notice (Form 500) or conducts a standard termination audit, it may identify a possible plan qualification defect or violation of other legal requirements. Under what circumstances, if any, does PBGC refer the matter to another Federal agency, such as IRS or the Employee Benefits Security Administration? Please provide examples, if any, of situations in which such a referral took place.

RESPONSE

Referrals to other agencies are made on a case-by-case basis and depend on the specific facts and circumstances.

QUESTION 8

Standard Terminations: Forfeiture of Benefits for Missing Participants

Regulation §1.411(a)-4(b)(6) provides that a benefit that is payable is not treated as forfeitable merely because the benefit is forfeitable on account of the inability to find the participant or beneficiary to whom payment is due, provided that the plan provides for reinstatement of the benefit if a claim is made for the forfeited benefit. If a plan provides for forfeiture of benefits in accordance with this regulation and the plan administrator has been unable to locate a participant despite making a diligent effort, how is the benefit handled upon standard plan termination?

RESPONSE

The plan administrator must treat the participant or beneficiary as a missing participant under Part 4050 of PBGC's regulations. Accordingly, the plan administrator must either:

- Pay the PBGC a designated benefit for the missing participant, or
- Purchase from an insurer an irrevocable commitment to pay the missing participant's benefit.

In either case, the plan administrator must provide information to PBGC as required under the regulation. This is done by filing Schedule MP with Form 501.

QUESTION 9

Standard Terminations: Distribution Processing Fees

Is it permissible to deduct processing fees from participants' benefits under defined benefit plans covered under Title IV of ERISA?

RESPONSE

No. Participants of a defined benefit plan covered under Title IV of ERISA must receive their full plan benefits [refer to Section 4041(b)(3)(A)]. Any administrative expenses that are paid from Plan assets may not reduce a participant's benefit under such a plan.

QUESTION 10

Standard Terminations: Automatic Rollovers for Missing Participants

Under The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), a plan administrator must set up an Individual Retirement Account (IRA) for the automatic rollover of any cash-out distribution in excess of \$1,000 for a participant that does not elect either a direct payment or a direct rollover of his benefit. If a plan terminates in a standard termination, may the plan administrator set up an IRA for the automatic rollover of a missing participant?

RESPONSE

No. A distribution may only be made in the form of a rollover to an IRA if the plan administrator is able to locate the participant. In the case of a missing participant in a standard termination, the plan administrator must either pay PBGC a designated benefit for the missing participant, or purchase from an insurer an irrevocable commitment to pay the missing participant's benefit. See Section 4050 of ERISA and 29 CFR Part 4050.

QUESTION 11

Distress or Involuntary Terminations: Maximum Benefits under Optional Forms

Pursuant to §4022.23 the PBGC provides guidance for determining optional form factors for situations not covered by the regulations. Which of the following are correct?

- (a) Adjustments to joint-life factors due to age differences greater than those specified in §4022.23(e) should be extended as follows. The 1% and ½% adjustment rates (depending on whether the co-annuitant is younger or older than the participant) are multiplied by 50% at 20 years of age difference. For example, for a co-annuitant 30 years younger the maximum amount otherwise payable is multiplied by 75.00% ($100\% - 1\% \times 20 - 0.5\% \times 10$). However, the adjusted joint-life factors must not exceed 100%.
- (b) For purposes of the joint-life factors, the age differences are calculated using age-nearest-birthday for the participant and beneficiary. In computing the difference in ages, years over 65 years of age are not counted. For example, if the participant is age 70 and the spouse is age 64, the participant is treated as age 65 and the spouse is treated as age 64.
- (c) Assume a joint and survivor annuity (J&S, in the customary "contingent" form in which the benefit does not decline if the co-annuitant dies first) includes a certain period. The benefit during the certain period may be "nonreducing" (i.e., equal to the amount payable to the retiree) or "reducible" (i.e., the amount payable after both recipients are deceased is the amount being paid to the recipient who died last.) Before adjusting for age differences, the factors used for these options are all based on interpolations or extrapolations of the following six factors:
 - .8640 (50% J&S with nonreducing 10C&C)
 - .7920 (100% J&S with nonreducing 10C&C)
 - .8727 (50% J&S with reducible 10C&C)
 - .7920 (100% J&S with reducible 10C&C)
 - .9000 (50% J&S, no certain period)
 - .8000 (100% J&S, no certain period)

RESPONSE

All of the information shown above is correct.

