

2013 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 14, 2013**

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on February 14, 2013, with representatives of the Enrolled Actuaries Program Committee. Included also are summaries of the responses to those questions. The summary responses to the questions are intended to reflect as accurately as possible the statements made by the government representatives. However, those responses are merely the current views of the individuals and do not represent the positions of the Pension Benefit Guaranty Corporation or of any other governmental agency and cannot be relied upon by any person for any purpose. Moreover, PBGC has not in any way approved this booklet or reviewed it to determine whether the statements herein are accurate or complete.

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

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The following representatives of the Pension Benefit Guaranty Corporation took part in the discussions:

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

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QUESTION 1

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

Q&A 3 of the 2010 Blue Book and Q&A 5 of the 2012 Blue Book both asked about a situation in which a plan amendment providing for an ad-hoc retiree COLA takes effect during the current plan year (after the valuation date) and is reflected in the IRC §430 funding target for the current plan year (either because the plan sponsor made an IRC §412(d)(2) election to reflect it or because it was required to be reflected under the special rule of IRC §1.430(d)-1(d)(2)).

The questions relate to whether such amendment should be included in the premium funding target for the plan year in which the amendment takes effect. Under the scenario for the:

- 2010 Q&A, the amendment was adopted before the current plan year began.
- 2012 Q&A, the amendment was adopted during the current plan year.

PBGC staff answered the 2010 question by saying “If the amendment is reflected in the funding target for purposes of determining the minimum required contribution, then it is reflected in the premium funding target to the extent vested.” PBGC staff answered the 2012 scenario by saying that the later adoption date did not change the answer.

Does this suggest that any time a mid-year benefit increase is included in the funding target for the year in which it takes effect for purposes of determining the minimum required contribution, it should be considered vested for premium purposes?

RESPONSE

No. The earlier questions related to a mid-year ad-hoc retiree COLA and the answers did not explicitly address the issue of whether that COLA should be considered vested. The answers did, however, suggest that the COLA should be considered vested because the affected retirees would need do nothing more than survive until the effective date to receive the increase.

In the case of a mid-year amendment involving active participants, it is possible the participant may terminate from employment before the amendment takes effect (or in the case of the 2012 Q&A, before the amendment is even adopted). Although the premium regulation does not address these situations explicitly, it would be reasonable to treat the increase as not being vested for the current plan year if in order to receive the increase the participant must continue working until the effective date.

QUESTION 2

Premiums: Use of Plan Assets to Pay Premiums for Plan Year in Which Distress or Involuntary Termination is Initiated

Section 4007.12(b) of PBGC's regulations on payment of premiums (29 CFR Part 4007) provides that, for any plan year in which a plan administrator issues a notice of intent to terminate in a distress termination or PBGC initiates a termination proceeding under ERISA section 4042, and for each plan year thereafter, the obligation to pay PBGC premiums (and any interest or penalties thereon) for a single-employer plan is an obligation solely of the contributing sponsor and the members of its controlled group, if any; that is, the plan has no such obligation.

Where a plan pays premiums for a plan year at a time when no distress or involuntary termination has yet been initiated, but later such a termination is initiated during that plan year, how should the plan administrator and the controlled group of the plan sponsor address and resolve this conflict?

RESPONSE

If your client is in this situation, please contact PBGC. We will try to resolve the issue based on the facts and circumstances.

QUESTION 3

Standard Terminations: PBGC Treatment of Hybrid Plan Market Rate of Interest in Standard Termination Audits

Please explain how the PBGC is dealing with the hybrid plan market rate of interest on plan termination in the absence of final IRS and PBGC rules in the context of standard termination audits.

RESPONSE

Pending finalization of an IRS hybrid plan rule, PBGC is following its interim policy regarding this issue, which is available through FOIA and is consistent with the proposed IRS rule. PBGC's audits of standard terminations of hybrid plans are completed on a case-by-case basis. PBGC will not challenge any plan that follows the guidance set forth in the proposed IRS rule.

The same policy applies to distress and involuntary terminations. See Question 10.

QUESTION 4

Standard Terminations: Offering a Second Election to Current Retirees

In connection with a standard termination, some plan sponsors are interested in offering current retirees in pay status a second election with one of the optional forms being a lump sum. IRC Regulation §1.401(a)(9)-6 Q&A 13 specifically contemplates this approach. However, the notice of plan benefits required by §4041.24 only communicates the amount and form of the annuity for retirees in pay status.

Would it be acceptable to provide the information in §4041.24(c) plus the information for participants who have made lump sum elections in §4041.24(d)(4), and offer a second election to retirees as part of the standard termination process?

RESPONSE

A plan terminating in a standard termination may offer current retirees in pay status a second election with one of the optional forms being a lump sum to the extent permitted under the Code. However, PBGC has concerns about plans offering lump sum payment options to retirees who are receiving benefits in the form of an annuity. Any retiree who elects a lump sum will immediately lose the benefits of a lifetime income and will be responsible for taking care of their own investments and making sure the money lasts through retirement. That said, if a decision is made to offer current retirees in pay status a second election with one of the optional forms being a lump sum, the plan administrator may provide the §4041.24(c) information together with the §4041.24(d)(4) information provided the additional information meets the requirements of §4041.3(c)(4).

