2019 Enrolled Actuaries Meeting

Questions to the PBGC

and Summary of Their Responses

INDEX

Summary of Discussions between the Enrolled Actuaries Program Committee
and Staff of the Pension Benefit Guaranty Corporation
on March 20, 2019

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on March 20, 2019, 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.

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

QUESTION #1

Premiums: Premium Funding Target Calculation for Mid-Year Spinoff

A new plan is created as a result of a mid-year spinoff from a calendar year plan. For funding purposes, a new valuation is not run as of the spinoff date for the new plan. Instead, the funding calculations for the new plan are determined by allocating the January 1 valuation results for the original plan among the two plans.

The original plan uses the alternative premium funding target to determine variable-rate premiums.

How is the premium funding target calculated for the spun-off plan?

RESPONSE

The UVB valuation date is the funding valuation date for the premium payment year – January 1, in this example. The allocation of assets and liabilities to the spun-off plan for these purposes should be consistent with the allocation of assets and liabilities for funding purposes.

If an election is made by the new plan to use the alternative premium funding target, the interest rates used are the same as those used to calculate the §430 funding target (disregarding interest rate stabilization rules). These are the same rates that were used to calculate the premium funding target for the original plan.

However, if the new plan does make such an election (i.e., if the standard premium funding target is used), the segment rates for the month prior to the mid-year spinoff date (the first day of the premium payment year) are used. These will generally differ from the rates that were used to calculate the premium funding target for the original plan.

QUESTION #2

Standard Terminations: Distributions in Anticipation of Plan Termination

When terminating a plan, are there any concerns with a plan purchasing annuities or paying lump sums either before or after the Notice of Intent to Terminate is issued?

RESPONSE

29 C.F.R § 4041.22 prohibits the payment of benefits through purchases of irrevocable commitments or (generally) in lump sum form after the issuance of a Notice of Intent to Terminate (NOIT) until the expiration of PBGC's 60-day review period. An exception is provided for distributions to participants who are separating from active employment (or those otherwise allowed by the IRC) that are consistent with prior plan practice and do not jeopardize plan sufficiency. Additionally, any distributions made in anticipation of plan termination, regardless of timing, must be in accordance with 4044 as required under 4041(b)(3)(A), which includes satisfaction of plan benefits through priority category 6. This includes both annuity purchases and lump sums. PBGC would look at the facts and circumstances of the case to determine if a distribution is made in anticipation of plan termination.

QUESTION #3

Standard Terminations: Lump Sum Window Prior to Plan Termination

29 C.F.R § 4041.22 prohibits the purchase of irrevocable commitments to provide plan benefits and the payment of benefits attributable to employer contributions, other than death benefits, in any form other than an annuity after the issuance of a Notice of Intent to Terminate (NOIT) until the expiration of PBGC's 60-day review period. An exception is provided for distributions to participants who are separating from active employment (or those otherwise allowed by the IRC) that are consistent with prior plan practice and do not jeopardize plan sufficiency.

Does this exception apply to benefits payable under a lump sum window (i.e., a plan amendment providing terminated vested participants a one-time opportunity to elect a lump sum of their accrued benefit) under which lump sums are scheduled to be paid after the NOIT is issued?

RESPONSE

PBGC would look at the facts and circumstances of the case to make that determination, but from the information provided, it is unlikely that the exception would apply.

QUESTION #4

Standard Terminations: PBGC Audit Policy

PBGC has previously indicated that all plans with more than 300 participants are audited following a standard termination. Random audits are performed for plans with fewer participants. In addition, PBGC audits those plans making distributions in satisfaction of plan liabilities before or without filing a standard termination notice.

Is this still the PBGC's policy?

RESPONSE - Yes.

QUESTION #5

Standard Terminations: Form 5500 After Distribution of Assets

Line 5c of the Schedule H/I of the Form 5500 asks, “If the plan is a defined benefit plan, is it covered under the PBGC insurance program?” If the answer is “yes”, the confirmation number from My PAA for the premium payment year must be entered.

In some situations, all assets have been distributed in satisfaction of benefit liabilities and no further PBGC flat-rate or variable-rate premiums are due. How should line 5c be answered in such situations?

RESPONSE

If the plan was covered by PBGC at any time during the plan year to which the Form 5500 relates, Line 5c of the Schedule H/I should be answered “Yes” and the My PAA confirmation number for that plan year reported. This is the case even if coverage has ceased and/or final premiums have been paid before the Form 5500 is due.

