

**American Bar Association  
Joint Committee on Employee Benefits  
Q&A Session with PBGC  
May 7, 2014**

*The following questions and answers are based on informal discussions between private-sector representatives of the JCEB and PBGC staff members. The questions were submitted by ABA members in advance to the agency and the responses were given at a meeting of JCEB and government representatives. Some responses were given in writing by PBGC staff and others were given orally by PBGC staff. The responses reflect the unofficial, individual views of the government participants as of the time of the discussion, and do not necessarily represent the official position of PBGC. With the exception of the written responses PBGC staff provided, which are incorporated into this report, this report on the discussions was prepared by designated JCEB representatives, based on the notes and recollections of the JCEB representatives at the meeting (with informal review by PBGC staff), and it was understood that this report would be made available to the public.*

**PREMIUMS**

*[Scrivener's Note: See also Q&A 40(a)–(b) regarding informal guidance in the 2014 “Blue Book” on issues relating to PBGC premiums.]*

- 1. QUESTION:** In Q&A 1 of the 2014 Blue Book, PBGC was asked about the reasons for its withdrawal of two long-standing opinion letters (Op. Ltrs. 77-172 and 85-19) regarding PBGC coverage of plans in Puerto Rico and Guam. In its response, PBGC stated that it will no longer determine that a plan is covered under Title IV of ERISA if its trust is created or organized outside the U.S. and no 1022(i) election has been made, and further stated that it has refunded “up to six years of premiums.” Why is PBGC limiting its premium refunds to the past six years, given that the statute of limitations (ERISA Section 4003(f)(5)) allows actions to be brought against PBGC until the *later* of six years after the cause of action arose or three years (six years in the case of fraud or concealment) after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of the cause of action?

**PBGC WRITTEN RESPONSE:**

As a preliminary matter, it is important to note that only the requesting parties to a PBGC opinion letter or coverage determination are entitled to rely on the opinion letter/coverage determination. Furthermore, the existence of the now-withdrawn opinion letters did not preclude any plan from seeking a coverage determination or filing a legal action. In fact, many plans did request a coverage determination before opinion letters 77-172 and 86-19 were withdrawn on April 19, 2013. Thus, PBGC’s decision to withdraw those opinion letters has no impact on the statute of limitations applicable to premium refund requests made by non-parties.

Consistent with section 4003(f)(5) of ERISA, PBGC will refund up to six years of premiums where appropriate. PBGC does, however, consider the statute of limitations to be tolled as of

the date the request for a determination was made. For example, if a plan requested a determination in 2010 but PBGC did not make a determination until 2013, the six year statute of limitations would be measured from 2010 and PBGC would refund premiums dating back to 2004.

- 2. QUESTION:** Under PBGC’s premium rules and instructions for the 2014 premium payment year, the variable-rate premium for small plans is generally based on year-old data, subject to an opt-out rule under which the small plan can elect to base the variable-rate premium on current-year data. An election to opt out can be made without PBGC approval only if it is for the first premium payment year for which such an election can be made, and once such an election is made, it cannot be changed for a later premium payment year without PBGC approval. Please explain how these rules work in the context of mergers, spinoffs, and consolidations involving one or more plans that either did or did not make such an opt-out election for a prior premium payment year. In particular, under what circumstances is a plan treated as having the opt-out “history” of another plan (*e.g.*, where the plan is a “successor plan” to that “other” plan for purposes of Title IV)?

**PBGC DISCUSSION RESPONSE:**

A plan that is spun off from another plan is considered a new plan, so it has no history for premium payment purposes. In a merger context, if Plan A is being merged into Plan B, the relevant history for premium payment purposes will be that of Plan B. If Plan A and Plan B are consolidated, resulting in Plan C, Plan C is considered a new plan, and therefore has no history for premium payment purposes.

- 3. QUESTION:** Under PBGC’s forms and instructions for the 2014 premium payment year, plan administrators will be required, for the first time, to provide a breakdown of the total flat-rate participant count into three categories: (1) active participants (2) terminated vested participants, and (3) retirees and beneficiaries receiving payment. If a plan has benefit liabilities with respect to an individual who is no longer working in a position that falls within the plan’s coverage, but is employed in another position with a member of the contributing sponsor’s controlled group (whether that other position falls within the coverage of another plan maintained by the same controlled group or does not fall within the coverage of any plan), is that individual to be treated as being in the active category or in the terminated vested category?

**PBGC DISCUSSION RESPONSE:**

The plan’s actuarial report will have a breakdown into categories of the participant count; use that breakdown for premium payment purposes. There is no need to reinvent the wheel or to change the valuation systems used by the plan. The key is to be consistent with the actuarial reports, and to be consistent from year to year. Note, however, that the reportable events regulation provides specific rules that must be followed for purposes of a reportable event.

- 4. QUESTION:** Please describe the most common errors PBGC has been finding in its initial reviews of premium filings. Please also describe PBGC’s current audit program relating to PBGC premiums, including recent activity, flat-rate and variable-rate premium audit findings and results (along with a brief summary of the most common problems found), and plans for future audits.

## **PBGC WRITTEN RESPONSE:**

The most common errors PBGC has been finding in its initial reviews of premium filings are:

- The identifying information on electronic payments is not correct or missing (e.g., employer identification number, plan number, date plan year begins). In 2013, over 5,000 electronic payments failed automated processing because of missing or improperly formatted employer identification numbers.
- The variable rate premium is determined using the standard premium funding target when an election to use the alternative premium funding target is in effect.
- The discount rates reported to have been used to determine the premium funding target are not acceptable given other reported information (e.g., method, UVB valuation date, etc.).
- The reported participant count date is not correct given other reported information (e.g., date plan year begins).
- The reported UVB valuation date is not acceptable given other reported information (e.g., plan size or date plan year begins).
- Some plans failed to comply with the requirement to provide the plan effective date on every filing, or provided a date that was different from the plan effective date provided on the Form 5500 filing.

Plans that use PBGC's software or import filings into MyPAA will avoid some of these errors because of internal checks and warning messages.

With regard to premium compliance evaluation efforts, PBGC continues to perform reviews of premium filings. These reviews may be performed by PBGC employees, or by CPA or actuarial firms under contract to PBGC. With respect to variable rate premiums, evaluations may require access to actuarial valuation reports prepared by the plan actuary in order to fully evaluate variable rate premiums.

## **PBGC COVERAGE**

- 5. QUESTION:** In Q&A 1 of the 2014 Blue Book, PBGC was asked about the reasons for its withdrawal of two long-standing opinion letters (Op. Ltrs. 77-172 and 85-19) regarding PBGC coverage of plans in Puerto Rico and Guam. In its response, PBGC stated that it will no longer determine that a plan is covered under Title IV of ERISA if its trust is created or organized outside the U.S. and no 1022(i) election has been made. Does this change in PBGC's position on plan coverage apply to plans that have already undergone distress or involuntary terminations and have been trustee'd by PBGC? If so, what steps (if any) is PBGC taking either to recover benefits that have been paid based on a coverage determination or to refund amounts (for employer liability, DUEC, etc.) that PBGC has collected based on such a determination? If not, what are the rules governing the effective date of the change and the plans to which the change

will be applicable (*e.g.*, plans for which a distress or involuntary termination had not been initiated, or perhaps completed, as of the effective date)?

**PBGC WRITTEN RESPONSE:**

The decision to withdraw opinion letters 77-172 and 85-19 has no impact on coverage decisions made with respect to any previously trustee plan. Accordingly, PBGC will not seek to recoup benefits paid to participants nor will it stop paying benefits solely as a result of PBGC's decision to withdraw the opinion letters. In addition, PBGC will not refund any amounts collected for employer liability and similar claims, and will continue collection efforts with respect to any pending claims. To the extent that there are any pending distress or involuntary terminations affected by this coverage issue, PBGC will make decisions based on all of the relevant facts and circumstances.

6. **QUESTION:** How is PBGC dealing with church plan Title IV coverage issues, and related PBGC premium issues, in light of recent court decisions (*Rollins v. Dignity Health* and *Kaplan v. Saint Peter's Healthcare System*) finding that only a church can establish a church plan?

**PBGC WRITTEN RESPONSE:**

PBGC is closely monitoring the six lawsuits involving church plans. It is too early to know how the issues will ultimately be resolved. It has been PBGC's longstanding policy that, in order to be determined to be a church plan under Title IV, the plan must first obtain a letter ruling from the IRS determining that the plan meets the definition of a church plan under the Internal Revenue Code. PBGC will continue to follow this policy unless there is a final court order finding a plan not to be a church plan.

**UPDATE:**

Two new lawsuits challenging a plan's status as a church plan have been filed. In addition, there have been developments in two of the previously-filed cases. In *Overall v. Ascension* (E.D. Mich.), the court ruled that a plan can be a church plan even if it was not established by a church. In *Medina v. Catholic Health Initiatives* (D. Colorado), the magistrate judge recommended that the court find that the plan is not a church plan because it was not established by a church.