PBGC is considering whether to amend its regulation on termination of single-employer plans (part 4041) to require plan administrators to disclose to affected parties (participants and beneficiaries) the consequences of electing a lump sum upon termination (as a first election or subsequent election). If PBGC were to impose new disclosure requirements, it would strive to do so with minimal burden on plans (e.g., by providing model language).

QUESTION 5

Standard Terminations: New Definition of Majority Owner

PPA amended ERISA section 4022(b)(5) to change the limitations on guaranteed benefits for “substantial” owners. In doing so it substituted a new definition of “majority” owner. Such an owner is defined using a 60 month look-back - i.e. a person that had the requisite ownership in the preceding 60 months is considered a majority owner and subject to the phase-in.

Section 4041.21(b)(2) of PBGC’s regulations on Termination of Single-Employer Plans (29 CFR Part 4041) provides that a majority owner may waive a portion of his benefit to the extent needed to allow an underfunded plan to terminate in a standard termination. Regulation §4041.2 defines majority owner, and in doing so makes no mention of a look-back. Indeed, in the 2004 Blue book, Q5, the PBGC made it clear that a participant has to be a majority owner at the time of the waiver for the waiver to be valid.

Did the PPA change to ERISA section 4022(b)(5) change the definition of majority owner for purposes of a majority owner waiver on plan termination to now include a 60-month look-back?

RESPONSE

No. The preamble to the existing regulation explained that the majority owner definition in the regulation had been developed using the substantial owner definition and specifically did not incorporate the 60 month look-back. The changes in PPA were aimed at other purposes and create no compelling reason to modify the regulation to change the individuals who are permitted to waive benefits.

QUESTION 6

Distress or Involuntary Termination: PBGC Treatment of DC Account Balance Purchases of Annuities from DB Plans

In Rev. Rul. 2012-4, dealing with individuals using their DC account balances to purchase annuities from their employer's DB plans, IRS states that PBGC will address Title IV consequences. Pending development of that guidance, can you address some of the issues being considered? For example:

- a) The revenue ruling indicates that the rollover is treated as employee mandatory contributions for purposes of IRC §415. Does this mean that the amounts are in priority category 2?
- b) Are there issues relating to whether the amounts should be treated as pre-tax vs. post-tax money?
- c) In determining Title IV treatment, will PBGC take into account the administrative difficulty in determining what part of an annuity is derived from prior rolled over amounts to determine the split between priority categories particularly if a portion of the benefit obtained with rolled over assets reflects a subsidy?
- d) Can you address some of the administrative difficulties PBGC has seen in PBGC-trusted plans?

RESPONSE

PBGC is in the process of developing a proposed regulation that would address some, or all, of these questions. The process is fairly far along.

QUESTION 7

Distress or Involuntary Termination: Allocation of Combined PBGC Recoveries

In 2012 Blue Book Q&A 22, PBGC stated that its policy for allocating its recoveries among various claims and plans (“PBGC Operating Policy 8.2-1: Valuation and Allocation of Recoveries”) was “still under review.” Please provide an update as to the status of that review and as to whether PBGC is still following that policy pending issuance of a new or revised policy.

RESPONSE

PBGC’s Operating Policy 8.2-1 was revised on October 1, 2012. Among other things, the revision:

- Simplifies PBGC’s valuation and allocation methodology, by discounting PBGC’s recoveries to the plan’s termination date and allocating them to PBGC’s claims as of that date.
- Clarifies that PBGC interprets the PPA 2006 amendments to ERISA section 4062(c) to refer to the same liability as under the pre-PPA provision – i.e., liability for due and unpaid minimum required contributions.
- Clarifies that PBGC will treat post-termination contributions to a plan as recoveries on PBGC’s claim for unpaid contributions rather than as part of the plan assets.
- Clarifies PBGC’s treatment of termination premiums – including them in the valuation and allocation process when termination premiums are part of a global claims settlement and either (i) the sponsor is reorganizing in Chapter 11 or continuing in business under a distress test 3 or 4 termination, or (ii) the sponsor is liquidating outside of bankruptcy. In most other cases, termination premiums are excluded from the valuation and allocation process.

A copy of the revised policy may be obtained by submitting a FOIA request to PBGC’s Disclosure Office.

QUESTION 8

Distress or Involuntary Terminations: Treatment of §4062(c) Claim

When a plan terminates in a distress or involuntary termination, PBGC, in its role as statutory trustee under ERISA section 4042, will generally have a claim against the employer for due and unpaid minimum funding contributions (the “DUEC Claim”), as well as a claim against the employer for certain shortfall amortization charges and installments (and, where applicable, for certain waiver amortization charges and installments) under section 4062(c) (the “§4062(c) Claim”).