For example, if a calendar year plan distributes all assets in satisfaction of benefit liabilities during 2018, line 5c on the 2018 Schedule H/I should be answered “yes” and the My PAA confirmation number for the 2018 Comprehensive Premium Filing should be reported.

QUESTION #6

Standard Terminations: Missing Participants and Mandatory Cash-outs

Assume a defined benefit plan provides that:

- Benefits with present values of $5,000 or less are subject to mandatory cash-out.
- If distribution forms are not returned by a specified date, the plan will set up an automatic IRA, as permitted by IRC §401(a)(31).

The plan is terminating in 2019 and distribution forms are sent to all participants subject to the mandatory cash-out rule so that the plan will know whether to send a check or roll over the distribution to an IRA or other plan selected by the participant.

If a participant who is subject to mandatory cash-out in conjunction with the close out of the plan does not return the distribution form within the specified time period, may the plan set up an auto-IRA for the individual as they would have had the plan not terminated?

RESPONSE

No. The participant would be considered missing under ERISA §4050.102 because he didn't respond to a notice about the distribution of the mandatory lump sum. Thus, unless the obligation for providing the benefit is transferred to an insurance company, the cash-out amount (plus the administrative fee, if applicable) must be transferred to PBGC. In either case, the participant must be reported as missing in the Form MP-100 filing.

Practitioners are reminded that if the plan doesn't know with reasonable certainty that the participant lives at the address where the distribution form or check was sent (e.g., the form or check comes back to the plan as undeliverable), then the plan must have done a diligent search and not found the participant before transferring his benefit to PBGC.

QUESTION #7

Reportable Events: Date on Which Liquidation Reportable Event Occurs

Under PBGC regulations at 29 CFR §4043.30(a), a liquidation reportable event occurs for a plan in various circumstances, including when a member of the plan's controlled group "[i]s involved in any transaction to implement its complete liquidation."

What is the date on which a liquidation reportable event as just quoted occurs? Please consider this typical set of developments relating to a transaction:

- a marketing process to attempt to sell all of the entity's assets, with the intent throughout the process that the entity will thereafter liquidate;
- thereafter, negotiation with the entity that provided the highest and best bid;
- thereafter, signing of the asset sales contract;
- thereafter, closing of the asset sales contract;
- thereafter, the effective date of the asset sales contract;
- thereafter, the filing of a certificate of dissolution; and
- a date of dissolution listed on the certificate of dissolution that is later than its filing date?

RESPONSE

We understand the description of the liquidation event provided in the regulation presents some issues. We are giving it some thought. In the meantime, if you have a situation that may involve liquidation, please call us to discuss because we anticipate that many situations will be fairly fact specific.

QUESTION #8

Reportable Events: Waivers for Foreign Non-Parent Entities and for De Minimis 10% Segments

Under PBGC's reportable events regulations, both a "de minimis 10% segment" waiver and a "foreign non-parent entity" waiver apply to several reportable events. For two of those reportable events ("change in contributing sponsor" and "liquidation"), it may be necessary to determine the status of multiple members of the controlled group to determine the applicability of either or both of these waivers. For example, if multiple members of the plan's controlled group will cease to be members of the controlled group as a result of a "legally binding agreement," or if multiple members of the plan's controlled group are liquidating, the "de minimis 10% segment" waiver relates to *all* of those entities *in the aggregate*, and the "foreign non-parent entity" waiver is met only if *each* of those entities qualifies as a foreign non-parent entity.

Would PBGC treat reporting as waived where

- one or more, but not all, of the entities for which such a reportable event occurs qualify as foreign non-parent entities and

- all of the other entities for which the reportable event occurs constitute, in the aggregate, a "de minimis 10% segment"?

Assume that, in the case of a liquidation reportable event, none of the liquidating entities is a contributing sponsor of any PBGC-covered plan.

RESPONSE

No. As stated in the question above, under these circumstances, reporting would be waived only if either 1) each entity that ceases to be a member of the plan's controlled group or liquidates is a foreign non-parent entity or 2) all entities ceasing to be members of the plan's controlled group or liquidating in the aggregate constitute a de minimis 10% segment; partial satisfaction of each of the two waivers may not be combined to achieve availability of an automatic waiver of reporting.