**STANDARD TERMINATIONS**

*[Scrivener's Note: See also Q&A 40(c)–(d) regarding informal guidance in the 2014 "Blue Book" on issues relating to standard terminations.]*

7. **QUESTION:** Assume that, in order to facilitate the standard termination of a plan the contributing sponsor of the plan properly executes a sufficiency commitment, and a majority owner properly elects an alternative treatment of his or her benefits. Under PBGC regulations (29 CFR § 4041.21(b)), a sufficiency commitment calls for the contributing sponsor to "contribute any additional sums necessary to enable the plan to satisfy plan benefits in accordance with § 4041.28," and an alternative treatment election calls for the majority owner to "forgo receipt of his or her plan benefits to the extent necessary to enable the plan to satisfy all

other plan benefits in accordance with § 4041.28.” Does PBGC agree that the contributing sponsor would be required to contribute additional sums only as needed to enable the plan to satisfy all plan benefits *other* than those of the majority owner who made the alternative treatment election, rather than *all* plan benefits, including those of that majority owner?

**JCEB PROPOSED RESPONSE:** Yes. It is clear in the circumstances described that the intent of the contributing sponsor and of the majority owner is that the sufficiency commitment is to make a contribution sufficient to enable the plan to satisfy all plan benefits other than those of the majority owner who made the alternative treatment election rather than all plan benefits including those of that majority owner, given that the majority owner alternative treatment election would otherwise be a nullity.

**PBGC WRITTEN RESPONSE:**

Yes. Benefits appropriately waived by majority owners are no longer included in the benefits necessary to be satisfied pursuant to a sufficiency commitment.

8. **QUESTION:** Under the rules governing majority owner “alternative treatment” elections, it is possible for there to be two or more majority owners who may make such an election (since majority owner status is based on 50% *or more* ownership and also as a result of the controlled group attribution rules). Assume that there are two or more majority owners, that each of them makes such an election, and that plan assets are sufficient to satisfy some, but not all, of the benefit liabilities of all of these majority owners. Will PBGC, upon audit of the standard termination, review how the shortfall was allocated among the majority owners and, if so, what are PBGC’s rules and guidelines in conducting such a review?

**PBGC WRITTEN RESPONSE:**

PBGC will follow the waiver and plan language to determine how the shortfall should be allocated among the majority owners. To the extent that no amounts or order of waivers has been specified, and all majority owners have waived their benefit to the extent necessary to fund all other benefits, PBGC will review the allocation to determine if the shortfall is allocated proportionate to each majority owner’s benefit under the plan.

9. **QUESTION:** PBGC recently revised its standard termination forms and instructions to provide (among other things) for submission, as part of the Form 500 filing, of a sample of the Notice of Intent to Terminate and samples of the Notices of Plan Benefits.

a) In the past, PBGC has not routinely received copies of these notices until the time of a PBGC audit. What does PBGC anticipate doing when it identifies that there are defects in one of these notices when it reviews them at the Form 500 review stage? In particular, under what circumstances does PBGC anticipate nullifying a termination or requiring the plan administrator to issue revised notices?

**PBGC WRITTEN RESPONSE:** As noted, PBGC’s forms have only recently been revised to require submission of these documents. (Plan administrators must use the new forms for terminations initiated on or after June 1, 2014.) What actions PBGC will take upon finding defects will depend upon the types and severity of defects that are found. When determining

whether a nullification is appropriate, PBGC will follow its regulations, which allow consideration of the plan participant's interests, as well as, the correction of good faith errors.

**b)** The revised instructions require submission of sample notices of plan benefits "issued to each category of participants (actives, retirees, separated vesteds, and separated non-vesteds)." PBGC regulations, however, do not provide separate rules governing the content of notices of plan benefits based on these four categories, but rather based on the following three categories: persons in pay status, persons not in pay status but with valid elections or de minimis benefits (whether actives, separated vested, or separated non-vesteds), and all other persons not in pay status (again, whether actives, separated vested, or separated non-vesteds). Should the submission made as part of the Form 500 follow the Form 500 instructions and provide a sample notice of plan benefits for each of the three categories noted in the instructions, without any need to provide a sample for each of the four categories noted in the regulations, or does PBGC intend that a sample be provided for each of the four regulatory categories?

**PBGC WRITTEN RESPONSE:** Notices of plan benefits should continue to include the information required by the regulations for each of the three types of individuals owed benefits. However, a copy of a notice of plan benefits provided to each category of participant (active, retiree, terminated vested, and non-vested) within the three types of persons stated in the PBGC regulations must be submitted to PBGC.

**10. QUESTION:** In the majority of cases, an employer will want to request and receive a favorable determination letter from IRS before assets are distributed as part of a standard termination. However, there are cases in which an employer decides, generally for timing reasons, either that it will not request a determination letter or that it will distribute assets before receiving the letter. Does PBGC take into account whether an IRS determination letter has been requested, or whether distribution occurred after (as opposed to before) receipt of the letter, in deciding which plans to select for a standard termination audit?

**PBGC WRITTEN RESPONSE:**

No.

**11. QUESTION:** PBGC provides a model notice of intent to terminate in its standard termination instructions booklet. Could PBGC provide models of the notice of plan benefits applicable to different categories of participants and beneficiaries?

**PBGC DISCUSSION RESPONSE:**

PBGC considered doing so, but concluded that there is too much diversity among plans and among participants for models of the notice of plan benefits to be helpful. In response to a follow-up question, PBGC said that it would consider any submissions regarding this issue, including suggestions, sample language, and examples.

**12. QUESTION:** Could PBGC provide a sample detailed standard termination timeline with milestones for the various steps that are ordinarily taken as part of the standard termination process?

## **PBGC DISCUSSION RESPONSE:**

PBGC stated that there is a timeline in the standard termination filing instructions. In response to a follow-up question, PBGC said that it would consider any suggestions regarding details that could be added (for example, a breakdown of specific tasks that must be completed, whether by the plan administrator, the plan actuary, the attorney, or other persons).

- 13. QUESTION:** Please provide an update regarding PBGC's recent experience in connection with standard termination audits.

## **PBGC WRITTEN RESPONSE:**

PBGC audited approximately 235 plan termination filings in fiscal year 2013, of which over 90% were plans with 300 or fewer participants. PBGC is continuing to audit the termination of all plans with more than 300 participants. Of the audited plans, PBGC required corrective action in approximately 30% of the cases. One-third of the errors involved incorrect accrued benefit calculations, a third were a result of inaccurate lump sum calculations, and the balance involved a variety of reasons including attempted election of alternative treatment ("waiver") of benefits by individuals who were not majority owners and missing election and spousal consent forms.

Accrued benefit calculation errors generally resulted from plans —

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

Mistakes in lump sum valuations resulted from plans —

- using the wrong date for determining the interest rate, mortality assumptions, or participant age;
- not using plan assumptions which require greater than minimum lump sums;
- using assumptions for an incorrect stability period and look back month in calculating 417(e) minimum lump sums; and most commonly
- using assumptions adopted in post-termination amendments, if they provide a lower benefit.

PBGC continues to see plans that either forfeit missing participants' benefits or roll them over to Individual Retirement Accounts instead of either purchasing irrevocable commitments (and submitting the information to PBGC) or transferring the designated

benefit to PBGC. Other errors noted include failure to include all benefit options in annuity contracts and deduction of processing fees from participants' benefits. Occasionally, in Cash Balance Plans we see plans not using the required five year average PPA rate for crediting interest after DOPT.

## **DISTRESS AND INVOLUNTARY TERMINATIONS**

- 14. QUESTION:** Please describe PBGC activity regarding potential or actual fiduciary breach claims involving plans that PBGC has become trustee of following the alleged fiduciary breach.

### **PBGC DISCUSSION RESPONSE:**

PBGC stated that recent fiduciary breach cases have involved: (1) transfers of plan assets to the plan sponsor in an effort to save the company; (2) improper distributions to company owners; and (3) improper investments involving insiders (*e.g.*, real estate investments with affiliates).

Between November 2011 and May 2014, PBGC closed 21 cases and collected \$7.9 million in recoveries involving benefit offsets or waivers and settlements.

A significant case is Embee Sunshade, in which the plan's fiduciaries failed to take appropriate action to collect minimum funding contributions. PBGC noted that Embee Sunshade was not a case in which the employer simply did not have the ability to pay the contributions; rather, the employer had diverted assets to an affiliate instead of paying the required contribution.

