2014 Enrolled Actuaries Meeting

Questions to the PBGC

and Summary of Their Responses

Summary of Discussions between the Enrolled Actuaries Program Committee and Staff of the Pension Benefit Guaranty Corporation on February 4, 2014

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on February 4, 2014, 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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Susan L. Breen-Held, The Principal Financial Group©
Bruce A. Cadenhead, Mercer
Scott A. Hittner, October Three LLC
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Eric A. Keener, Aon Hewitt
Ellen L. Kleinstuber, The Savitz Organization
Jeffrey S. Litwin, Sibson Consulting, a Division of Segal
Marjorie R. Martin, Buck Consultants, A Xerox Company
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The following representatives of the Pension Benefit Guaranty Corporation took part in the discussions:

James J. Armbruster, Assistant Chief Counsel, Office of the Chief Counsel
Chris Bone, Director, Policy, Research and Analysis Department
Kenneth Cooper, Assistant General Counsel, Office of the General Counsel
David Gustafson, Chief Policy Actuary, Policy, Research and Analysis Department
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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: PBGC Coverage of Puerto Rico or Guam Plans

On April 19, 2013 PBGC withdrew two long-standing opinion letters regarding ERISA and PBGC coverage of defined benefit plans in Puerto Rico and Guam (Opinion Letters 77-172 and 85-19). PBGC stated that the letters were withdrawn because they no longer reflect PBGC's views. Opinion Letter 77-172 stated in part:

> The PBGC does not consider the requirement of Code §401(a) that the trust under the plan be "created or organized in the United States" to be a bar to Title IV coverage under §4021(a)(1) of the Act provided the plan has in practice otherwise met the tax qualification requirements of the Code…
>
> Section 4021(a)(2) provides for Title IV coverage of non-trusteed plans which are funded by annuity contracts where a plan meets, or the Secretary of the Treasury has determined that a plan meets, the requirements of §404(a)(2) of the Code. PBGC has determined that where a non-trusteed defined benefit annuity plan maintained by a Puerto Rican employer meets, or has been determined by the Secretary of the Treasury to meet, the requirements of Code §404(a)(2) and the plan is not a plan described in §4021(b) of the Act, it is subject to Title IV coverage.

a) What has changed about PBGC's view of whether or not coverage applies to these plans?

b) If PBGC has determined that a Puerto Rico or Guam plan is not covered, has PBGC refunded premiums? If so, for how many years?

RESPONSE

a) In general, PBGC will no longer determine that a plan is covered under Title IV of ERISA if:

   1) The plan's trust is created or organized outside of the United States, and

   2) No election under §1022(i)(2) has been made.

b) Yes. PBGC has refunded up to six years of premiums.

Copies of recent determination letters sent to sponsors of Puerto Rico Plans will soon be available on PBGC's website.

QUESTION 2

Premiums: Annuity Contracts

a) Irrevocable, non-participating annuity contracts are purchased to provide plan benefit payments for participants. The plan is not permitted to cancel or revise the contracts with the exception of minor changes due to data errors. Benefit payments under the contracts are made to the plan by the insurer and benefit distributions to participants are paid from the trust; however, the plan is under no legal obligation to use the insurance company payments made on account of an individual participant for that participant. In other words, the plan owns the payments and is not acting as an agent for the insurance company in making the payments.

   Are the plan participants whose benefits are insured by these annuity contracts considered plan participants for premium purposes?

b) Can PBGC provide general guidance on distinguishing between annuities that would remove plan participants from the flat rate premium and those that would not?

RESPONSE

a) Yes. Section 4006.6(a) and (b)(2)(i) of PBGC's premium rates regulation (29 CFR part 4006) says that "an individual is considered to be a participant in a plan on any date if the plan has benefit liabilities with respect to the individual on that date" and that "an individual is treated as no longer being a participant — . . . [i]n the case of a living individual whose accrued benefit is fully or partially vested, or a deceased individual whose accrued benefit was fully or partially vested at the time of death, after . . . [a]n insurer makes an irrevocable commitment to pay all benefit liabilities with respect to the individual."