QUESTION #9

Reportable Events: Controlled Group Financial Information

The Form 10 instructions provide that a filer, when subject to a requirement to provide financial information for the plan's controlled group, must submit, "for all controlled group members" (emphasis added), audited (or, if unavailable, unaudited) financial statements "for the most recent fiscal year" or (if neither audited nor unaudited financial statements are available) federal tax returns "for the most recent tax year." Where the financial statements or federal tax returns contain consolidated financial information, there is no explicit requirement to provide any breakdown information for particular controlled group members (in contrast to the 29 CFR §4010.9(b)(2) requirement for §4010 reports to provide revenues, operating income, and net assets for all non-exempt members of the controlled group that are included in consolidated financial statements).

a) Assume that audited or unaudited financial statements and federal tax returns **are not** available for a particular member of the plan's controlled group because their financial information is consolidated with the parent. Is there a need to provide any financial information (such as the breakdown information referenced above for §4010 reports) for that entity?

Another portion of the Form 10 instructions provides that a filer, when subject to a requirement to provide a description of a plan's controlled group structure, "may exclude de minimis 5% segments and foreign entities other than foreign parents." However, there is nothing in the Form 10 instructions that explicitly allows for the same exclusions when the filer is subject to a requirement to provide financial information for the plan's controlled group.

b) Assume that audited or unaudited financial statements or federal tax returns **are** available for such an excludible member of the controlled group. Is there a need to provide these financial statements or federal tax returns as part of the Form 10 filing to satisfy the requirement to submit controlled group financial information?

RESPONSE

a) No. Note, however, that PBGC may, following its review of the Form 10 filing, require the submission of additional financial information about particular controlled group members pursuant to its authority under 29 CFR §4043.3(d).

b) Yes. We need to know the full value of the controlled group so we can understand how the change in controlled group will impact the value. Not knowing names of de minimis entities is different than not being able to understand the full value of the controlled group. This has never come up before because most companies that have such de minimis segments prepare consolidated results and they are included in the financials provided.

QUESTION #10

ERISA §4010 Reporting: ERISA §4010 Filing Requirements after Acquisition

Companies A and B both have calendar fiscal years. Company A acquires all the assets of Company B via an asset purchase during 2019, but before the April 15th 4010 filing due date. As of the date of acquisition, Company A becomes the sponsor of the Company B pension plan, a calendar year plan with a 4010 funding percentage for the 2018 plan year below 80%. Company B ceases to exist after the sale. If not for the acquisition, Company B would have been required to submit an ERISA §4010 filing for the 2018 information year.

Prior to the acquisition:

- Companies A and B were not in the same Controlled Group.
- Neither Company A nor any members of its controlled group would have otherwise been required to file.

Is Company A required to submit a §4010 filing for the 2018 information year given Company A is now the plan sponsor of the pension plan?

RESPONSE

No. Company A is not required to submit a §4010 filing for the 2018 information year. However, if Company B was part of a controlled group at the end of 2018, and some other member of that controlled group is still in existence on April 15th, that member is required to submit the §4010 filing.

QUESTION #11

ERISA §4010 Reporting: Waivers of ERISA §4010 Filing Requirement Triggered by Acquisition

Company A and Company B which are not in the same controlled group have calendar year information years, and the plans they sponsor have calendar year plan years. Company A, which would otherwise not have to make an ERISA §4010 filing for an information year, acquires Company B during the information year, triggering an ERISA §4010 filing requirement for Company A and the members of its controlled group.

Does PBGC consider requests for filing waivers in such situations? If so, which of the following would be helpful in determining that a waiver is warranted:

a) Date of acquisition: After September 15th, so that it was not possible to avoid the filing by making contributions to the acquired plan(s)

b) Funding of Company B plans before the ERISA §4010 filing is due but too late to affect the FTAP triggering the filing

c) Relative size of pension plans for Company A and Company B

d) History of Company A funded levels being above the ERISA §4010 thresholds

e) Overall health of Company A/combined company compared to Company B

RESPONSE

We consider all waiver requests received. Our decision is based on the facts and circumstances presented. It would not be appropriate to suggest, in advance, which facts and circumstances would likely lead to a waiver being granted (or not being granted).

Waiver requests are due 15 days before the 4010 filing due date. The process involves simply sending an email to ERISA.4010@PBGC.gov summarizing the relevant facts and circumstances. Feel free to contact us by phone if you'd like to discuss a particular situation before submitting the request.

QUESTION #12

ERISA §4010 Reporting: Projection of Census Data for Purposes of Calculating Benefit Liabilities

PBGC regulation §4010.8 provides that plan census data used to calculate benefit liabilities must be determined as of the end of the plan year ending within the information year, or the first day of the following year. Where such "actual" data are not available, projected census data may be used.

For a calendar year plan and information year, projected census data is almost always used because actual data as of the end of the year is typically not available for the filing due just 105 days later. For plan years that end before the end of the information year, actual data may be available in time for the filing, but it may not be convenient to use such actual data.