- a) The amounts of the DUEC Claim and §4062(c) Claim may overlap with one another and, if PBGC determines its claim against the employer for unfunded benefit liabilities under §4062(b) (the “UBL Claim”) without making any adjustment relating to either of these claims, there will be overlap between each of these claims and the UBL Claim. When PBGC finalizes the amounts of its DUEC Claim, §4062(c) Claim, and UBL Claim (e.g., for purposes of making benefit determinations), how does PBGC make adjustments for any such overlap?
- b) ERISA section §4044(f) provides generally for the use of an historical recovery ratio, in lieu of use of the recovery ratio in a particular case, to determine the value of PBGC’s recovery on its §4062(c) Claim that is allocable as a plan asset under ERISA section 4044 for purposes of determining the amount of benefits payable by PBGC. Does PBGC use this or any other historical recovery ratio to determine the value of PBGC’s recovery on its DUEC Claim for any purpose, or is PBGC continuing, as it did in the pre-PPA context, to determine the value of its recovery on its DUEC Claim for all purposes based solely on its experience in the particular case in which it had that claim?

RESPONSE

- a) As explained in our answer to Question 7, PBGC interprets the PPA 2006 amendments to refer to the same liability as under the pre-PPA provision – i.e., liability for due and unpaid minimum required contributions. Under this interpretation, there is no duplication between the DUEC Claim and the §4062(c) Claim; they are one and the same. PBGC has ceased filing these as separate claims and is now filing only the one claim.

As it has always done, PBGC reduces its UBL claim by the amount it receives (or expects to receive) on its DUEC claim. The valuation and allocation policy described in the answer to Question 7 describes how PBGC makes this adjustment.

- b) Yes, as provided under ERISA section 4044(f), for “small” plans PBGC uses a historical recovery ratio to determine the value of its claim under section 4062(c) for purposes of determining the amount of benefits payable by PBGC. A “small” plan for this purpose is one in which the value of the plan’s unfunded nonguaranteed benefits is \$20 million or less. PBGC staff refer to this ratio as the Small Plan DUEC Recovery Ratio, or SPDRR. For “large” plans (those with unfunded nonguaranteed benefits over \$20 million), PBGC determines benefits based on its actual recoveries for that plan.

QUESTION 9

Distress or Involuntary Terminations: Guaranteed Benefit for High 25 HCE

Assume one of the 25 highest paid HCEs elects a lump sum, but the distribution is restricted in accordance with Treasury Reg. §1.401(a)(4)-5(b). Consistent with the arrangement described in Rev. Rul. 92-76, the lump sum is rolled into an individual retirement account, which is covered by an escrow agreement. The escrow agreement includes a restriction schedule that reduces the restricted amount in the account every month, for a specified period of time, in an amount equal to the straight life annuity amount (adjusted for interest). The participant may withdraw any amount in the account that is in excess of 125% of the restricted amount.

- a) If the plan terminates before the full amount of the lump-sum distribution has become unrestricted, will PBGC require return of the restricted amount and how will PBGC determine the participant's benefit?
- b) Will PBGC use whatever interest-rate method was being used under the plan, or is there some restriction on the interest credit provided on the unpaid balance?

RESPONSE

- a) Yes, PBGC will demand repayment of the restricted amount, according to the terms of the escrow agreement. The restricted amount is considered part of plan assets for purposes of the ERISA section 4044 allocation. Once the restricted amount has been paid to PBGC, the benefit is treated as a term-certain benefit. PBGC will make monthly payments equal to the amount that becomes unrestricted each month under the restriction schedule, subject to PBGC's guarantee limits and the 4044 allocation rules, for the period remaining under the restriction schedule.
- b) PBGC will generally use the interest rate method that was being used under the plan when the payment was made.

QUESTION 10

Distress or Involuntary Terminations: PBGC Treatment of Hybrid Plan Market Rate of Interest in Trusteed Plans

Please explain how the PBGC is dealing with the hybrid plan market rate of interest on plan termination in the absence of final IRS and PBGC rules when PBGC trustees a plan.

RESPONSE

Pending finalization of an IRS hybrid plan rule, PBGC is following its interim policy regarding this issue, which is available through FOIA and is consistent with the proposed IRS rule. PBGC's audits of standard terminations of hybrid plans are completed on a case-by-case basis. PBGC will not challenge any plan that follows the guidance set forth in the proposed IRS rule.

The same policy applies to audits of standard terminations. See Question 3.

QUESTION 11

Reporting: ERISA Section 4010 Reporting: Compliance Regarding Reporting Triggers

PBGC announced, in its Plan for Regulatory Review¹ that it “is considering waiving reporting for plans that must file 4010 information solely on the basis of either (i) a statutory lien resulting from missed required contributions of over one million dollars or (ii) outstanding funding waivers exceeding the same amount.” Has PBGC made, or is it still considering, any changes in its approach to enforcing compliance with the two above-noted reporting triggers?