   And §4001.2 of PBGC's terminology regulation (29 CFR part 4001) says that "[i]rrevocable commitment means an obligation by an insurer to pay benefits to a named participant or surviving beneficiary, if the obligation cannot be cancelled under the terms of the insurance contract (except for fraud or mistake) without the consent of the participant or beneficiary and is legally enforceable by the participant or beneficiary."

   The annuity contracts described in the question provide for payment of benefits not to participants and beneficiaries but to the plan, and are therefore not irrevocable commitments.

b) To remove a participant from the flat-rate premium participant count, an annuity contract must be an irrevocable commitment. Whether it is depends on its provisions, and the interpretation of those provisions is in general a matter of state law. Generally speaking, an annuity contract under which the plan's actions can affect what the participant gets is not an irrevocable commitment.

QUESTION 3

Standard Terminations: Purchased Annuities

Under §4041(b)(3), a plan sponsor is to purchase an annuity that provides for all benefit liabilities of the plan. Does this requirement mean that the annuity must include plan provisions for the suspension of benefits to participants between normal retirement age and age 70 ½ during qualified periods of re-employment after the plan termination?

RESPONSE

Generally, of course, the insurance contract must reflect the plan provisions. But, as a practical matter, PBGC would not be concerned if the contract did not provide for suspension of benefits upon reemployment, as that would not result in taking away any promised benefits (rather, it would provide for *greater* benefits than the terms of the plan provide). Perhaps the best solution would be to amend the plan before termination to remove the suspension provisions.

QUESTION 4

Standard Terminations: Termination with No Annuity Provider

An employer sponsors two defined benefit plans, Plan A and Plan B. Plan A, which is being terminated, covers only a small group of active and terminated vested participants. Plan A provides a benefit equal to the greater of a cash balance benefit and a traditional benefit. The entire benefit may be taken as a lump sum.

Upon termination, most participants elect to take the benefit as a lump sum, but ten participants do not. These participants retain the right to elect either an annuity or a lump sum on or after termination of employment. At the date of termination it is not possible to determine which formula will win for a given participant at a given age. Although the interest credit and annuity conversion bases are fixed for the cash balance formula benefit, the lump sum value of the traditional benefit varies with IRC §417(e) interest rates. In light of the difficulty in valuing this benefit, and the small number of participants to be covered, no insurers are willing to bid on this business, and the benefit cannot be secured through the purchase of traditional insurance products.

May the employer transfer these participants to Plan B, instead of an insurer?

RESPONSE

PBGC is not aware of any real life situations where an employer could not find a reputable insurance company to bid on the business. PBGC appreciates that the cost of purchasing a handful of annuities for participants not yet in pay status might be expensive, especially in situations like the one noted above. However, under current law transferring these participants to another employer provided plan is not an option. If the participants (and their spouses if they're married) do not consent to a lump sum, annuities must be purchased.

QUESTION #5

Standard Terminations: Post-Form 501 Identification of Missing Participants

As part of a standard plan termination, a plan sponsor properly searches for those participants who are considered missing prior to distributing assets. After the Form 501 and Schedule MP are filed, the plan sponsor further determines that some of the participants previously reported as receiving lump sums or irrevocable commitments are in fact missing.

a) If the plan administrator completes a diligent search for these participants and cannot find them, should the plan administrator provide an amended Form 501 and amended Schedule MP?

b) If all participants originally identified as missing were treated the same way (i.e., either irrevocable commitments were purchased for all of them or they were all turned over to PBGC along with proper payment), must these newly identified missing participants be treated the same way as the participants originally identified as missing?

RESPONSE

a) Timing may make it difficult or impossible to do a diligent search and thus may affect how the participants are dealt with.

Under §4050.4(b)(1) of PBGC's missing participants regulation (29 CFR part 4050), one requirement of a diligent search is that it be "carried on in such a manner that if the individual is found, distribution to the individual can reasonably be expected to be made on or before the deemed distribution date." Under §4050.2, the deemed distribution date may be no later than the last day of the period in which distribution may be made under PBGC's regulation on Termination of Single-Employer Plans (29 CFR part 4041). If the Form 501 and Schedule MP have been filed early enough to leave time for a diligent search and distribution by the deemed distribution date, the normal procedures under the missing participants regulation apply, and the plan administrator must file amended forms.