PBGC noted that it had inherited litigation by a plan against Morgan Stanley involving the purchase of mortgage-backed securities that had been held long after doing so was prudent; the Second Circuit affirmed the district court's dismissal, on procedural grounds, of the complaint (*Pension Benefit Guaranty Corp. ex rel. St. Vincent Catholic Medical Centers Retirement Plan v. Morgan Stanley Investment Management Inc.*, 712 F.3d 705 (2d Cir. 2013)). There was a strong dissent at the Second Circuit level; PBGC believes that the dissent, which reflects the substantive views of other circuits, reached the correct result. PBGC also stated that it had not pursued fiduciary breach cases on the sole ground that the investment had turned out poorly.

## **ERISA SECTIONS 4062(e), 4063, AND 4064**

### **UPDATE APPLICABLE TO Q&As 15 THROUGH 19:**

On July 8, 2014, PBGC announced a moratorium on the enforcement of 4062(e) cases until the end of 2014. During this period, PBGC will cease enforcement efforts on open and new cases. While companies should continue to report new 4062(e) events, PBGC will take no action on those events during the moratorium. PBGC will use the moratorium to consider further targeting its enforcement efforts and to work with plan sponsors to minimize effects on necessary business activities.

- 15. QUESTION:** ERISA section 4062(e) applies when an employer ceases operations at a facility and, as a result, more than 20 percent of employees covered by its defined benefit pension plan separate from employment. Please provide an update regarding PBGC's experience and

enforcement plans in connection with finding out about 4062(e) events and pursuing and resolving 4062(e) liability.

**PBGC WRITTEN RESPONSE:**

During FY 2013, PBGC negotiated 13 settlements valued at over \$150 million, protecting over 10,000 participants.

In December 2013, PBGC's Appeals Board affirmed the 4062(e) liability determinations in the Munksjo and Home Meridian International cases. PBGC settled the Munksjo case and is in discussions with Home Meridian regarding its liability. PBGC intends to pursue resolution of liability within a much shorter period than in the past. If PBGC and the company are not able to resolve the liability, PBGC will pursue all legal remedies.

**UPDATE:** PBGC has now settled the Home Meridian case.

**16. QUESTION:** On November 2, 2012, PBGC announced ([www.pbgc.gov/news/press/releases/pr12-32.html](http://www.pbgc.gov/news/press/releases/pr12-32.html)) that it was implementing a 4062(e) Enforcement Pilot Program under which it will generally not enforce the liability against "financially sound" or "creditworthy" companies, or in small plan situations based on a 100-participant threshold.

**a)** Please provide an update on PBGC's experience under this program, including a discussion of the numbers and kinds of cases in which companies have qualified for relief or have been denied relief.

**PBGC WRITTEN RESPONSE:** PBGC has published the staff guidelines for assessing creditworthiness under the pilot enforcement program on its website [http://pbgc.gov/Documents/4062\(e\)-enforcement-of-guidelines.pdf](http://pbgc.gov/Documents/4062(e)-enforcement-of-guidelines.pdf). As of the end of Fiscal Year 2013, PBGC refrained from enforcing pension liabilities totaling over \$1 billion, in over 75 cases against financially sound companies.

Has there been any change since the issuance of these guidelines in PBGC's approach to PBGC enforcement?

**PBGC WRITTEN RESPONSE:** No.

Does PBGC intend to formalize the guidelines through regulation?

**PBGC WRITTEN RESPONSE:** Not at this time.

**b)** An employer who is deciding whether or not to proceed with a transaction or other event that PBGC may conclude would constitute a 4062(e) event may base its decision on whether or not PBGC will forbear from enforcement of the resulting liability under the 4062(e) Enforcement Pilot Program. Even if the employer meets the specified criteria for financial soundness based on credit ratings (or based on credit scores and levels of secured debt), the employer has no assurance that PBGC will not then or later pursue the 4062(e) liability, given that PBGC's guidelines provide that: (1) PBGC may pursue the liability, notwithstanding that the employer meets the foregoing criteria, if in PBGC's judgment, the employer "presents signs of financial

weakness”; and (2) PBGC will forbear only “if and so long as” the employer is “financially sound,” which means that an employer who proceeds with the transaction or other event could face a resulting liability anytime during the following five-year period depending on future financial changes. Would PBGC be willing to consider providing certainty to a financially sound employer, in advance of a contemplated transaction or event, that it will not ever pursue 4062(e) liability based on that transaction or event?

**PBGC WRITTEN RESPONSE:** No. PBGC will continue to follow the guidelines as issued, including the suspension of forbearance if an employer no longer meets the financial-soundness criteria. PBGC continues to review its experience applying the guidelines.

c) Would PBGC consider granting an across-the-board waiver of reporting of a 4062(e) event where the affected plan is a small plan that qualifies for forbearance under the Pilot Program? Please note that this situation is distinguishable from the situation where the Pilot Program applies based on the employer being “financially sound,” since there is no need for PBGC to monitor future financial or other changes during the 5-year period during which 4062(e) could have meaning. If PBGC would not consider granting such an across-the-board waiver, please explain why PBGC needs to receive these reports regarding small plans.

**PBGC WRITTEN RESPONSE:** No. If an employer experiences an event under section 4062(e), section 4063(a) requires the employer to notify PBGC. Moreover, the notice requirement allows PBGC to assess the effect of the enforcement guidelines on small plans. We also note that the notice is minimal, requiring only that the employer notify PBGC of the cessation of operations and request a liability calculation.

**17. QUESTION:** Under statutory provisions (29 U.S.C. § 1368(b)) and PBGC regulatory provisions (29 CFR § 4068.4), an ERISA Section 4068 lien arises (in certain circumstances) only upon a plan’s termination date. Does PBGC take the position that a 4068 lien may apply to an asserted ERISA Section 4062(e) liability where the affected pension plan is ongoing and thus has no termination date?

**PBGC WRITTEN RESPONSE:** Yes.

If so:

a) How often and under what circumstances has PBGC taken such a position?

**PBGC WRITTEN RESPONSE:** PBGC makes every effort to work with plan sponsors to address section 4062(e) liability consensually, and the vast majority of these cases are concluded by agreement between the plan sponsor and PBGC. In one case, in which concerted PBGC settlement efforts had thus far been unavailing, PBGC issued a demand letter stating that absent timely payment of the ERISA Section 4062(e) liability, PBGC would file lien notices under ERISA Section 4068 lien against the sponsor and its other controlled group members. But PBGC did not file lien notices in that case because the parties reached a settlement satisfactorily resolving the liability prior to the payment deadline.

b) When in PBGC’s view does such a lien arise, and when is it created?

**PBGC WRITTEN RESPONSE:** The plain language of both ERISA Section 4068 and 29 C.F.R. § 4068.4 provides that a lien arises when a person liable under ERISA Sections 4062 (which includes 4062(e)), 4063 (which is incorporated into section 4062(e)) or 4064 neglects or refuses to pay the liability (up to 30% of net worth). The withdrawal date under ERISA section 4063—and by extension the cessation date under ERISA section 4062(e)—are equivalent to the date of plan termination for purposes of ERISA section 4068 and a lien is deemed to arise under that section as of the cessation date upon a sponsor’s neglect or refusal to pay ERISA Section 4062(e) liability after demand.

c) As of what date does PBGC determine net worth for purposes of the 30% of net worth limitation on the lien, given that, under statutory provisions (29 U.S.C. § 1362(d)(1)(C)) and PBGC regulatory provisions (29 CFR §§ 4062.2, .5, 4068.2), the net worth determination is tied to the plan’s termination date and the plan has no termination date?

**PBGC WRITTEN RESPONSE:** The net worth determination for purposes of the 30% limitation on the lien in that context is tied to the date of the cessation of operations.

d) How does PBGC reconcile the 6-year statute of limitations on enforcement of a 4068 lien with the 5-year limit applicable to 4062(e) liability?

**PBGC WRITTEN RESPONSE:** Unless otherwise provided in a tolling agreement between a sponsor and PBGC, ERISA Sections 4062(e) and 4063 provide that the liability is abated at the end of the 5-year period commencing on the date of the cessation of operations. Once the liability is abated, there is no longer any lien securing it.

**18. QUESTION:** On March 21, 2014, PBGC’s Inspector General issued a report (“[Increased Oversight, Internal Controls and Performance Accountability Needed for PBGC’s Monitoring, Enforcing and Modifying Negotiated Funding Agreements](#)”) that, among other things, raised concerns about the effectiveness of PBGC’s negotiated settlements relating to 4062(e) liability.

a) What changes, if any, does PBGC believe practitioners will experience in their dealings with PBGC as a result of the issuance of this report?

**PBGC WRITTEN RESPONSE:** None. The changes recommended by the Inspector General related to internal PBGC processes.

b) How many cases have there been, since PBGC issued its final rule regarding the 4062(e) liability formula in 2006, in which PBGC reached a 4062(e) settlement, and the result of that settlement was that PBGC’s losses, or participants’ losses, in connection with a later distress or involuntary termination of the affected pension plan were reduced, and what were the approximate dollar amounts of those reductions?