RESPONSE

ERISA section 4010 requires that PBGC submit to Congress a report summarizing, in the aggregate, the information received in 4010 filings. In order to provide as full information as possible, PBGC is continuing to enforce these statutory reporting triggers. At this time, changing the approach to enforcing compliance with these reporting triggers is not a top priority. PBGC has, however, recommended that Congress consider modifying the statute in ways that would reduce burden more significantly. Specifically, the Recommendations section of PBGC’s Summary 4010 Report² to Congress states:

“In theory, the 4010 data greatly enhance PBGC’s ability to identify and monitor potential risks to the pension insurance system, to focus PBGC resources on situations that pose the greatest risks to the system, to assert appropriate claims in bankruptcy against members of a controlled group of the plan sponsor of a terminated plan, and to prepare PBGC’s financial statements.

However, in practice, the 4010 reporting criteria fail to properly target plans, resulting in both over- and under-inclusiveness. Companies whose financial soundness is widely recognized are forced to file 4010 reports while companies that are on the verge of bankruptcy (or even, in bankruptcy) are exempt from reporting simply because their plans were over 80% funded. In fact, in the past few years, PBGC incurred more than \$2 billion in total claims from companies that were not required to submit 4010 information.

It is clear that the funding percentage is a poor predictor of termination risk. PBGC has found the risk of termination of a plan depends most significantly on the plan sponsor’s financial strength, not on its current funding level. Congress could, by better targeting of reporting requirements, both take a substantial and unnecessary reporting burden off companies and help PBGC do its job better.

Therefore, PBGC recommends Congress create reporting criteria based on the sponsor’s financial soundness using risk measurement tools already widely-employed in business, such as credit scores, rather than relying solely on the plan’s funding percentage.

The Recommendations section of that report also includes a suggestion to simplify the reporting process:

“PBGC also recommends eliminating the requirement to report the funding target of the plan determined as if the plan has been in at-risk status for at least 5 plan years (ERISA Section 4010(d)(1)(B)). PBGC does not use this information because termination liability, which is also reported ... is the relevant amount. It is burdensome and costly for companies to calculate the 4010(d)(1)(B) amount and that amount is not used for any purpose other than reporting under ERISA Section 4010.”

¹ <http://www.pbgc.gov/documents/plan-for-regulatory-review.pdf>

² <http://www.pbgc.gov/documents/PBGC-4010-report-harkin.pdf>

QUESTION 12

Reporting: Form 200 Reporting Requirement Created by Mandatory Funding Balance Reduction

In 2010 Blue Book Q&A 19, PBGC stated that it would consider a request to waive penalties for late reporting of a Form 200 where there was a mandatory reduction of a carryover or prefunding balance (that is, a “deemed election”) that retroactively created a late quarterly contribution by rendering invalid a prior election to apply a funding balance against the quarterly required contribution and thus retroactively created a “missed” quarterly contribution.

As a follow-up to 2010 Blue Book Q&A 19, to reduce burdens on employers, would PBGC be willing to consider granting an automatic penalty waiver, instead of requiring submission of a formal request for a penalty waiver, in the circumstances described in Q&A 19, at least where the plan meets a specified funding threshold?

RESPONSE

PBGC has no plans to provide for an automatic penalty waiver at this time. If you have a client in this situation, we suggest you contact us to discuss the specific facts and circumstances.

QUESTION 13

ERISA Section 4062(e): Enforcement Pilot Program (Creditworthiness Threshold)

In the “4062(e) Enforcement Pilot Program” that PBGC announced on November 2, 2012, PBGC stated that: (1) it will “generally” not enforce downsizing liability under section 4062(e) against “financially sound” or “creditworthy” companies; (2) in evaluating creditworthiness, PBGC “will use the standards already used by businesses throughout the world: common financial measures of financial soundness such as credit ratings, credit scores, indebtedness, liquidity, and profitability”; and (3) where a company is “financially sound” or “creditworthy”, PBGC will take no action to enforce section 4062(e) liability, provided that there are no “other indicators of financial weakness” or “other risks”.

- a) What is the level of creditworthiness that will be needed to qualify for this relief? In particular, will the relief apply, in general, where the company involved, based on “the standards already used by businesses throughout the world”, is investment grade rather than below investment grade, or is the general threshold higher or lower than that?
- b) What criteria would be used to determine whether there are “other indicators of financial weakness” or “other risks” that would override a determination of financial soundness or creditworthiness?
- c) The announcement does not explicitly address controlled group liability. In particular, it states that PBGC is modifying its enforcement program under which it has previously “enforced all 4062(e) cases without regard to . . . the financial health of the company sponsor”, and refers throughout, under its new approach, to the creditworthiness or financial soundness of “a company.”

Will PBGC be taking into account the creditworthiness or financial soundness not just of the sponsor, but also of all entities within the sponsor’s controlled group?

RESPONSE

For purposes of the pilot program, a company generally is financially sound if it has an investment grade credit rating of its unsecured debt, or an equivalent credit score and no significant secured debt. However, a company is not financially sound if it presents signs of financial weakness, such as existing or imminent transactions or changes in business fundamentals that could affect credit ratings, lack of ongoing operations, or an insignificant U.S. presence. Because liability under section 4062(e) is joint and several, PBGC will typically review the financial soundness of the entire controlled group.