QUESTION 12

Distress or Involuntary Terminations: Referrals to Other Federal Agencies

When PBGC reviews a Distress Termination Notice of Intent to Terminate (Form 600), a Distress Termination Notice (Form 601), or otherwise reviews or evaluates the circumstances surrounding a plan involved in a distress or involuntary termination, it may identify a possible plan qualification defect or violation of other legal requirements. Under what circumstances, if any, does PBGC refer the matter to another Federal agency, such as IRS or the Employee Benefits Security Administration? Please provide examples, if any, of situations in which such a referral took place

RESPONSE

Referrals to other agencies are made on a case-by-case basis, and depend on the specific facts and circumstances of the specific case.

QUESTION 13

Distress or Involuntary Terminations: PBGC Review of Compliance with §436

When PBGC becomes statutory trustee of a pension plan that underwent a distress or involuntary termination, does PBGC review the plan's compliance with the rules governing benefit restrictions under §436? If PBGC believes that these rules were not complied with, what action, if any, does PBGC take?

RESPONSE

PBGC does take the §436 restrictions into account. For example, if no AFTAP calculation has been certified, PBGC will apply the §436 funding status presumptions, which could result in a benefit freeze prior to termination. If the plan did not comply with the §436 rules, PBGC will adjust benefits and take any other appropriate actions.

QUESTION 14

Distress or Involuntary Termination: Applicability of Appeal Right to Benefit Cutback Mandated by PBGC Regulations

Assume that a plan has filed a distress termination application with a proposed termination date of March 31, 2011. PBGC's regulations at §4022.61–.63, require the plan administrator to reduce benefits to estimated Title IV levels effective beginning with the April 1, 2011 monthly check for those participants in pay status with benefits exceeding PBGC limits. Is such a benefit reduction an "adverse benefit determination" for which the plan administrator must provide any affected participant with a right to appeal?

RESPONSE

This is a DOL issue that was addressed in Q&A 7 of the 2010 Green Book (which can be obtained from the Conference of Consulting Actuaries).

QUESTION 15

Reportable Events: Funding-Related Waiver and Extension Look-Back Rules

PBGC Technical Updates [10-4](#)⁵ and [11-1](#)⁶ provide guidance on how to perform certain waiver or extension tests under PBGC's reportable events regulation (29 CFR Part 4043) in light of changes made by the Pension Protection Act of 2006 (which aren't yet reflected in the regulation). These tests are based on data used to calculate variable-rate premiums (VRPs); for example, some tests are based on the ratio of plan assets to the value of vested benefits (the "VRP funding percentage").

Consider Plan A, a calendar-year plan. Assume that a substantial owner receives a reportable distribution from Plan A in 2012. Under the principles of Technical Updates 10-4 and 11-1:

- (a) Which year's VRP funding percentage would be used to determine if reporting is waived under the 80-percent funding test in §4043.27(c)(2)(iii)?
- (b) If reporting is not waived, which year's VRP funding percentage would be used to determine if the due date for reporting is extended under the "Form 1" extension test in §4043.27(d)?
- (c) If the "Form 1" extension applies, what is the reporting due date?

RESPONSE:

- (a) 2011. The assets and liabilities used for this determination would be reported in the 2011 Comprehensive Premium Filing.
- (b) 2010. The assets and liabilities used for this determination would be reported in the 2010 Comprehensive Premium Filing.
- (c) 30 days after the 2012 VRP is due. If the plan in question is considered "small" for 2012 premium purposes, the VRP is due April 30, 2013, so the extended §4043 reporting date would be May 30, 2013. If the plan is not considered "small", the VRP due date is October 15, 2012, so the extended §4043 reporting due date is November 14, 2012.

These responses are based on the guidance in Technical Updates 10-4 and 11-1, which represent PBGC's current thinking on this matter. They do not create or confer any rights for or on any person or operate to bind the public. Any approach that satisfies the requirements of the statute (as amended by the Pension Protection Act of 2006) and regulation is acceptable. To discuss an alternative approach (which is not required), contact PBGC at 800-736-2444.