If, as is more likely, there is not enough time to timely complete a diligent search and distribution (as described above) when the plan administrator discovers that there are participants who have not received distributions and now cannot be located, §4050.12(f) may apply. That section provides that "[i]f the PBGC determines that one or more persons should receive benefits (which may be in addition to benefits already provided) in order for a plan termination to be valid (e.g., upon audit of the termination), and one or more of such individuals cannot be located, the PBGC will determine, in a manner consistent with the purposes of [the missing participants regulation] and section 4050 of ERISA, how the provisions of [the missing participants regulation] apply to such benefits." The plan administrator should consult with PBGC to learn how to proceed. In general, PBGC would require a search that meets the requirements of §4050.4(b)(2) and .4(b)(3) and the filing of supplemental forms.

If the deemed distribution date is the last day of the period in which distribution may be made under §4041, the plan administrator could request an extension of that period under §4041.30; if it were granted there would be more time to complete a diligent search and distribution. But if the plan administrator chose an earlier date to be the deemed distribution date (in accordance with §4050.2), the deemed distribution date could not be changed.

b) No. ERISA §4050.3 requires distribution for each missing participant (not for all missing participants) by buying an irrevocable commitment from an insurer or paying a designated benefit to PBGC. This mirrors the structure of the statute. There is no requirement to use the same method for all missing participants or to treat any particular missing participant the same way as any other particular missing participant.

QUESTION #6

Distress or Involuntary Terminations: Meaning of "Will be Unable to Pay Benefits when Due" Involuntary Termination Criterion

One of the criteria for initiation of an involuntary termination is that the plan "will be unable to pay benefits when due". Under what circumstances does PBGC believe this criterion is met? What if the plan has assets sufficient to pay benefits for at least the next several years and may, depending on future experience (e.g., interest rates, investment returns) be able to pay all benefits when due, but the ability of the employer to satisfy future minimum funding obligations is at best uncertain?

RESPONSE

Historically, the "will be unable to pay benefits when due" involuntary termination criterion of §4042(a)(2) has meant one of two things: either the plan is underfunded on a termination basis and is unlikely to be able to pay benefits at some point in the future, taking into consideration the plan sponsor's ability to fund the plan; or the plan is or will be abandoned and thus there will be no one to administer the plan.

PBGC evaluates each case based on its facts and circumstances. Two examples of cases in which PBGC initiated termination based on the "will be unable to pay benefits when due" criterion are: (1) the plan sponsor sold the bulk of its operations and the limited business that remained was unable to fund the plan, and (2) the plan sponsor was liquidating and there was a small window of time during which the plan would continue to be administered.

More than half of PBGC's annual terminations involve companies that have gone out of business and liquidated outside of bankruptcy. In such cases, distress terminations are less common than PBGC-initiated terminations. A recurring problem for PBGC is not finding out about such cases until after the liquidation has been completed, and then having difficulty locating records and effectuating a smooth transition to PBGC trusteeship.

PBGC encourages all employers who are under financial pressure that may affect their ability to fund their pension plans to contact PBGC as early as possible before the situation deteriorates and excise taxes or liens are triggered. PBGC will work with the employer to find solutions; for example, PBGC may be able to assist with the funding waiver process. PBGC welcomes suggestions as to further outreach to let its customers know of the importance of contacting PBGC early.

QUESTION #7

Distress or Involuntary Terminations: Treatment of "Shell Entities" in Distress Terminations

To qualify for a distress termination of a plan, each member of the controlled group maintaining the plan must qualify for at least one of the four distress tests. Under what circumstances will PBGC approve a distress termination where there is a controlled group member that does not qualify for any of the distress tests, but is essentially a shell (i.e., it has no or only minimal assets, no employees, and no ongoing business), and thus clearly cannot assist in maintaining an ongoing plan? Assume that each of the other controlled group members clearly qualifies for at least one of the four distress tests.

RESPONSE

PBGC usually finds that shell entities have a de minimis value. Thus, PBGC typically disregards shell corporations that are part of a plan sponsor controlled group for purposes of determining whether a plan meets the distress termination criteria. PBGC makes such findings on a case-by-case basis.

QUESTION #8

Distress or Involuntary Terminations: Determination of Unpaid Contributions for Purposes of Schedule EA-D

In connection with an application for a distress termination of a plan, must the plan's enrolled actuary determine and report the estimated total amount of contributions owed to the plan but unpaid as of the proposed termination date?