QUESTION 14

ERISA Section 4062(e): Enforcement Pilot Program (Small Plan Threshold)

In the “4062(e) Enforcement Pilot Program” that PBGC announced on November 2, 2012, PBGC stated that it will “generally” not enforce downsizing liability under Section 4062(e) in small plan situations based on a 100-participant threshold.

- a) Does the relief apply where the participant count is 100?
- b) Will PBGC be aggregating all plans maintained by a company, or by the entire controlled group, in determining whether the small plan relief applies and, if so, under what aggregation rules?
- c) What definition of “participant” will PBGC be using in determining whether the small plan relief applies?
- d) As of what date(s) will participants be counted in determining whether the small plan relief applies?

RESPONSE

- a) No. The relief applies only to plans with fewer than 100 participants.
- b) No. Plans are not aggregated for this purpose.
- c) The definition of participant used for determining the flat-rate premium is used for this purpose.
- d) For this purpose, PBGC uses the participant count reported on the comprehensive premium filing most recently submitted prior to the date the cessation of operations giving rise to the 4062(e) event began.

QUESTION 15

ERISA Section 4062(e): Enforcement Pilot Program (Pending or Settled Cases)

In the “4062(e) Enforcement Pilot Program” that PBGC announced on November 2, 2012, PBGC stated that it will “generally” not enforce downsizing liability under section 4062(e) against “financially sound” or “creditworthy” companies, or in small plan situations based on a 100-participant threshold.

- a) Does the pilot program apply to pending cases?
- b) Will PBGC release the employer from its settlement obligations if a settlement of section 4062(e) liabilities has been reached between the employer and PBGC, and the employer has future obligations under the agreement (for example, making contributions in addition to the minimum required contribution), but would qualify for relief under the new policy?

RESPONSE

- a) Yes, the pilot program applies to pending cases.
- b) PBGC will not release a financially sound employer from its obligations under a settlement agreement. Rather, PBGC will offer to suspend enforcement of future obligations under the agreement on the condition that the obligations will be reinstated if the employer ceases to be financially sound. However, PBGC will release an employer from its obligations under a settlement agreement with respect to a plan that would qualify for relief under the pilot program because it has fewer than 100 participants. See question 14.

QUESTION 16

ERISA Section 4062(e): Liable Parties and Liability Period

ERISA section 4062(e) provides for a liability that may be assessed against the employer (that is, the entire controlled group maintaining the affected plan), with the liability serving to protect the plan if it terminates in a distress or involuntary termination within a specified five-year period. When does the five-year period start—the date the cessation of operations occurs, the date the resulting headcount reduction first exceeds 20 percent, or the later of those two dates?

RESPONSE

Our experience has been that the reduction in active participants has exceeded 20 percent before or at about the same time as the cessation date, and PBGC's historical practice – predating the 2010 proposal – has been to treat the cessation date as the start of the five-year liability period.

QUESTION 17

Multiemployer Plans: Mass Withdrawal

ERISA section 4219(c)(1)(B) provides for a cap on the withdrawal liability assessment to a withdrawn employer by limiting the payment schedule to only the first 20 annual payments. Upon mass withdrawal, special rules apply with respect to determining withdrawal liability, including a redetermination and reallocation of withdrawal liability. Among these rules, §4219.12(b) provides that certain employers may lose the benefit of the 20-year cap on withdrawal liability payments.

In PBGC Opinion Letter 94-3, it is noted that which employers lose the 20-year cap protection varies depending upon the circumstances under which the mass withdrawal takes place.

- a) If the mass withdrawal occurs by the withdrawal of substantially all employers pursuant to an agreement or arrangement to withdraw, only those employers withdrawing pursuant to the agreement or arrangement lose the benefit of any reduction in their initial withdrawal liability assessment as a result of the 20-year cap limitation and are subject to the full allocation (or reallocation) of the plan's unfunded vested benefits.
- b) If the mass withdrawal occurs by the withdrawal of every employer from the plan, all employers withdrawing from the plan that terminates by the withdrawal of every employer lose the benefit of any reduction due to the 20-year cap limitation, regardless of when the employer withdraws.

For (b), does the elimination of the 20-year cap limitation apply only with respect to the employers who withdrew after the beginning of the second full plan year preceding the date the plan terminates by the withdrawal of the last employer, or does the mass withdrawal serve to eliminate the 20-year cap limitation with respect to all employers, including those who may have withdrawn prior to the second full plan year preceding the withdrawal of the last employer (including employers who have paid off the full 20-years of payments under the initial withdrawal assessment)?

RESPONSE

The Agency's opinion has not changed since Op Ltr. 94-3. In Op. Ltr. 94-3, all employers lose the benefit of the 20-year cap limitation when the plan terminates by mass withdrawal. Further, PBGC regulations do not provide for a limitation on who loses the 20-year cap.

QUESTION 18

Multiemployer Plans: Developments of Interest

Please provide an update on situations under the multiemployer program that may be of interest to enrolled actuaries, such as withdrawal liability formulas or plan mergers that have been approved or disapproved, or significant litigation in which the PBGC has been involved.