Assuming a calendar information year, which, if any, of the following situations would require the use of actual, rather than projected, data for the 2019 §4010 filing?

a) Plan A's plan year ends September 30, 2018. October 1, 2018 data was received and preliminary funding valuation results have been calculated, but have not yet been reviewed as of the §4010 due date.

b) Plan A's plan year ends September 30, 2018. October 1, 2018 data was received, and the preliminary funding valuation results were calculated and reviewed but not certified as of the §4010 due date. Before completing the October 1, 2018 valuation, the actuary had already calculated benefit liabilities for §4010 purposes based on rolled forward data.

c) Plan B's plan year ends March 31, 2018. April 1, 2018 data has been received and processed and the actuary issued an AFTAP certification for the April 1, 2018 plan year before December 31, 2018. For this situation, would it matter whether, to manage workflow, the actuary had already calculated benefit liabilities for §4010 purposes based on rolled forward data before issuing the AFTAP certification?

RESPONSE

The actuary may use a reasonable approach to data.

QUESTION #13

ERISA §4044 Calculations: Calculation of Priority Category 3 Benefits for Participants Not in Pay Status Three Years before Valuation Date

ERISA §4044.13 provides for participants who were not yet in pay status three years before the valuation date, the benefits in priority category 3 are "those annuity benefits that could have been in pay status [then]." ERISA §4044.51 provides that in the case of a benefit not in pay status and where the participant has not made an election to commence, the benefit is assumed to commence at the later of the participant's XRA and the valuation date.

Assume that a plan has not been amended during the 5 years preceding the valuation date.

a) For benefits that have not commenced as of the valuation date, what is the appropriate early retirement factor to apply to the accrued benefit? The factor that would have applied three years ago or the factor at XRA?

b) For benefits that went into payment within the last three years, what are the appropriate early retirement and optional form conversion factors to apply to the accrued benefit? The factors that would have applied three years ago or the factors applicable at the annuity starting date?

RESPONSE

a) The factor that would have applied three years ago.

b) The factors that would have applied three years ago, but the PC3 benefit should not exceed the actual benefit being paid.

QUESTION #14

ERISA §4062(e): Deadline for Reporting §4062(e) Event

Under ERISA §4063(a), the plan administrator of a plan for which an ERISA §4062(e) event has occurred must notify PBGC of the §4062(e) event within a 60-day period. There is ambiguity as to whether the 60-day period begins to run on the date of the cessation of operations or, instead, on the later of the cessation date and the date on which the applicable headcount reduction threshold is crossed.

Does the 60-day period begin to run on the later of the cessation date and the date that the "15% of eligible employees" threshold is crossed?

RESPONSE

A "substantial cessation of operations" under ERISA §4062(e) requires both a permanent cessation of operations and a workforce reduction of more than 15% of eligible employees, therefore the 60-day period to report begins once both have occurred.

QUESTION #15

Other: Determining Whether IRC §430(k) Lien is Discontinued at End of Plan Year

Guidance in PBGC's "Staff Responses to Practitioner Questions" (available at www.pbgc.gov/prac/staff-responses-prac-questions) provides that "[t]he determination whether the $1M lien threshold [under IRC §430(k)] is crossed occurs only at the time a required contribution is due." Thus, for example, if the total of missed contributions, including interest, is $999,000 at the time the October 15, 2019 quarterly contribution is missed in the case of a calendar-year plan, the lien cannot arise (*e.g.*, based on any daily accrual of interest) before the next required contribution (*i.e.*, the January 15, 2020 quarterly contribution) is due and missed at least in part.

Under IRC §430(k)(4)(B), once the lien arises, it continues to exist until the last day of the first plan year in which the unpaid balance of the total of missed contributions, including interest, no longer exceeds $1 million. For this purpose, it is unclear if the determination whether the unpaid balance of the total of missed contributions, including interest, no longer exceeds $1 million is made on any date during the plan year or only at the time a required contribution is due.

For example, assume that

- the total of missed contributions, including interest, at the time the October 15, 2019 quarterly contribution is missed in the case of a calendar-year plan is $1,001,000 and that the lien thus arises on that date.

- a contribution of $100,000 is made to the plan on December 1, 2019, before the next required contribution (*i.e.*, the January 15, 2020 quarterly contribution) is due.

In such circumstances, does the lien cease to exist on December 31, 2019?

RESPONSE

In the example above, if the total of missed contributions, including interest, no longer exceeds $1 million on December 31, 2019 (the last day of the plan year), then under IRC §430(k)(4)(B), the lien will automatically cease to exist on January 1, 2020.