RESPONSE

In the past, that amount was reported on Schedule EA-D of PBGC Form 601. However, PBGC recently revised Form 601 to, among other things, eliminate that requirement.

The proposed changes were approved by OMB on February 7, 2014. PBGC is in the process of creating a version of the new form in an adobe fillable format and expects to post such form in the near future, very likely before the 2014 Enrolled Actuaries Meeting.

If you need to complete a Form 601 before that happens, it is acceptable to use the old form which is still available on PBGC's website. Alternatively, if you would prefer to use the new form to avoid the calculation described above, PBGC will provide, upon request, a non-fillable pdf version of the new form.

QUESTION #9

Other Reporting: FTAP for a Terminating Plan

A plan is undergoing a standard termination with a December 31, 2013 proposed termination date. Because valuations are not required for funding or benefit restriction purposes for plan years that begin after the plan termination date, and the standard termination is expected to be successfully completed, no January 1, 2014 valuation has been performed. Assets have not yet been distributed by April 2015 when a §4010 filing for the 2014 plan year might be due.

How should the plan sponsor determine whether this plan has a 2014 FTAP below 80%, or whether the plan has a §4010 funding shortfall below $15 million?

RESPONSE

The §4010 regulation (29 CFR part 4010) does not provide a special rule for plans in this situation and requires that a valuation needs to be performed in order to determine if a filing is required. However, PBGC realizes that that this may not be practical. If you have a client with a plan in this situation, we suggest you contact PBGC at ERISA.4010@pbgc.gov to discuss waiving §4010 reporting requirements based on the prior year's FTAP and the status of the pending termination.

QUESTION #10

Other: Participant and Plan Sponsor Advocate

MAP-21 established a Participant and Plan Sponsor Advocate role within the PBGC to act as a liaison between PBGC and participants in plans trusteed by PBGC, and the sponsors of pension plans insured by PBGC. The following questions pertain to this new position.

a) What is the newly established position about?

b) Has this position been filled and, if so, what can you tell us about the person serving in this role?

c) Can you give some examples of the issues the Participant and Plan Sponsor Advocate has been dealing with since she joined PBGC?

RESPONSE

a) The Advocate supports participants in attaining their full rights in plans trusteed by PBGC and assists sponsors and participants in resolving disputes with the Corporation. To the extent possible, the Advocate will propose changes in administrative practices of the Corporation to mitigate problems and identify potential legislative changes that may be appropriate to mitigate problems. The Advocate also submits an Annual Report to the four Congressional Committees that have jurisdiction over PBGC.

b) Yes. The Board of Directors of the PBGC selected Constance Donovan as the Participant and Plan Sponsor Advocate on October 22, 2013, and Ms. Donovan joined PBGC soon after that on December 2, 2013, after winding up her duties as Pension Counsel to the Office of DC Pensions in the Department of the Treasury. Prior to that, Ms. Donovan had extensive experience in administering pension plans and was Counsel and Executive Director to three prominent public pension plans. Ms. Donovan also had 20 years of private sector experience with NCR Corporation and AT&T. You can contact her at her office at PBGC by email at: donovan.constance@pbgc.gov or by direct dial at 202-326-4000 x 4877.

c) The Advocate office was quickly engaged in a number of issues by participant and plan sponsor groups, and PBGC staff has also been assertive in bringing Ms. Donovan up to speed on the operations of the Corporation. So far, Connie has met and received feedback on a variety of issues such as premium filing penalties, §4062(e) cases, premium increases, concern over how PBGC values its liabilities, and missing participants and lost plan cases. Ms. Donovan has also met with outside stakeholders including the Pension Rights Center, AARP, CIEBA (the Committee on Investment of Employee Benefit Assets), the Chamber of Commerce, WISER (the Women's Institute for a Secure Retirement), ABC (the American Benefits Committee), the National Institute for Retirement Security, the ERISA Industry Committee, ASPPA, and EBRI. Connie will continue to meet with various external stakeholder groups, including Hill staff, and other PBGC departments, which will continue to provide invaluable insight and feedback to help shape the 2014 agenda for the Advocate office.