RESPONSE

- PBGC has given approval of alternative withdrawal liability allocation methods in several cases; PBGC hopes that these approvals will encourage other plans to apply. The allocation methods involved splitting unfunded vested benefits between old and new employers for purposes of withdrawal liability. (The split is not for funding purposes; there is still only one funding standard account.)
- PBGC has also approved mergers.
- On or about September 11, 2012, Quality Automotive Services, LLC filed suit against PBGC seeking to reverse its July 31, 2012 determination that the company's permanent cessation of contributions to the Freight Drivers and Helpers Local Union No. 557 Pension Fund (a trucking industry plan) resulted in substantial damage to the contribution base of the fund. That litigation is currently pending in federal court in the District of Columbia.
- PBGC has also filed an amicus brief with the U.S. Court of Appeals for the First Circuit regarding the definition of "trade or business" under ERISA §4001(b)(1) in the currently pending Sun Capital Partners III, et. al. v. New England Teamsters & Trucking Industry Pension Fund case, Appellate Case No. 12-2312.

QUESTION 19

Multiemployer Plans: Question 13 of Form 5500 Schedule R

Question 13 of Schedule R to the Form 5500 asks for employers that made 5% or more of the contributions. Please confirm that in identifying those employers, withdrawal liability is ignored in both the numerator and the denominator.

RESPONSE

Because it pertains to the Form 5500, this issue involves other agencies. PBGC staff's view is that withdrawal liability payments are not intended to be included in item 13 of Form 5500. The involved agencies are aware of this issue and it is being considered in connection with a possible revision to the Form 5500, but no decisions have been made.

QUESTION 20

Multiemployer Plans: Guarantee Cutbacks

For multiemployer plans, PBGC guarantees 100% of the first \$11 of the monthly benefit rate, 75% of the next \$33 of the monthly benefit rate and 0% of the monthly benefit rate to the extent it is in excess of \$44. Assuming the plan is terminated and there are insufficient assets to pay more than the guaranteed amounts, how are benefits cut back to the multiemployer guarantee amounts in these various situations?

- a) Do the PBGC multiemployer guarantee cutbacks apply to the monthly amount of the benefit and not the present value?
- b) Is the guarantee applied against the single life normal retirement benefit or the form that is elected?
- c) Does the answer to (b) depend on whether the participant is in pay status in an optional form before the guarantee limit applies?
- d) If the participant is already collecting a Social Security Leveling Option when the cutback occurs, how does the cutback work (assuming the monthly guarantee is below the monthly single life annuity equivalent and below the monthly amount of payment before Social Security Age but greater than the monthly payment after Social Security Age)?
- e) What happens to a survivor benefit in the following cases:
 - i) If the participant dies after electing a QJSA but before the cutback?
 - ii) If the participant dies after electing a QJSA and after the cutback?
 - iii) If the survivor is receiving a QPSA before the cutback?
 - iv) If the survivor is receiving a QPSA as a result of a participant dying after the cutback and before electing a payment form?

RESPONSE

- a) Yes. As provided in ERISA section 4022A(c), the PBGC guarantee is based on the monthly benefit amount and not a present value.
- b) The guarantee is applied against the benefit form elected so long as that benefit is no greater than the monthly benefit which would be payable under the plan at normal retirement age in the form of a single life annuity.
- c) No. The PBGC guarantee would be calculated based on the benefit the participant is receiving based on the option elected, so long as this benefit is no greater than the monthly benefit which would be payable under the plan at normal retirement age in the form of a single life annuity.
- d) The PBGC guaranteed amount before Social Security Age is calculated based on the amount the participant is receiving from the plan at the time of insolvency or would have received from the plan but for insolvency, so long as this benefit is no greater than the monthly benefit which would be payable under the plan at normal retirement age in the form of a single life annuity. The PBGC guaranteed amount at and after Social Security Age is also calculated based on the amount the participant is receiving from the plan at the time of insolvency or would have received from the plan but for insolvency, so long as this benefit is no greater than the monthly benefit which would be payable under the plan at normal retirement age in the form of a single life annuity.

- e) Whether the participant dies before or after the plan becomes insolvent and benefits become subject to PBGC's guarantee has no effect on the guaranteed amount of survivor's QJSA. The PBGC guarantee amount is based on the QJSA benefit the survivor is receiving from the plan at the time of the insolvency or would have received from the plan but for the plan's insolvency.

The facts provided do not have sufficient information to fully answer the QPSA questions. A QPSA in a multiemployer plan is not guaranteed unless the participant dies prior to plan termination. But assuming the plan terminated before the participant's death, the QPSA is not guaranteed (but may be paid until plan insolvency if such payment is approved by PBGC under ERISA section 4041A(f)). Assuming the plan terminated after the participant's death, then the survivor's guarantee is calculated the same as above, based on the QPSA benefit the survivor is receiving before plan insolvency or would have received but for plan insolvency.