**PBGC WRITTEN RESPONSE:** Section 4062(e) requires an employer to post protection that will be applied to plan assets in the event of an underfunded termination in the five years following the event that gave rise to the liability. If the plan remains ongoing after five years, the protection is returned to the employer. In many cases, PBGC has allowed employers to satisfy all or part of the liability through additional contributions to the plans, which permanently improves plan funding.

The statute creates an incentive for employers who provide the contingent protection to ensure that their plans do not terminate during the statute's five-year risk window. Similarly, plans that receive additional contributions are better funded and able to avoid underfunded terminations well into the future. PBGC's experience is that these protections help avoid plan terminations, which is in keeping with PBGC's purpose of encouraging the continuation and maintenance of plans for the benefit of the participants.

**19. QUESTION:** Would PBGC consider accepting credit default swaps in connection with settlements of 4062(e) liabilities?

**PBGC DISCUSSION RESPONSE:**

Yes. PBGC will consider credit default swaps in settlement of 4062(e) liability or Early Warning Program concerns. Credit default swaps can be a good form of security. However, it is likely that they would be used only in larger cases in which the employer has debt obligations that actively trade in the market. There are issues relating to (1) who holds the credit default swaps (PBGC, the plan, or a special purpose vehicle), (2) who pays for it (the plan sponsor or the plan), and (3) the appropriate tax treatment of the plan sponsor (if it pays). PBGC noted that, because it does not have in-house expertise with respect to credit default swaps, which can be quite complex, the agency would anticipate engaging a financial advisor and/or sourcing agent for this purpose.

**20. QUESTION:** Please provide an update regarding PBGC's experience with multiple-employer plans, in particular regarding mergers, spinoffs, withdrawals, partitions, or terminations.

**PBGC WRITTEN RESPONSE:**

PBGC continues to review a request from 2013 involving the possible spin-off from a multiple-employer plan of the assets and liabilities attributable to the two substantial employers.

PBGC continues to review a request from 2013 involving the proposed substitution of a healthy foreign company as a sponsor in place of a liquidating U.S. company that was formerly in the same controlled group as the proposed substitute, and whether PBGC would assess withdrawal liability under the circumstances.

PBGC has agreed to allow a current plan sponsor to make additional contributions to the plan equal to the withdrawal liability incurred by a substantial employer who withdrew from the plan. Under its agreement with the withdrawn employer, the current plan sponsor agreed to be responsible for the withdrawal liability.

PBGC advised a plan that PBGC could not "approve" a plan amendment releasing any withdrawing employer who contributed 125% of the amount of its withdrawal liability to the

plan from all future liability with respect to the plan. PBGC explained that such determinations are made on a case-by-case basis, as provided under sections 4063 and 4064.

PBGC consulted with the IRS regarding a request to the Service from a multiple-employer plan sponsored by a charitable organization for an extension of the plan's funding amortization period. The request was mooted by the recent passage of the Cooperative and Small Employer Charity Pension Flexibility Act, which provides comparable relief.

PBGC is negotiating the settlement of employer liabilities resulting from the termination of two unrelated multiple-employer plans trusted by PBGC in 2012.

PBGC is negotiating liability for the withdrawal of two of three contributing sponsors of a plan. Plan termination may follow due to the inability of the remaining sponsor to maintain the plan.

### **EARLY WARNING PROGRAM**

**21. QUESTION:** Would PBGC consider accepting credit default swaps in connection with settlements in Early Warning Program cases?

#### **PBGC DISCUSSION RESPONSE:**

Yes. PBGC will consider credit default swaps in settlement of 4062(e) liability or Early Warning Program concerns. Credit default swaps can be a good form of security. However, it is likely that they would be used only in larger cases in which the employer has debt obligations that actively trade in the market. There are issues relating to (1) who holds the credit default swaps (PBGC, the plan, or a special purpose vehicle), (2) who pays for it (the plan sponsor or the plan), and (3) the appropriate tax treatment of the plan sponsor (if it pays). PBGC noted that, because it does not have in-house expertise with respect to credit default swaps, which can be quite complex, the agency would anticipate engaging a financial advisor and/or sourcing agent for this purpose.

**22. QUESTION:** In Q&A 19 of the 2011 Blue Book, 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.” Is PBGC still using these same criteria?

#### **PBGC DISCUSSION RESPONSE:**

Yes. In addition, PBGC may also monitor employers when it becomes aware of situations of concern that do not meet these criteria. For example, PBGC may monitor an employer as a result a distressed situation PBGC learns about through media reports. Another example is a situation in which an employer has chronic problems meeting funding requirements.

**23. QUESTION:** Please provide an update regarding the cases PBGC has been involved in over the past year under its Early Warning Program, along with a discussion of the types of transactions that are of concern to PBGC and of what PBGC does when it learns of a transaction of concern.

## **PBGC WRITTEN RESPONSE:**

The types of transactions of concern and what PBGC does is generally explained by Technical Update 00-3 and the Early Warning Program fact sheet, both of which are on PBGC's website. The most recent Early Warning Program case of interest was the Agency's protective action in April 2013 to terminate the Saint-Gobain pension plan because of the impending transfer of the plan to a far weaker entity. PBGC resolved this litigation by executing a consensual settlement agreement with all of the relevant parties in April 2014. Further information is in a press release on PBGC's website.

## **MULTIEMPLOYER PLAN ISSUES**

- 24. QUESTION:** If an employer incurs a complete withdrawal and pays its entire withdrawal liability, and then acquires another employer (in a stock acquisition) that contributes to the same plan, does the contribution history of the newly-combined employer include the withdrawn employer's pre-transaction contribution history?

**JCEB PROPOSED RESPONSE:** No. When the first employer withdrew and paid its entire withdrawal liability, its contribution history was effectively paid for (except for the possibility of a reallocation if there were a mass withdrawal within 3 years). The newly-acquired employer was not then part of its controlled group. The regulations under section 4207 indicate that when a withdrawn employer receives an abatement of liability, its subsequent withdrawal liability is determined as if it were a new employer (other than in an attributable rule plan) adjusted to reflect a portion of the abated liability. Those regulations also address the situation where the withdrawn employer acquired a contributing employer (prior to applying for the abatement), in which case the acquired employer's contributions cannot alone support the abatement. In either case, there is no indication that the withdrawn employer's prior contribution history counts in calculating a subsequent withdrawal liability. An employer that paid its entire withdrawal liability (and therefore is ineligible for an abatement because there is nothing to abate) should not be worse off than an employer that receives an abatement.

## **PBGC DISCUSSION RESPONSE:**

Under MPPAA, disputes over the calculation of withdrawal liability or the payment schedule are resolved between the plan trustees and employers through plan trustee review, arbitration, and if necessary, litigation.

- 25. QUESTION:** If a multiemployer plan terminates by amendment pursuant to Section 4041A(a)(1), and the employer continues to contribute at the employer's highest contribution rate over the last 5 years, can the employer and plan settle the employer's future contribution obligation as a lump sum, based on a projection that employment levels will remain unchanged (if that is a reasonable assumption) and using a reasonable current rate of return to determine present value?

**JCEB PROPOSED RESPONSE:** Because the employer's contribution obligation (per CBU) is fixed, the plan should be able to reach a reasonable settlement of the future contribution obligation without violating either ERISA or the Code.

**PBGC DISCUSSION RESPONSE:**

ERISA Section 4041A(e) addresses this issue. If the plan terminates by amendment, the employer continues to contribute at a rate that equals or exceeds the employer's highest rate of contributions during the five consecutive plan years ending on or before the plan termination date. Any settlement of an employer's future contribution obligation must be based on a collective bargaining agreement contribution rate that is at least equal to the highest rate during the five consecutive plan years ending on or before the plan termination date.

- 26. QUESTION:** Does PBGC still believe that the 20-year limitation on withdrawal liability payments is inapplicable for any previously-withdrawn employer when a plan suffers a mass withdrawal, no matter how long before the mass withdrawal date the employer withdrew? If so, has this position been litigated, to the knowledge of the PBGC?

**JCEB PROPOSED RESPONSE:** The PBGC's interpretation (as set forth in Op. Ltr. 94-3) is not consistent with the statute, which says that if a plan terminates via a withdrawal of all employers, the liability of "each such employer" is calculated without regard to the 20-year cap. If the term "such" means every employer that ever withdrew, the term "such" would mean every employer and therefore the word "such" would be irrelevant. Furthermore, because eventually every multiemployer plan (where liability is large enough to be subject to the 20-year cap) is likely to terminate at some point when the industry ends or all employers have gone out of business, no employer would ever benefit from the 20-year cap because eventually the plan would terminate and the trustees would go back to collect the additional payments. Therefore, the term "such" must mean the employers whose withdrawal resulted in the mass withdrawal (*i.e.*, subject to a reasonable look-back period, presumptively three years).

