

ERISA COMPLIANCE & ENFORCEMENT STRATEGY GUIDE

Government Agency Enforcement Activities

A Practical Look at Terminating Underfunded Defined Benefit Plans

William N. Anspach, Jr.

Much Shelist Freed Denenberg Ament & Rubenstein, P.C.
Chicago, Illinois

Background

This report will focus solely on the termination of defined benefit plans with unfunded liabilities in closely held companies and professional service organizations. Tactics and strategies applicable to these entities differ from those that apply to unfunded liabilities for large publicly held companies, which are not within the purview of this discussion.

The Pension Benefit Guaranty Corporation is the federal agency that administers the defined benefit pension plan termination insurance program under Title IV of ERISA. A single employer plan sponsor may terminate a PBGC covered plan under the standard termination procedure only if the plan has sufficient assets to pay all benefit liabilities as of the termination date.¹ If the plan's assets are insufficient to pay all benefit liabilities, the only other way a plan sponsor may terminate the plan is through a distress termination. As a practical matter, in order to initiate a distress termination, the plan sponsor must generally be bankrupt.² In the alternative, the PBGC in certain circumstances may cause an involuntary termination of the plan.³ Generally, if the employer is unable to continue in business, most closely held employers and professional service organizations simply let PBGC involuntarily terminate the plan. As a result, most so-called distress terminations are actually involuntary terminations by PBGC. When the PBGC decides to

involuntarily terminate a pension plan, it is required to apply to an appropriate United States district court for the appointment of a trustee.⁴ Often the plan administrator will consent to the appointment of a statutory trustee, in which case no court order is necessary. When PBGC is appointed statutory trustee, plan assets are transferred to PBGC. PBGC then pays plan benefits guaranteed under Title IV of ERISA and makes up the deficiency in plan assets out of its own funds.⁵

Controlled Group Liability

All members of a controlled group are jointly and severally liable for liabilities incurred when a defined benefit plan terminates with insufficient assets.⁶ In determining whether a controlled group exists, PBGC regulations provide that the operative terms have the same meaning as in I.R.C. §414(c) and the IRS regulations thereunder.⁷ The purpose of the controlled group rules is to prevent abuse. All ERISA practitioners are familiar with the coverage rules which, when applied with the controlled group rules, prevent employers from selectively assigning employees to different entities in order to favor highly compensated employees. In the context of termination of PBGC covered plans, the purported purpose was to prevent employers from promising unrealistically high benefits that would be guaranteed by PBGC in the event the employer went out of business.

In examining controlled group liability, there are only two conditions precedent to liability:

- the entity must be a “trade or business,” and
- the entity must be under common control with the plan sponsor.

There is no economic nexus requirement. The only nexus requirement is common control.⁸ The phrase “trade or business” is not defined in ERISA. The phrase appears in countless sections and subsections of the Internal Revenue Code and the Treasury regulations. As a result, for

purposes of ERISA the courts have devised their own interpretation of this phrase.⁹

To be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity, and the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify as a trade or business.¹⁰

Unfortunately, the court's interpretation of these controlled group rules has caused great consternation among benefits practitioners. For purposes of liability to PBGC and withdrawal liability in multiemployer plans, courts have broadly interpreted the phrase "trade or business." Of particular concern to plan sponsors of closely held businesses is whether another trade or business exists in the form of a general partnership or as a sole proprietorship. If so, owners of the plan sponsor will become individually liable for the unfunded benefit obligations. The broad net courts have cast in determining the existence of a trade or business is illustrated in *Central States v. Miller*.¹¹ There the sole shareholders in a business, a husband and wife, bought a house for \$39,019 in order to sell it to their daughter and her husband. Because of marital difficulties the daughter did not move into the house. Instead, the house was rented to an unrelated individual, and two years later was sold for \$50,500. During the time the couple owned the rental house, their business withdrew from a multiemployer fund. The district court found that a trade or business of real estate existed and as a result, the business owners were personally liable for the withdrawal liability. There are numerous similar cases, with most cases involving withdrawal liability.

Notwithstanding the courts' broad definition of trade or business for purposes of PBGC liability and withdrawal liability, the trade or business conclusion is still dependent upon the facts and circumstances of each case. As the U.S. Supreme Court noted in *Commissioner v. Groetzinger*¹², the taxpayer must be involved in the activity with continuity and regularity. In the Miller case discussed above, remarkably the court considered ten months of rent as of the date of notice of

withdrawal liability to be sufficient to constitute a regular and continuous activity designed to produce income.

Since determination of this issue is still fact based, despite the adverse case law it is still possible to prevail on these cases. A better strategy, however, is simply to break the controlled group link prior to the termination date. ERISA §4069 provides that the PBGC can ignore transactions whose principal purpose is to evade liability under Title IV of ERISA, subject to a 5-year look-back period. The intent of §4069 is to prevent the shifting of pension obligations to weak companies. This section involves corporate reorganizations and should not apply to breaking the controlled group link to an owner when the purported trade or business has no economic nexus.

As will be discussed in the next section, the controlled group is determined as of the plan termination date. There is no look-back rule.

Practice Tip: The owners of an entity that sponsors a defined benefit plan that has unfunded liabilities coupled with a troubled business should closely examine the controlled group liability issue. Of particular concern is ownership of any of the following assets:

- any rental property, including farm land held for investment or a vacation home that is occasionally leased;
- equipment leasing arrangement involving the owner; and
- ownership of land and building that is rented to the business.