QUESTION 21

Other: Litigation Issues

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

RESPONSE

PBGC v. Bendix Commercial Vehicle Sys., 2012 WL 629928 (N.D. Ohio Feb. 24, 2012) – This was PBGC’s first lawsuit under ERISA section 4062(e), which imposes contingent liability when a company ceases operations at a facility, resulting in a separation from employment of more than 20 percent of employees who are participants in its pension plan. PBGC filed the administrative record supporting the agency’s determination of liability, and Bendix sought extra-record discovery. The court rejected all three bases for discovery that the company asserted, emphasizing that a presumption of regularity is accorded to an agency’s submission and certification of the administrative record.

Davis v. PBGC, 864 F. Supp. 2d 148 (2012), appeal docketed, No. 12-5274 (D.C. Cir. Aug. 30, 2012); previous decisions at 596 F. Supp. 2d 1 (D.D.C. 2008), aff’d 571 F.3d 1288 (D.C. Cir. 2009); No. 08-1064 (D.D.C. Mar. 17, 2009); 815 F. Supp. 2d 283 (2011) – A group of retired participants of a terminated pension plan sued PBGC, asserting that the agency erred in making benefit determinations and breached its fiduciary duty. The court ruled in PBGC’s favor on all counts regarding PBGC’s benefit determinations. The court held that the agency is entitled to broad deference in interpreting the statute and plan provisions, and rejected the participants’ argument that PBGC functions under a conflict of interest. The court also denied participants’ motion for a preliminary injunction prohibiting PBGC from recouping benefit overpayments from them while the suit was pending. The D.C. Circuit affirmed that denial, holding that PBGC’s interpretations of ERISA are entitled to deference. The participants’ appeal is pending in the D.C. Circuit. The participants’ fiduciary duty claim was dismissed in January 2013.

Deppenbrook v. PBGC, No. 11-600 (D.D.C. Mar. 12, 2012); previous decision at 2011 WL 1045765 (W.D. Pa. Mar. 17, 2011); – A group of participants challenged PBGC’s denial of shutdown benefits. The Pennsylvania district court transferred the case to the District of Columbia, the only proper venue under section 4003(f) of ERISA. The participants then sought to supplement the agency’s administrative record with declarations and other documents. The District of Columbia court denied the motion, holding that the documents were not considered by PBGC and could shed no light on the determination.

PBGC v. Asahi Tec Corp., 839 F. Supp. 2d 118 (D.D.C. 2012); No. 12-8007 (D.C. Cir. July 16, 2012) – In this case of first impression, the district court agreed with PBGC that it had jurisdiction over a foreign member of a plan sponsor’s controlled group for purposes of enforcing termination liability. A foreign auto-parts manufacturer bought a U.S. manufacturer. When the U.S. company sold its assets under Chapter 11, its pension plan was terminated. The court held that because ERISA bases liability on the fact of ownership alone, the foreign manufacturer’s deliberate and knowing decision to acquire a U.S. company and subject itself to ERISA is a sufficient minimum contact for specific jurisdiction in this context. The circuit court subsequently denied the foreign manufacturer’s petition for interlocutory appeal.

PBGC v. Town & Country Bank and Trust Co., 2012 WL 4753352 (W.D. Ky. Oct. 4, 2012) – A plan sponsor informed participants that their plan would perform a standard termination on a given date. Two days after that date, a Saturday, the sponsor amended the plan to change the assumptions for valuing lump sums, and later paid benefits using the amended assumptions, resulting in reduced lump sums in violation of ERISA regulations. After an audit, PBGC informed the plan sponsor of the violation and its need to pay additional benefits. The plan sponsor refused to comply, and PBGC sued to enforce its audit findings. The district court rejected the plan sponsor's arguments, holding that PBGC is entitled to deference on its interpretation of its regulations, and that the agency's determination was reasonable.

Stephens v. US Airways Group, Inc., No. 07-1264 (RMC) (D.D.C. Dec. 7, 2012) (denying class certification after remand); previous decisions at 555 F. Supp. 2d 112 (D.D.C. 2008) (initial decision); 696 F. Supp. 2d 84 (2010), aff'd in part, rev'd in part and remanded, 644 F.3d 437 (D.C. Cir. 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 from PBGC. On remand, the district court denied the participants' two motions for class certification because only one of the participants had exhausted the plan's administrative remedies. The court rejected the participants' arguments that a statutory violation was at issue, and that exhaustion was excused due to futility.

United Steel, paper and Forestry, Rubber, Manufacturing, Energy, Allied Indus. and Service Workers Int'l Union, AFL-CIO-CLC v. PBGC, 2013 WL 135265 (D.C. Cir. Jan. 11, 2013) – The D.C. Circuit affirmed the district court in upholding PBGC's determination that employees did not earn shutdown benefits before plan termination. The court confirmed that the arbitrary and capricious standard applies to PBGC's determination of whether a "permanent shutdown occurred, and emphasized that weighing the evidence is not the court's function when reviewing agency action. Accordingly, the court concluded that PBGC's record contained sufficient support for its determination, and thus should be upheld.

QUESTION 22

Other: “Risk Mitigation Program”

In [Technical Update 00-3 \(“PBGC’s Early Warning Program”\)](#), PBGC announced that it “contacts a company for further information about a transaction *only if* certain screening criteria are met (emphasis added). More recently, in its response to [2011 Blue Book](#) Q&A 19, PBGC stated that “[g]enerally, PBGC monitors employers with pension plans that in the aggregate have \$50M or more in underfunding or 5,000 or more participants,” and noted that “PBGC also monitors employers for other reasons as appropriate.”