⁵ <http://www.pbqc.gov/res/other-guidance/tu/tu10-4.html>

⁶ <http://www.pbqc.gov/res/other-guidance/tu/tu11-1.html>

QUESTION 16

Reportable Events: Lookback for Funding-Related Waivers under Technical Update 11-1

In response to Question 13 in the 2011 Blue Book -- which involved a January 1, 2011 merger of Plan B into Plan A with a reportable event occurring for Plan A on February 1, 2011 -- PBGC stated that it "seems reasonable to read [Technical Update 10-4] as being consistent with a look-back to the surviving plan's Variable Rate Premium (VRP) values alone." The guidance in Technical Update 10-4 provided for a one-year lookback to determine whether a funding-related waiver test is met under the reportable events regulation for a reportable event occurring in the 2011 plan year. That guidance has been extended by Technical Update 11-1 to apply to reportable events occurring in the 2012 plan year.

Assume that calendar-year Plan X was spun off, effective January 1, 2012, from Plan Y, and that a reportable event occurs for Plan X on February 1, 2012. Does PBGC agree that it is reasonable to read Technical Update 11-1 as being consistent with a look-back for Plan X to Plan Y's VRP values, as of Plan Y's funding valuation date for the 2011 plan year—which at that time, included assets and liabilities that later were spun off to new Plan X, along with other assets and liabilities—to determine whether a funding-related waiver test is met?

RESPONSE

No. The response to Question 13 in the 2011 Blue Book noted that the Technical Update "guidance is not explicit regarding a situation where one plan merges into another" but reasoned that "if applied literally, the guidance would indicate that the 'look-back' is to the prior-year VRP values of the plan involved in the reportable event, which in the case of a pre-event merger would be the surviving plan." In the spinoff case described, the transferor plan (Plan Y) is not the plan involved in the reportable event. Accordingly, the reasoning of the response to Question 13 in the 2011 Blue Book does not fit the spinoff case. It seems more reasonable to analogize the spunoff plan to a new plan, which has no prior year.

The guidance in Technical Update 11-1 represents PBGC's current thinking on this matter. It does not create or confer any rights for or on any person or operate to bind the public. Any approach that satisfies the requirements of the statute (as amended by the Pension Protection Act of 2006) and regulation is acceptable. To discuss an alternative approach (which is not required) or a reporting waiver, contact PBGC at 800-736-2444.

QUESTION 17

Other Reporting: ERISA §4010 Filing for Controlled Groups with Terminated Plans

Company A, which has a calendar year fiscal year, sponsors Plan A, a calendar year plan. Company A intends to terminate the plan in a standard termination with a proposed termination date of July 1, 2010. In November 2011, Plan A received a favorable determination letter from IRS on the plan as amended as of July 1, 2010. Company A can now move forward with distributing benefits; however the distribution won't be completed by December 31, 2011. There are sufficient assets in the plan to do this (including the value of any commitment to make the plan sufficient for termination signed by the contributing sponsor or a controlled group member on or prior to December 31, 2011).

No valuation has been performed for 2011. The last valuation was as of January 1, 2010, and at that time the FTAP was at least 80%. Because the plan termination date was before January 1, 2011, minimum funding standards do not apply for 2011. Similarly, there's no need to calculate the liabilities for benefit restriction purposes because §1.436-1(a)(3)(ii) provides a special rule regarding the application of benefit restrictions after plan termination.

Must the 2011 FTAP be calculated solely for purposes of determining whether a §4010 filing is required for the 2011 Information Year?

RESPONSE

We appreciate that for a plan that has already received a favorable determination letter regarding a standard termination calculating the 2011 FTAP might be impractical and unduly burdensome. However, a literal reading of the statute and regulation indicates that the 2011 FTAP would need to be calculated to determine whether a §4010 filing is required for the 2011 Information Year. We suggest that plans in this situation contact our Corporate Finance & Restructuring Department at 202-326-4100 or ERISA.4010@pbgc.gov before year-end to request a filing waiver.