**PBGC DISCUSSION RESPONSE:**

PBGC continues to hold the view set forth in Op. Ltr. 94-3. There, PBGC opined that all employers lose the benefit of the 20-year cap limitation when the plan terminates by mass withdrawal.

- 27. QUESTION:** If an employer pays its entire withdrawal liability in a lump sum present value (subject to the 20-year cap) and then the plan incurs a mass withdrawal more than 3 years later (and the answer to the previous question is that the PBGC still believes the 20-year cap is inapplicable to such an employer), how is the additional liability allocated and how is it paid?

**JCEB PROPOSED RESPONSE:** The plan should assess the remaining payments (due beginning 20 years after the initial payment. Alternatively, the plan can assess the present value of that deferred payment stream, with payments commencing upon the assessment. But the first alternative is closer to congressional intent.

**PBGC DISCUSSION RESPONSE:**

This question is addressed in PBGC regulation 29 C.F.R. § 4219.16(f)(2). In response to a follow-up question, PBGC said that it would review any letter outlining perceived problems with the rule and consider whether changes to the rule may be appropriate.

**28. QUESTION:** If an employer is paying its withdrawal liability pursuant to a schedule capped at 20 years, and the plan incurs a mass withdrawal, is it possible for the redetermination liability to result in a payment schedule that is longer than the original payment schedule calculated without the 20-year cap?

**JCEB PROPOSED RESPONSE:** No. The employer’s redetermination liability is defined as “the employer’s liability for 20-year limitation amounts.” If the initial assessment resulted in a payment schedule for a specified number of years in excess of 20 years, the occurrence of a mass withdrawal (before reallocation liability) should merely eliminate the 20-year cap and require continued payments for the remainder of the originally-determined period, in accordance with the requirement of 29 CFR § 4219.16(f)(1), which states that the redetermination liability is added to the initial liability and a new payment schedule determined, using the same interest assumptions used to determine the original schedule.

**PBGC DISCUSSION RESPONSE:**

Under MPPAA, disputes over the calculation of withdrawal liability or the payment schedule are resolved between plan trustees and employers through plan trustee review, arbitration, and if necessary, litigation.

**29. QUESTION:** PBGC recently issued a proposed regulation addressing how the single-employer guarantee rules work in the case of a rollover from a DC plan to a DB plan. Do similar rules apply with respect to the multiemployer guarantee, *e.g.*, so that rollover amounts can be paid out from the plan without being counted against the maximum guarantee?

**PBGC DISCUSSION RESPONSE:**

PBGC’s proposed regulation was triggered by IRS guidance that addressed rollovers only from a DC plan to a single-employer DB plan, not to a multiemployer plan. The single-employer and multiemployer guarantees are calculated differently.

**30. QUESTION:** Is PBGC involved in any efforts to change the rule that prohibits plans terminated by mass withdrawal from paying QPSAs if the plans have insufficient assets to cover nonforfeitable benefits? Does PBGC expect that this rule will be changed in the near future?

**PBGC DISCUSSION RESPONSE:**

PBGC declined to answer this question.

**31. QUESTION:** How did PBGC apply the partition standard for the Bakery and Sales Drivers Local 33 Industry Pension Fund (*e.g.*, how far was the fund from insolvency)?

**PBGC DISCUSSION RESPONSE:**

PBGC followed the requirements of ERISA section 4233.

**32. QUESTION:** Please provide an update on situations under the multiemployer program that may be of interest to employee benefits attorneys, such as alternative withdrawal liability

formulas or plan mergers that have been approved or disapproved, or significant litigation in which the PBGC has been involved.

**PBGC WRITTEN RESPONSE:**

PBGC filed an amicus brief in the First Circuit in the *Sun Capital* case, involving the “trade or business” requirements of the controlled group rules. See litigation summary under Q&A 33.

PBGC ordered a partition of the Bakery Drivers Local 33 plan.

PBGC also issued a proposed regulation regarding annual valuation requirements for multiemployer plans terminated by mass withdrawal, notices of insolvency, and filing requirements for mergers of multiemployer plans not seeking compliance determinations.

**LITIGATION AND GENERAL MATTERS**

- 33. QUESTION:** Please describe PBGC litigation in the past year that has established precedent that would be of interest to employee benefits attorneys.

**PBGC WRITTEN RESPONSE:**

**Burmeister v. PBGC**, 943 F. Supp. 2d 83 (D.D.C. May 6, 2013): A retiree and the union representing him challenged PBGC’s reduction of his benefit due to early retirement. Applying the deferential arbitrary and capricious standard of review, the court upheld PBGC’s benefit determination, as the plan document in effect on the termination date did not reflect an earlier collective bargaining agreement that had eliminated reductions for early retirement.

**Davis v. PBGC**, 734 F.3d 1161 (D.C. Cir. Nov. 1, 2013): The D.C. Circuit upheld PBGC’s denial of a number of benefit claims by a group of retired pilots. Many of the claims involved PBGC’s determination of which benefits are in priority category 3 under the allocation scheme in ERISA section 4044. Other claims involved PBGC’s construction of plan provisions. The court of appeals held that whatever standard of review applied, PBGC’s interpretations of the statute and the pension plan were the better ones. It also held that PBGC properly refused to consider evidence that was not submitted to the agency until after it issued its determination, and that judicial review is limited to the administrative record.

**DeLeon v. U.S. Airways**, 2014 WL 341570 (D.D.C. Jan. 31, 2014); 2013 WL 1903661 (May 8, 2013): A retiree in a PBGC-trusted plan challenged the agency’s benefit determination based on her service and earnings after a benefit freeze. Applying the deferential arbitrary and capricious standard of review to the administrative record, the court upheld PBGC’s determination. In the earlier decision, the court dismissed the retiree’s fiduciary breach claim against PBGC.

**Deppenbrook v. PBGC**, 950 F. Supp. 2d 68 (D.D.C. June 17, 2013); appeal docketed, No. 13-5254 (D.C. Cir. Aug. 12, 2013): A group of participants challenged PBGC’s denial of shutdown benefits. The court granted summary judgment to PBGC, reviewing its decision with “great deference” under the Administrative Procedure Act. The court agreed that the shutdown

benefits did not vest before the plan's termination date, and that PBGC did not mishandle any of the plan's assets. The participants' appeal is pending.

**Durango-Georgia Paper Co. v. H.G. Estate, LLC**, 739 F.3d 1263 (11th Cir. Jan. 7, 2014):

The trustee of a bankrupt plan sponsor sued a predecessor controlled group member under 29 U.S.C. § 1369 for attempting to evade pension liability, seeking a money judgment. PBGC participated as amicus, explaining that regardless of which entity asserts a cause of action under section 1369, any recovery is payable solely to PBGC. The court deferred to PBGC's view, and found that the trustee did not purport to seek relief solely for PBGC's benefit, but rather, for the sponsor and its creditors. Accordingly, the court affirmed the district court's dismissal of the case.

**H & R Convention & Catering Corp. v. PBGC**, 2013 WL 1911335 (E.D.N.Y. May 8, 2013):

The purchaser of a pension plan sponsor sued PBGC and others after the sponsor failed to complete an agreed-upon standard termination and PBGC initiated termination. The purchaser sought recovery against the former sponsor for fiduciary breach, a declaration that it was not liable for contributions or termination liability, and an order prohibiting PBGC from paying benefits to the sponsor's former shareholders. PBGC was appointed statutory trustee after the suit was filed, then moved to dismiss the fiduciary breach claims based on the purchaser's lack of standing. The court dismissed the case, holding that PBGC's trusteeship cuts off a former sponsor's right to maintain fiduciary breach claims, even if they were initiated prior to PBGC trusteeship. The court concluded that the facts were not sufficient to issue a declaratory judgment, given the statutory provisions governing assigning termination and contribution liability.

**PBGC v. Asahi Tec Corp.**, 2013 WL 5503191 (D.D.C. Oct. 4, 2013): PBGC sued a foreign corporation to collect liability for a terminated pension plan that had been sponsored by its wholly owned subsidiary. The court rejected the corporation's argument that it was not subject to jurisdiction in the United States. The court held that the corporation's deliberate and knowing decision to acquire a U.S. company and subject itself to ERISA is a sufficient minimum contact for specific jurisdiction. The court held further that that the corporation was jointly and severally liable for the plan's underfunding and termination premiums, giving deference to PBGC's regulation on the latter.

**PBGC v. Kentucky Bancshares**, 2014 WL 1047140 (E.D. Ky. Mar. 17, 2014): PBGC determined that Kentucky Bancshares underpaid participants in a standard termination, under the terms of a plan amendment it made after the plan's termination date, thereby violating PBGC's regulations. The company argued that it was required to adopt the amendment under the Pension Protection Act to remain tax qualified. The court rejected that argument, accepting PBGC's view that PPA established a floor for valuing lump sums, and nothing in the tax code prohibits a sponsor from paying a larger benefit if required by another statutory provision or a plan term.