- a) Does PBGC still have screening criteria that, as under [Technical Update 00-3](#), provide companies with certainty that, if the criteria are not met, they will not be included in PBGC’s Early Warning Program? If so, what are they?
- b) The screening criteria announced in [Technical Update 00-3](#) explicitly took into account bond ratings. Does PBGC currently take bond ratings into account in deciding which employers to monitor under its Early Warning Program? If so, how?
- c) How does PBGC calculate the “\$50M or more in underfunding” test it announced in its response to [2011 Blue Book](#) Q&A 19? In particular, is it based on numbers reported (for all plans maintained by the controlled group) for Variable Rate Premium (VRP) purposes, for funding purposes, for §4010 purposes, or for some other purpose?
- d) How does PBGC calculate the “5,000 or more participants” test it announced in its response to [2011 Blue Book](#) Q&A 19? In particular, is it based on the participant counts reported (for all plans maintained by the controlled group) for flat-rate premium purposes, for Form 5500 purposes, or for some other purpose?
- e) Does PBGC have any plans to modify the guidance provided in [Technical Update 00-3](#)?

RESPONSE

- a) No. The screening criteria in Technical Update 00-3, which incorporate pre-PPA funding concepts, are no longer applicable given the enactment of PPA. Typically, PBGC will look at employers with plans that in the aggregate have \$50 million or more in underfunding or 5,000 or more participants, but other companies may also be monitored, depending upon the facts and circumstances. Currently, there are approximately 1,000 employers being monitored in the Early Warning Program.
- b) PBGC may monitor an employer without regard to its credit rating. However, PBGC may take an employer’s bond rating into account in determining whether a situation involves a risk to PBGC.
- c) The calculation of \$50M or more in underfunding takes into account the aggregate underfunding of all plans maintained by the controlled group. The numbers for each plan are based on the most recent and best information available to PBGC. The underfunding may be taken directly from submitted filings (e.g., ERISA section 4010, premium filings or Schedule SB of Form 5500). Alternatively, it may be an estimate prepared by PBGC actuaries in which available assets and liability data is adjusted to reflect underfunding on a termination basis.

- d) The calculation of 5,000 or more participants is based on numbers reported for all plans maintained by the controlled group. The participant count is based on the most recent data available to PBGC and is derived from a variety of sources, including §4010 information, Form 5500 and PBGC premium filings and responses to PBGC inquiries to the plan sponsor.
- e) Yes. PBGC is currently working on updated guidance for the Early Warning Program. Issuing this guidance is a priority for our Corporate Finance and Restructuring Department.

QUESTION 23

Other: PBGC Administrative Decisions of Interest

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

RESPONSE

PBGC Appeals Board decisions are available on PBGC's Website at <http://vwww.pbgc.gov/practitioners/law-regulations-informalguidance/contentUpage15626.html>. There is a search feature that can be used to find decisions that address topics and issues that may be of interest. There are two decisions of note from 2012.

- Delphi Hourly Plan — The Board's decision addressed the "divorce pop-up" feature of the Delphi Hourly Plan's normal form of benefit for married participants. The Delphi Hourly Plan's normal form of benefit for a married participant included a Joint and 65% Survivor Annuity with a "popup" provision allowing the benefit to increase to the Straight Life Annuity amount upon the death of the spouse or following a divorce, if a domestic relations order so provides or a notarized written consent of the former spouse is obtained. PBGC determined that a cancellation of the surviving spouse's benefit in the event of a divorce would not be allowed after the Plan's termination date because it was a change in the form of benefit, not permitted under PBGC regulations. In a 14-page decision the Appeals Board upheld PBGC's determination. The full decision is available at: <http://www.pbgc.gov/Documents/apbletter/Decision--Delphi-Hourly-Rate-Employees-2012-11-14.pdf>
- Lukens Steel — In 1998, a Lukens Steel salaried employee was laid off and under the terms of his employment contract was entitled to a severance payment. To mitigate tax liabilities, a portion of the severance payment (\$400,000) was paid from the qualified Plan which was amended on June 1, 1998 to provide a new Cash Balance Benefit for the employee in addition to the benefit the Plan already provided. The June 1st amendment provided for distribution of the Cash Balance on July 1, 1998. The participant elected, with his spouse's consent, to receive his \$400K lump sum payment in lieu of an annuity that would have started at the same time, his actual retirement date ("ARD"). The Luken's Plan later merged into the Bethlehem Steel Plan. The rather complicated facts of this case are outlined in the Board's 13-page decision. The Appeals Board determined that PBGC had failed to fully account for the lump-sum payment when determining PBGC's maximum guaranteed benefit limit. Thus, the Board determined no benefit remained to be paid under PBGC's guarantee to this participant. The full decision can be found at <http://www.pbgc.gov/Documents/apbletter/Decision--Bethlehem-Steel-Corp-2012-12-18.pdf>