QUESTION 18

Other Reporting: ERISA §4010 Filing for Plan Years Ending in the Last Half of 2011

In early March 2012, PBGC published two Federal Register documents slightly revising certain interest assumptions under ERISA section 4044 as shown below:

Changes to ERISA section 4044 Interest Factors

Measurement Date	As Originally Published			Revised		
	Select Rate	Select Period	Ultimate Rate	Select Rate	Select Period	Ultimate Rate
July - September 2011	4.21%	25 years	4.34%	4.22%	20 years	4.34%
October - December 2011	4.07%	20 years	4.28%	4.09%	20 years	4.30%

In some cases, 4010 filings including benefit liabilities determined using the originally-published factors have already been submitted. Do such filings need to be amended to reflect benefit liabilities determined using the revised assumptions? Does the answer change if such liabilities were calculated using the originally-published factors in preparation for a 4010 filing due that has not yet been submitted (e.g., a filing due April 15, 2012)?

RESPONSE

No. The changes are very minor and will have very little impact on benefit liabilities. If you have already calculated benefit liabilities using the originally-published interest factors, you do not need to redo those calculations, regardless of whether the filing has already been submitted. In such cases, the interest factors actually used (i.e., the originally-published interest factors) must be reported on Schedule P of the 4010 filing.

For further information, contact our Corporate Finance & Restructuring Department at 202-326-4070 or ERISA.4010@pbgc.gov.

QUESTION 19

ERISA §4062 and §4063: §4062(e) Status of Regulation and Enforcement Policy

ERISA provides for reporting of and liability for certain substantial cessations of operations by employers that maintain single-employer plans, specifically when an employer ceases operations at a facility in any location and as a result more than 20 percent of employers who are participants in a plan sponsored by the employer are separated. In August 2010, PBGC proposed a regulation providing guidance on 4062(e). Please describe the status of that regulation and PBGC's enforcement of pending cases.

RESPONSE

In light of comments on the 2010 proposal and regulatory review, PBGC has announced it will re-propose the 4062(e) regulation in 2012. See PBGC's Fall Regulatory Agenda (available on www.reginfo.gov). In the interim, PBGC has begun to consider changes in its 4062(e) enforcement program.

In his February 2, 2012 testimony⁷ before the Health, Employment, Labor, and Pensions Subcommittee of the House Committee on Education and the Workforce, PBGC Director Joshua Gotbaum stated:

"PBGC is also being more responsive to companies and plans in enforcing ERISA section 4062(e) - a statutory provision that imposes liability in certain situations when plan sponsors downsize. In light of comments, the agency plans to issue a re-proposed regulation on 4062(e). We have also begun to consider changes in how resources are directed within the 4062(e) enforcement program, in order to focus on the real threats to the retirement security of people in traditional pension plans."

⁷ <http://www.pbgc.gov/news/testimony/page/tm020212.html>

QUESTION 20

ERISA §4062 and §4063: Settlements in Advance of Triggering Event

Assume that an employer is considering whether to take some action (e.g., closing a plant or engaging in a going-concern asset sale) that PBGC would view as triggering liability under §4062(e), and that the employer, for valid business reasons, is not willing to take the action without knowing in advance how its exposure under §4062(e) will be addressed.

- (a) If the employer approached PBGC in advance of taking this action, would PBGC be willing to negotiate an appropriate settlement agreement with the employer to resolve any §4062(e) liability *before* the §4062(e) event occurs?
- (b) Assume that the action the employer is contemplating would clearly serve to strengthen the employer and thereby enhance the employer's ability to fund its PBGC-covered pension plan(s), and that the employer, for valid business reasons, is not willing to take the action unless PBGC agrees not to pursue collection of any resulting §4062(e) liability. Under what circumstances, if any, would PBGC be willing to agree not to pursue such collection?

RESPONSE

- (a) Yes. PBGC has authority under §4067 to reach a settlement with an employer regarding its §4062(e) liability in advance of the time the liability arises, and would be happy to pursue such negotiations with interested employers.
- (b) It depends on the facts and circumstances of a particular case, so we cannot provide a general answer. Employers are encouraged to contact the agency to discuss specific cases.

QUESTION 21

Other: Requests for Revocation of Pension Relief Act Elections

Under the Pension Relief Act, an employer may revoke an election to use an alternative amortization schedule only with the approval of IRS, in consultation with PBGC. What are the issues PBGC considers in connection with such consultations? In particular, what are the kinds of reasons PBGC might have to oppose a revocation?

RESPONSE

To date, PBGC has been consulted on only one request, which was straight-forward and approved. Because we've seen only one case, we cannot speculate as to what kinds of reasons PBGC might think a revocation was inappropriate. If additional revocation requests are submitted, PBGC will consider the facts and circumstances of each case as part of the consultation process.