**PBGC v. The Renco Group**, No. 13 Civ. 621 (RJS) (S.D.N.Y. Mar. 14, 2014): PBGC brought suit against Renco for evading or avoiding pension liabilities in a transaction that removed it from the controlled group of its struggling subsidiary. PBGC included state law fraud claims in addition to its ERISA section 4069 claim. Renco moved to dismiss the state law claims, arguing

that PBGC lacked statutory authority to bring them and that such claims were preempted by ERISA. The court denied Renco's motion, holding that PBGC is clearly authorized to bring fraud (and other state law) claims under ERISA section 4002(b). The court also rejected Renco's preemption argument, citing recent precedent narrowing the scope of ERISA preemption. The court explained that PBGC's fraud claims did not interfere with ERISA or the pension plans, and address an actionable harm different from that under section 4069.

**PBGC v. Saint-Gobain Corp. Benefits Comm.**, 2013 WL 5525693 (E.D. Pa. Oct. 4, 2013): PBGC determined that the Saint-Gobain plan should be terminated, and brought suit under ERISA section 4042(c) for a termination order. The district court held that the arbitrary and capricious standard of review under the Administrative Procedure Act does not apply to PBGC's determination, as it is not "agency action" producing a decision with legally binding effect. The court denied PBGC's motion to certify the ruling for immediate appeal. The case subsequently settled.

**Powell Valley Nat'l Bank v. PBGC**, 2013 WL 4759242 (W.D. Va. Sept. 4, 2013), appeal docketed, No. 13-2340 (4th Cir. Oct. 31, 2013): A plan sponsor initiated a standard termination and, after the termination date it had chosen, amended its plan to adopt certain factors from the Pension Protection Act of 2006 for valuing lump sums, resulting in smaller benefit amounts. PBGC audited the plan and found that the participants' benefit amounts were decreased in violation of section 4041(b)(1)(D) of ERISA. The sponsor sued PBGC, asserting that the distributions were proper because Congress had changed the lump-sum valuation factors. Applying the deferential arbitrary and capricious standard of review, the court agreed with PBGC that in completing a standard termination, a plan administrator must follow the plan provisions in effect on the termination date. The sponsor's appeal is pending.

**Quality Auto. Services v. PBGC**, 960 F. Supp. 2d 211 (D.D.C. Aug. 15, 2013): An employer that had withdrawn from a multiemployer "trucking industry" plan challenged PBGC's determination that the withdrawal caused "substantial damage" to the plan's contribution base. In granting PBGC's motion for summary judgment, the court found reasonable PBGC's consideration of the plan's overall financial condition, as well as the cumulative effect on the plan of all employer withdrawals. The court held that PBGC's determination was consistent with prior agency precedent, and that PBGC had reasonably concluded that the employer's replacement by another contributing employer was irrelevant.

**Sun Capital Partners III v. New England Teamsters & Trucking Indus. Pension Fund**, 724 F.3d 129 (1st Cir. 2013), cert denied, 134 S. Ct. 1492 (U.S. Mar. 3, 2014): An operating company owned by two private equity funds withdrew from a multiemployer plan, and the plan assessed withdrawal liability. The district court held that the private equity funds were not liable because they were passive investments, not "trades or businesses." The First Circuit reversed, finding that at least one of the funds was a "trade or business," because it operated, managed, and was advantaged by its relationship with the operating company. The appellate court also noted the lack of a Treasury regulation or other agency guidance defining "trade or business" in this context, but found PBGC's analysis, in an unrelated PBGC Appeals Board decision and its amicus brief, persuasive.

**VanderKam v. PBGC**, 943 F. Supp. 2d 130 (D.D.C. May 7, 2013); appeal docketed, No. 13-5163 (D.C. Cir. June 5, 2013): A retiree and his spouse sued PBGC and the retiree's former spouse, challenging PBGC's refusal to recognize a qualified domestic relations order that purported to transfer the retiree's survivor benefit from his former spouse to his current spouse. The court deferred to PBGC's interpretation of ERISA and granted summary judgment, holding that the survivor benefit vested at the annuity starting date, and the subsequent substitution was invalid. The appeal of the retiree and his spouse is pending.

**34. QUESTION:** Please describe any decisions of PBGC's Appeals Board that would be of interest to employee benefits attorneys.

**PBGC WRITTEN RESPONSE:**

All Appeals Board (3-Member) decisions are posted on PBGC's website with appropriate redactions to protect personal privacy. The four decisions identified below may be of interest to the ERISA community:

The Board issued a decision on September 27, 2013 which decided a group appeal filed on behalf of 1,498 retired pilots in the Delta Airlines Pilots Plan. The appeal raised 13 issues that challenged PBGC's actions in the following 5 areas:

- PBGC's determinations of PC3 benefit amounts;
- PBGC's allocation of assets and recoveries;
- PBGC's payment of guaranteed benefits;
- PBGC's Benefit calculations; and
- Five procedural and other claims.

The Board's decision generally denied the major claims in the appeal, but did correct errors found in the Social Security reduction of six appellants. The Board also informed the appellants that PBGC had hired a public accounting firm to perform a Plan asset re-evaluation. The Board's decision can be found here:

<http://www.pbgc.gov/documents/apbletter/Decision--Delta-Pilots-Retirement-Plan-2013-27-09.pdf>

The Board issued a decision on December 11, 2013 that discussed how the PC3 benefit is calculated for a UAL Pilots Plan participant who was not yet retired as of DOPT-3, but retired prior to DOPT, elected a level income form of benefit, and was PC3 eligible. The Board changed PBGC's determination, which resulted in a higher PC3 benefit for the appellant. The Board's decision can be found here:

<http://www.pbgc.gov/Documents/apbletter/Decision--United-Airlines-Inc.-Pilots-2013-12-11.pdf>

The Board issued two decisions on December 31, 2013 involving claims by employers that they should not be liable under ERISA § 4062(e). The section 4062(e) liability rules are triggered when "an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his

employees who are participants under a plan established and maintained by him are separated from employment.” The Appeals Board’s decisions discuss relevant considerations involved in 4062(e) cases. In each case, the Board upheld PBGC’s determination. The two decisions can be found here:

<http://www.pbgc.gov/documents/apbletter/Decision--Home-Meridian-Plan-2013-12-31.pdf>

<http://www.pbgc.gov/documents/apbletter/Decision--Munksjo-Plan-2013-12-31.pdf>

- 35. QUESTION:** Please discuss any situations within the last year in which PBGC invoked the prohibition under ERISA section 4069(a) that the principal purpose of a transaction was to evade liability? Please include matters that were settled in advance of litigation.

**PBGC WRITTEN RESPONSE:**

On January 28, 2013, PBGC filed a lawsuit against The Renco Group, Inc. (“Renco”) and six subsidiaries in the Southern District of New York. PBGC’s lawsuit is based on events arising from a January 2012 transaction between Renco, affiliates of Cerberus Capital Management L.P. (“Cerberus”), and RG Steel, LLC (“RG Steel”). PBGC alleges that Renco engaged in the transaction with a principal purpose of evading the pension liabilities of its subsidiary, RG Steel. PBGC also alleges claims against Renco for state-law fraud, fraudulent concealment, and negligent misrepresentation.

Renco moved to dismiss PBGC’s state-law claims, arguing that they were preempted by ERISA. PBGC opposed that motion. On March 14, 2014, the Court denied Renco’s motion to dismiss. The Court held that PBGC has authority to bring state-law fraud claims, and that ERISA does not preempt state-law fraud claims where companies engage in fraud when dealing with PBGC. See litigation summary under Q&A 33.

The parties have filed pre-motion letters, stating their intention to move for summary judgment on all counts of PBGC’s complaint.

There have there been no other situations within the last year in which PBGC invoked the prohibition under ERISA section 4069(a).

For a discussion on *Durango-Georgia Paper*, a case in which a party other than PBGC invoked ERISA section 4069(a), see litigation summary under Q&A 33.

- 36. QUESTION:** Please provide an update regarding PBGC’s recent experience in connection with its assertions relating to ERISA’s extraterritorial reach. In particular, has PBGC been actively seeking to enforce judgments in foreign jurisdictions and, if not, does it plan to do so?

**PBGC WRITTEN RESPONSE:**

There is no new information to provide on this topic.

Note: PBGC does not consider the *Asahi Tec* case (described in the litigation summary under Q&A 33) as implicating ERISA’s extraterritorial reach. *Asahi Tec*’s minimum contacts with

the U.S. make the exercise of jurisdiction consistent with the Due Process clause of the Constitution.

- 37. QUESTION:** Please provide an update regarding PBGC’s recent experience in connection with its claims that a private equity fund may qualify as a “trade or business” and thus be jointly-and-severally liable under ERISA for various pension-related debts of a portfolio company that it owns at least 80 percent of. Please include a discussion of the implications of *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund* (No. 12-2312, July 24, 2013) and of the U.S. Supreme Court’s decision not to grant certiorari. Has PBGC been actively taking the position that private investment funds constitute “trades or businesses” in certain circumstances and, if not, does it plan to do so?

**PBGC WRITTEN RESPONSE:**

*Sun Capital* is described in the litigation summary under Q&A 33. The decision represents a new application of an old principle – what is a passive investment, a hobby, or a personal activity for income tax purposes can be a trade or business under ERISA Title IV. “Trade or business” is used many times in the Tax Code, always contextually. And for more than 30 years, the courts have interpreted it broadly to protect multiemployer plans and the PBGC insurance program. PBGC will discuss more fully its view of the potential implications of the *Sun Capital* decision in the off-the-record portion of this meeting.

A recent decision in which the reviewing court did not find the ‘trade or business’ prong satisfied is *Hotel 71 Mezz Lender LLC v. Nat’l Ret. Fund*, 2014 WL 841286 (N.D. Ill. March 3, 2014). The court held that a lending company and its private-equity owner were not ‘trades or businesses.’ The case most likely is of limited value, however, as the court’s opinion does not discuss the underlying facts, such as the operations of those entities.

- 38. QUESTION:** MAP-21 created a new position entitled “Participant and Plan Sponsor Advocate” to deal with a variety of PBGC issues, and the position was filled in late 2013. Please provide an update on the activities of the Advocate.

**PBGC WRITTEN RESPONSE:**

The Participant Plan Sponsor Advocate started her appointment in December 2013 and was quickly engaged in specific issues that are affecting participants and plan sponsors.

Participant issues have generally involved helping participants secure benefits they are entitled to despite long protracted delays by PBGC that have been frustrating to both participants and participant advocacy groups such as the Pension Rights Center (PRC). Other participant issues have been brought to the attention of the Advocate office through advocacy groups such as AARP and the PRC that have potential to affect participant and beneficiary benefit entitlements on a larger systemic basis.

Plan sponsor issues have covered a range of concerns such as: A lack of relief from premium payment penalties; 4062 (e) enforcement practices that are perceived by businesses as overreaching on the part of PBGC into normal day-to-day business transactions that can result

multi-million dollar liabilities that far exceed the cost-benefit of the initial business transaction that triggered the liability; and premium increases.

The Advocate has also been meeting with various plan sponsor and participant advocacy groups such as AARP, PRC, CEIBA, ERIC, WISER, ABC, the Chamber, NIRS, and the Business Roundtable to solicit input on participant and plan sponsor issues relative to their interactions with PBGC that could benefit from intervention by the Advocate office, or referral of issues to the Board that give rise to policy matters that affect participants and plan sponsors in their dealings with the Corporation.

The issues discussed above and others identified throughout the year will help establish priorities for the Advocate office as well as provide valuable insights into the year-end Advocate report to Congress.

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

**PBGC DISCUSSION RESPONSE:**

PBGC provided the information in the attached charts.

**INFORMAL GUIDANCE FROM 2014 BLUE BOOK**

**40.QUESTION:** Please provide a brief summary of any informal guidance in the 2014 Blue Book that may be of particular interest to employee benefits attorneys and that is not otherwise addressed in the foregoing Qs and As.

*[Scrivener's Note: Each year, considerable informal guidance on a variety of PBGC-related issues is included in a "Summary of Discussions between the Enrolled Actuaries Program Committee and Staff of the Pension Benefit Guaranty Corporation" (generally referred to as the annual "Blue Book"). The 2014 Blue Book (as well as all prior Blue Books) (copyright ©, Enrolled Actuaries Meeting), can be found on the PBGC's website at [www.pbgc.gov/res/other-guidance/blue-books.html](http://www.pbgc.gov/res/other-guidance/blue-books.html). The answers in the Blue Book reflect the views of individual staff members and do not represent the official position of PBGC.]*

**PBGC'S MEETING RESPONSE:** Please refer to the 2014 Blue Book answers cited below.

**a)** 2014 Blue Book Q&A 2 ("Premiums: Annuity Contracts"). This question related to the circumstances under which participants (or their surviving beneficiaries) are considered to be plan participants for premium purposes when irrevocable, non-participating contracts are purchased to provide benefit payments under a plan. PBGC stated that if the annuity contracts provide for payment of benefits not to participants and beneficiaries but to the plan, they are not irrevocable commitments as defined under PBGC regulations, and therefore the participants (or their surviving beneficiaries) are considered participants for premium purposes.

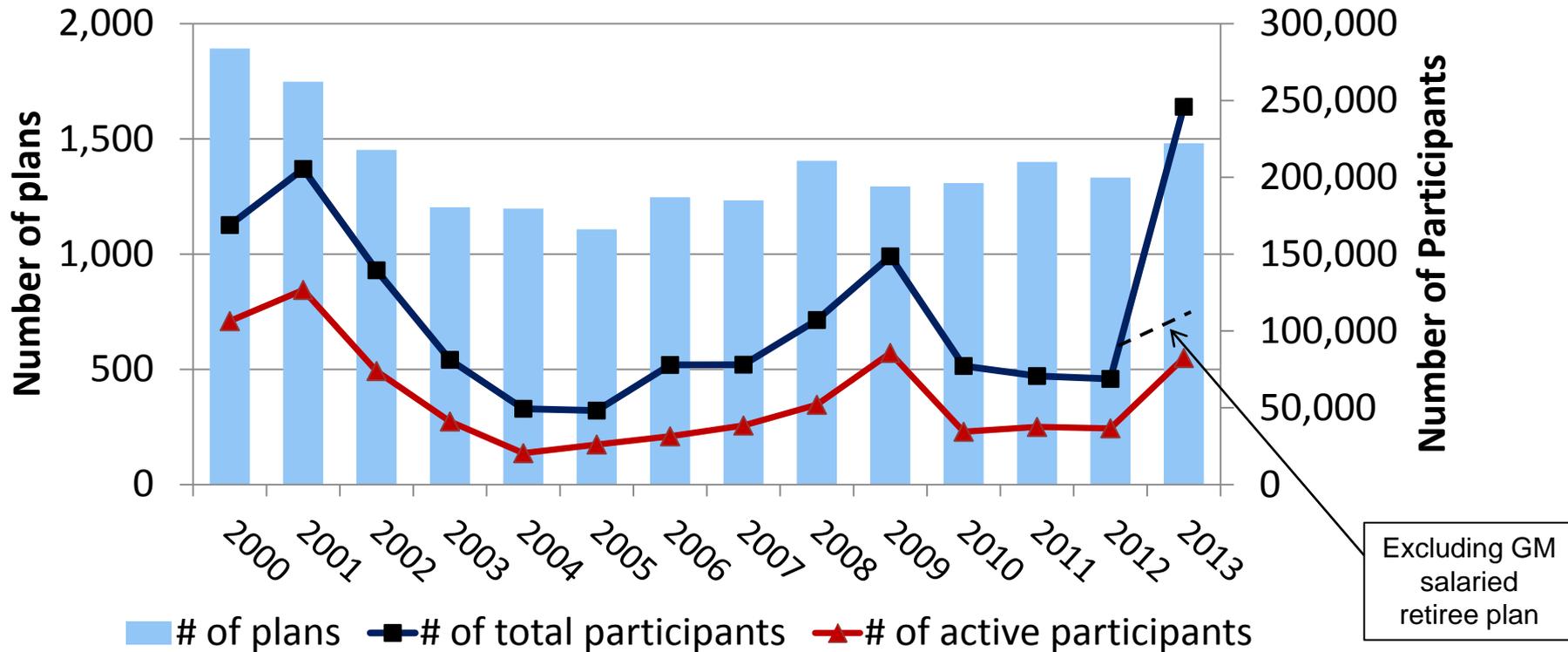
**b)** 2014 Blue Book Q&A 3 ("Premiums: Purchased Annuities"). This question asked whether an annuity that provides for all benefit liabilities of the plan must include plan provisions for the suspension of benefits to participants between normal retirement age and age 70 ½ during qualified periods of reemployment after plan termination. PBGC stated that, as a practical

matter, PBGC would not be concerned if the contract did not include such a provision, but that the best solution might be to amend the plan before termination to remove the suspension provisions.

**c)** 2014 Blue Book Q&A 4 (“Standard Terminations: Termination with No Annuity Provider”). This question asked whether, in a standard termination context, participants who retained the right to elect either an annuity or a lump sum on or after termination of employment could be transferred to an ongoing defined benefit plan sponsored by the same employer. PBGC stated that such a transfer is not permissible and that if any such participant (and his or her spouse if the participant is not married) does not consent to a lump sum, an annuity must be purchased for the participant.