QUESTION 22

Other: Allocation of Combined PBGC Recoveries

In its response to Question 12 at the 2011 JCEB-PBGC meeting⁸, PBGC staff stated that PBGC's then-current policy for allocating its recoveries among various claims and plans ("PBGC Operating Policy 8.2-1: Valuation and Allocation of Recoveries") was "currently under review" and that PBGC was following its old policy pending the issuance of a new or revised policy. Please provide an update as to the status of this policy.

RESPONSE

The policy is still under review. Currently PBGC is not in a position to advise when a new or revised policy may be issued.

QUESTION 23

Other: "Risk Mitigation Program"

Technical Update 00-3⁹ states that PBGC "contacts a company for further information about a transaction *only if* certain screening criteria are met (emphasis added), but PBGC staff's response in the 2011 Blue Book suggests that companies that don't meet those criteria are sometimes contacted. Does PBGC have any plans to revise/update Technical Update 00-3? In the interim, what employers does PBGC contact under its Early Warning Program?

RESPONSE

The criteria listed in Technical Update 00-3 represented PBGC's thinking on the Early Warning Program at the time the Technical Update was issued. Some of those criteria incorporate pre-PPA funding concepts and are no longer applicable given the enactment of PPA. Currently, PBGC contacts employers under its Early Warning Program if it appears a transaction or situation has arisen that may weaken the financial support for a pension plan. The criteria taken into account include, but are not limited to, the nature of the transaction or situation, plan funding, plan size, and company financial health (which may include an employer's bond rating and/or other indicia of financial condition). PBGC is considering whether to revise Technical Update 00-3 or provide guidance in another form.

⁸ http://www.americanbar.org/content/dam/aba/events/employee_benefits/2011_pbgc_gas_final.authcheckdam.pdf

⁹ <http://www.pbgc.gov/res/other-guidance/tu/tu00-3.html>

QUESTION 24

Other: Litigation Issues

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

RESPONSE

Stephens v. US Airways Group, Inc., 644 F.3d 437 (D.C. Cir. 2011), pet. for certiorari filed (Dec. 13, 2011) – A group of retirees brought suit while the plan was ongoing, asserting that the company's payment of lump sum benefits without interest up to 45 days after the benefit commencement date specified in the plan violated both the plan's benefit commencement provision and ERISA's actuarial equivalence provision. After the plan terminated, PBGC assumed defense of the case. The district court ruled for PBGC on all grounds. The D.C. Circuit held that the participants' lump sum benefits were the actuarial equivalent of their annuitized benefits under their pension plan, but that they may be entitled to interest to the extent of any unreasonable delay in paying their lump sum benefits. The court also held that the participants were not entitled to attorneys' fees against PBGC. The case was remanded to the district court for further proceedings.

Carter v. Pension Plan of A. Finkl & Sons Co. For Eligible Office Emps., 654 F.3d 719 (7th Cir. 2011), aff'g 2010 WL 1930133 (N.D. Ill. May 12, 2010) – A plan sponsor gave notice to participants and PBGC of its intent to complete a standard termination of its pension plan, and amended the plan to allow participants, upon plan termination, to receive their pension benefits before retiring. The sponsor subsequently withdrew its standard termination application and adopted a second plan amendment nullifying the first amendment. Participants demanded immediate distribution of the plan's assets and sued the sponsor under ERISA's anti-cutback provision, section 204(g). The district court granted summary judgment to the sponsor, holding that the second plan amendment did not violate the anti-cutback provision, and that, because the pension plan did not terminate, active participants were not entitled to immediate payment of their benefits. The court of appeals agreed with PBGC, appearing as *amicus curiae*, and affirmed the district court's decision, reaffirming the longstanding principle that Title IV of ERISA provides the exclusive means by which an employer can voluntarily terminate its plan.