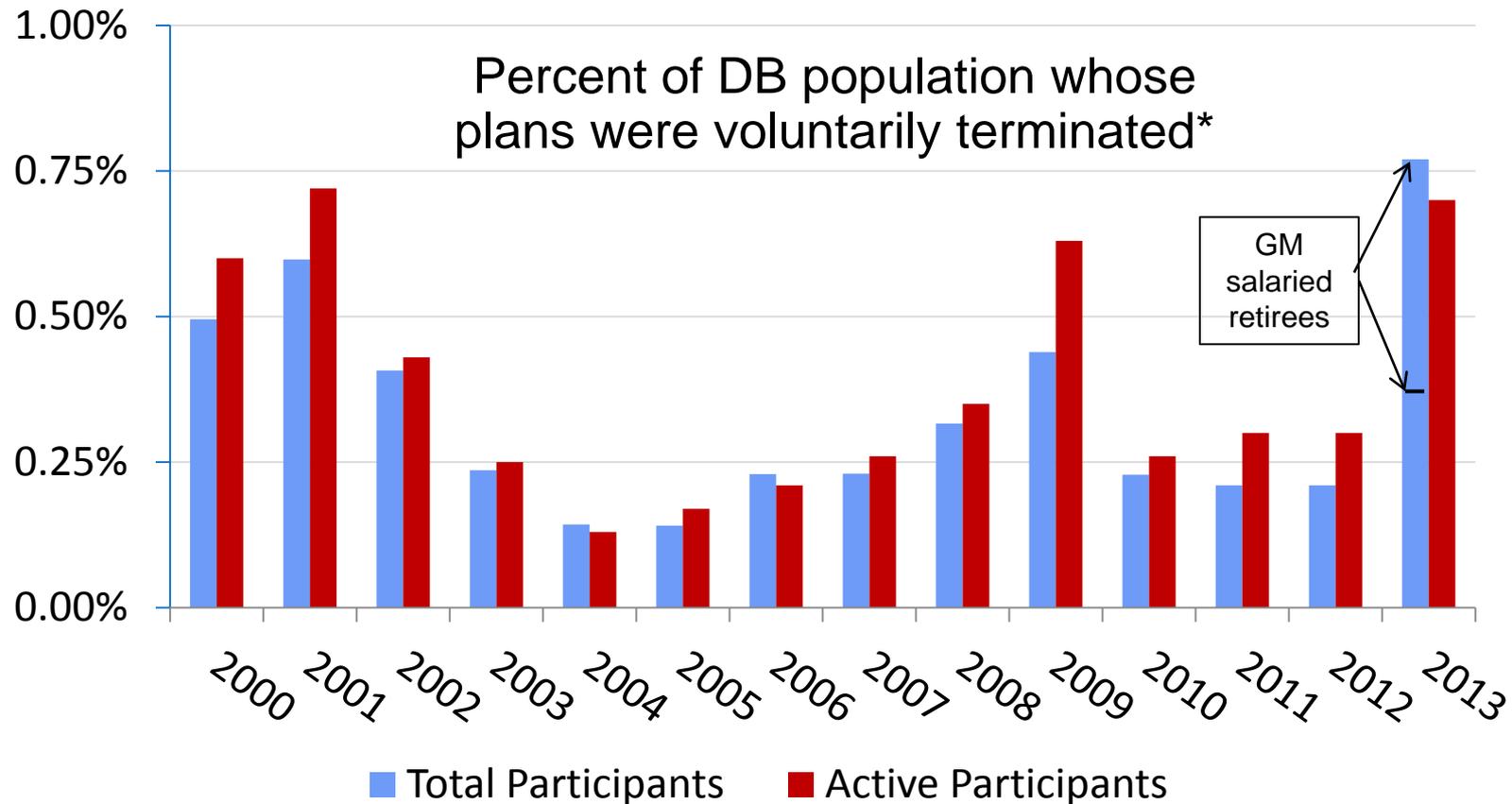
**d)** 2014 Blue Book Q&A 5 (“Standard Terminations: Post-Form 501 Identification of Missing Participants”). This question related to situations in which, after filing PBGC Form 501 Identification of Missing Participants, the plan sponsor determines that some of the participants previously reported as receiving lump sums or irrevocable commitments are in fact missing. PBGC stated that, where there is enough time to complete a diligent search and distribution by the “deemed distribution date” under PBGC’s missing participants regulation, the normal procedures under the regulation apply and the plan administrator must file amended forms. In other circumstances, § 4050.12(f) of the regulation may apply and the plan administrator should consult with PBGC how to proceed. PBGC also stated that there is no requirement that any particular missing participant must receive the same form of distribution (either the purchase of an irrevocable commitment or the payment of a designated benefit to PBGC) as any other particular missing participant.

# Standard Terminations History 2000 - 2013



- Total number of standard terminations — 19,300
- Participants involved — 1.5 million of which about 800,000 were active
- Average number of participants per plan — 81 total (41 active)

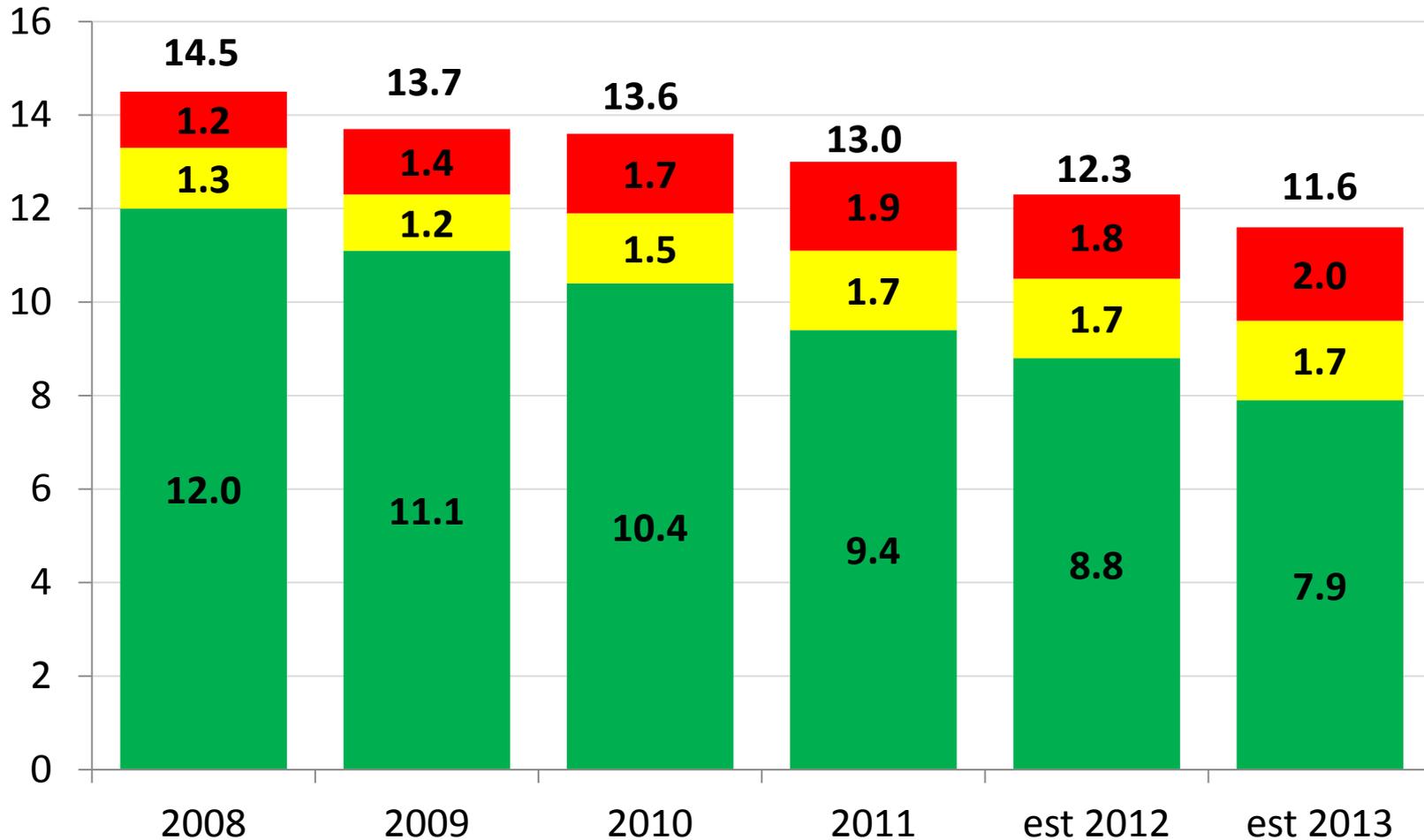
# Standard terminations affect fewer than 1% of single-employer DB participants each year



\* Excludes voluntary distress terminations

# Single-employer Plans - Freeze Trends

# of active participants - in millions



■ No freeze ■ Other ■ Hard freeze

# Most Non-Frozen Plans Are Also Open to New Entrants

# of active participants in single-employer plans - in millions