Cox Enterprises, Inc. v. Pension Ben. Guar. Corp., 2012 WL 11015 (11th Cir. Jan. 4, 2012) – The Eleventh Circuit confirmed that debt comes before equity, and that PBGC's claim for pension underfunding was therefore senior to a former shareholder's statutory right to a buyout. The court agreed with PBGC that the Florida corporations statute prohibits distribution to a shareholder if it would render the corporation insolvent, even where the shareholder is entitled to a buyout and has been awarded that relief. Cox Enterprises, a minority stockholder in a newspaper company, won a judgment against the company's directors and officers for corporate waste. Under state law, Cox was entitled to a buyout, but the newspaper defaulted on the buyout and the court appointed a receiver to oversee its liquidation. PBGC terminated the newspaper's pension plan, and sought recovery of its underfunding. The receiver recommended that Cox receive all of the company's assets and the district court approved. PBGC appealed, and prevailed in the court of appeals.

Deppenbrook v. PBGC, 2011 WL 1045765 (W.D. Pa. Mar. 17, 2011) – A group of participants brought suit in Pennsylvania, seeking recalculation of their benefits under a terminated plan. PBGC moved to dismiss or transfer venue to the District of Columbia, as no termination proceedings were pending in Pennsylvania. The court granted that motion. The court also dismissed without prejudice the claims of any participant who had failed to exhaust administrative remedies.

Davis v. PBGC, 2011 WL 4536888 (D.D.C. Sept. 30, 2011) – A group of participants brought a 12-count suit challenging two PBGC Appeals Board decisions regarding their benefits. They moved for summary judgment on one of their claims, relying on documents that they filed with the court but had not submitted to PBGC. PBGC filed a cross-motion for summary judgment, relying on its administrative record. The court denied both motions, holding that it could not fairly adjudicate them because the participants had improperly relied on extra-record material. The court also rejected the participants' argument that PBGC functions under a conflict of interest, affecting the standard of review, and affirmed the presumption that the agency properly designated the administrative record. The court invited the parties to re-file motions citing only to the administrative record.

FBOP Corp. v. PBGC, No. 11-C-2782 (N.D. Ill. Oct. 5, 2011) – PBGC issued to a plan sponsor notice of the agency's determination that the plan should be terminated under section 4042 of ERISA. PBGC also issued a notice indicating that it intended to set off the plan's unfunded benefit liabilities against the sponsor's anticipated income tax refund. PBGC withdrew the setoff notice after learning that the refund would be delayed. The sponsor refused to terminate consensually, and instead sued PBGC for a judgment declaring that the plan should not be terminated and an injunction against any setoff. PBGC, in turn, sued the sponsor for an order terminating the plan, and moved to dismiss the sponsor's suit. The court granted the motion to dismiss, holding that the sponsor's suit for declaratory judgment was duplicative of PBGC's termination suit, and that, because PBGC had withdrawn the setoff notice, the court lacked subject-matter jurisdiction over it.

PBGC v. Ferfolia Funeral Homes, Inc., 2011 WL 2971043 (N.D. Ohio July 20, 2011) – PBGC received a post-distribution certification from the sponsor of a pension plan stating that it had completed a standard termination and made distributions to the participants. PBGC selected the pension plan for post-distribution audit, and determined that the lump-sum distributions were not calculated in accordance with applicable law. The plan sponsor disputed the determination. PBGC filed suit under section 4003(e)(1) of ERISA to enforce the determination and to recover the additional distributions allegedly owed the plan participants and beneficiaries. The sponsor moved to dismiss the complaint, arguing that PBGC's suit was barred by the statute of limitations under section 4003(e)(6)(A)(i) of ERISA, as the complaint was dated more than six years from the plan termination date. The court denied the motion, agreeing with PBGC that the statute of limitations begins to run when a company commits a noncompliant act – like making deficient distributions – and not on the plan termination date.

US Airline Pilots Association v. PBGC, No. 1:09-cv-01675 (FJS) (D.D.C. Mar. 14, 2011) – The court denied USAPA's renewed motion for preliminary injunction. USAPA, a union representing participants in a terminated pension plan, sued PBGC alleging that the agency had failed to investigate and to rectify possible wrongdoings by former plan fiduciaries. USAPA moved in 2009 for a preliminary injunction to have a "special trustee" appointed to fulfill the duties that PBGC allegedly refused to perform. The court denied that motion. USAPA filed a renewed motion for preliminary injunction, asserting that discovery had provided further evidence to support its claims. In again ruling for PBGC, the court held that USAPA had failed to show a substantial likelihood of success on the merits, given that an agency's enforcement decisions are presumptively unreviewable. The court also found no irreparable harm, noting that the first \$510 million of any litigation recovery would accrue to PBGC rather than the plan. Finally, the court held that appointing a special trustee would unduly disrupt the agency's operations and would not be in the public interest.

In re Wolverine Proctor & Schwartz, LLC, No. 10-1334 (1st Cir. Apr. 20, 2011), aff'g 436 B.R. 253 (D. Mass. 2010), aff'g 2009 WL 1271953 (Bankr. D. Mass. May 5, 2009) – The First Circuit affirmed the lower courts' decisions upholding PBGC's settlement of its claims for termination liability with the plan sponsor's liquidating trustee. A creditor objected to the settlement, arguing that the so-called "prudent investor" rate should have been used to calculate PBGC's claim for unfunded benefit liabilities. Following Raleigh v. Illinois Dep't of Rev., the bankruptcy court held that the substantive non-bankruptcy law – here, ERISA and PBGC's regulations – controlled the amount of liability. Rejecting the argument that PBGC could not recover more than its original proof of claim, the court found that PBGC had reserved the right to amend it. The district court and the court of appeals affirmed, holding that the bankruptcy court did not abuse its discretion in approving the settlement agreement, but rather, correctly applied the relevant legal standard.

QUESTION 25

Other: PBGC Corporate Governance

There has been significant discussion about changing PBGC's corporate governance. Please explain the various proposals and what their aims are.

RESPONSE

PBGC's Board consists of three Cabinet Secretaries – the Secretaries of Labor, Commerce, and the Treasury. The Secretary of Labor is the Chairman. In 2007, after looking at other government corporations, GAO issued a report that, among other things, concluded that the small size of the Board was a constraint on good governance. The current structure makes it difficult to have typical board committees such as audit and investment committees. GAO thought such committees were necessary and that the Board should also have outside expertise. GAO was also concerned that a change in administration results in 100% turnover on the Board.

Congress has taken up the issue. Senator Kohl introduced the PBGC Governance Improvement Act of 2010. The bill provides for four new Board members (including one representative for employers and one for employees), and provides that only two of the four new members could belong to the same party. The bill also provides for staggered four year terms. During an oversight hearing, HELP committee members have also expressed interest in changing PBGC's governance. PBGC Director Joshua Gotbaum has indicated that he would be comfortable with the current structure or a new one. There is no Administration position on this issue.

QUESTION 26

Other - Schedule SB - Non-Vested Benefits for Inactive Participants

If a plan has non-vested benefits for inactive participants, how should this be disclosed on the Schedule SB? For example, if a plan provided a flat \$3,000 death benefit to terminated vested participants who die before retirement, that benefit would be non-vested in accordance with §4006.4(d)(3).

RESPONSE

According to Schedule SB instructions, the entire funding target (vested and non-vested) for terminated vested participants is entered column 2 of line 3b. Although it would be more helpful from a premium audit perspective if non-vested benefits for terminated vested participants were included in the non-vested active line, we don't have the authority to ask people to disregard the Schedule SB instructions. The instructions should be followed as written.

We are looking into the feasibility of modifying Schedule SB in the future so that the funding target is broken down between vested and non-vested benefits as it was before PPA. In the meantime, we are aware that, in some cases, the Alternative Premium Funding Target reported on the Comprehensive Premium Filing will not be the same as the amount derived by subtracting the non-vested funding target for active participants from the total funding target.

QUESTION 27

Other: ERISA 4044 Retirement Assumptions: Extended XRA tables

Where on PBGC's website can I find the XRAs for participants with unreduced retirement ages below age 60 or above age 70 (i.e., the extended XRA tables)?

RESPONSE

PBGC recently added a section to the practitioner's page entitled "ERISA 4044 Retirement Assumptions"¹⁰. This page provides links to the "high, medium, and low" XRA tables for unreduced retirement ages from 40 to 80. In addition, this page also provides links to each year's retirement rate categories, which previously were accessible only by pulling up each year's amended regulation.

Please note - the format of the practitioner's home page has been modified slightly to accommodate for this new page. The XRA page described above can be found under a heading called "Mortality, Retirement and PV Max Guarantee".

¹⁰ <http://www.pbgc.gov/prac/mortality-retirement-and-pv-max-guarantee/erisa-section-4044-retirement-assumptions.html>