It is imperative that the individual divest himself or herself of these properties prior to closing the business, filing for bankruptcy, or making an assignment for the benefit of creditors. If investment property such as farm land cannot be timely sold, the owner should at least terminate the lease and no longer charge rent. Similarly, the owner should immediately cease the rental of any vacation home.

Date of Plan Termination

The date of plan termination is crucial for many reasons, including the following:

- The minimum funding obligation continues until this date.
- Benefit accruals continue until this date (unless a prior freeze was adopted).
- The date affects the extent of PBGC's benefit guarantee.
- Benefit increases within 5 years before termination are phased in at 20% per year for purposes of PBGC's guarantee.
- Interest rates for valuing benefit liabilities are determined as of this date.
- Identity of employers liable for unfunded benefit obligations are determined as of this date.
- The plan termination date is used for any priority claim made by PBGC in bankruptcy court.

The termination date is critically important for the determination of the controlled group. So long as a controlled group does not exist on the termination date, unfunded liabilities cannot be imposed upon any other entities or the owners of the plan sponsor. As discussed in the previous section, it is difficult to prevail in court on the issue of the determination of a trade or business. Courts strongly favor the PBGC and multiemployer plans and look for another liable party. A much more successful tactic is to control the determination of the date of plan termination. When the PBGC seeks involuntary termination, the plan administrator and the PBGC are authorized to issue a mutually acceptable date for plan termination.¹³ If no agreement is reached, the appropriate termination date is decided by a court.¹⁴ In *PBGC v. Heppenstall*¹⁵, the court stated that it “must select the date which it determines is most consistent with the purposes of the insurance subtitle.”¹⁶

As a practical matter, in the author's experience the PBGC will select a termination date no earlier than the date an assignment for the benefit of creditors was made or the date a bankruptcy petition was filed, or in absence of such event, the date of the involuntary termination (regardless of whether business operations ceased at an earlier date). Most courts will give deference to the recommendation of PBGC, especially if the selected date is not prior to a date on which participants have reasonable expectations of continued benefit accrual.¹⁷ In *Farmstead Foods Pension Plan v. PBGC*,¹⁸ the employer initiated a distress termination filing after business operations ceased. Eventually the PBGC involuntarily terminated the plan and sought the same termination date as first proposed by the employer. The union challenged this date on the grounds that the termination date selected violated the collective bargaining agreement. The court accepted the PBGC's termination date and stated that the employees had no reasonable expectation of further benefit accruals after such date. If the employer had not initiated a distress termination and selected a termination date, we question whether the PBGC would have selected the same date.

There are two other noteworthy cases regarding the selection of the termination date. In *PBGC v. Valley-Vulcan Mold Co.*¹⁹, the employer filed for bankruptcy in November 1990. No distress termination filing was made. In 1992, the PBGC involuntarily terminated the plan. At that time interest rates were lower, which made the plan's unfunded liabilities significantly higher. Since no employees accrued any benefits after 1990, the employer sought a retroactive termination date to 1990. Although the bankruptcy petition was filed in 1990, the court held for the PBGC and accepted the termination date as the 1992 date, the date that the PBGC involuntarily terminated the plan. The court noted that it was unable to locate any other published case in which the PBGC sought a termination date later than the date proposed by the plan administrator.

In *PBGC v. FEL Corporation*²⁰, the PBGC brought suit to terminate the plan and requested a termination date of August 6, 1992. An involuntary bankruptcy petition was filed in April 1992 against the controlled group

that included the plan sponsor. The plan of reorganization was approved on August 10, 1992, with an August 30, 1992 effective date. The reorganization plan provided for breaking up the controlled group. By selecting a termination date prior to the reorganization, all members of the controlled group would be liable for the unfunded liability. The court accepted the August 6, 1992 termination date requested by PBGC.

Practice Tip: Despite the disparate interests of the PBGC and the plan administrator, in none of the cases discussed above was the termination date prior to the date the PBGC became involved with the termination (except if such date was proposed by the plan administrator). As a result, with planning, the owner of the entity sponsoring the plan should be able to divest investments that cause personal liability to the owner. If interest rates are expected to fall and the owner is concerned that a later termination date will cause an increase in the unfunded liabilities, the owner should initiate and follow through with a distress termination in order to set the termination date. An involuntary termination by the PBGC generally results in a later termination date.

Waiver of Benefit Issue

PBGC Covered Plans

In order to submit a standard termination to PBGC, there must be a certification by an enrolled actuary stating that the projected value of the assets as of the date of the final distribution exceeds the projected value of the present value of accrued benefits under the plan as of the date of such final distribution. If the plan has unfunded liabilities, to facilitate the termination of the plan in a standard termination, the plan sponsor may make a commitment in writing to contribute the amount necessary to make the plan sufficient.²¹ In the alternative, majority owners “may elect to forgo receipt of his or her plan benefit to the extent necessary to enable the plan to satisfy all other plan benefits. . . .”²² A majority owner is generally defined as an individual who owns directly or indirectly 50% or more of an unincorporated trade or business or of a corporation or partnership.²³ The majority owner's election to forego benefits must be in writing and, if married, spousal consent is necessary.

Notwithstanding the above, plans have been submitted as standard terminations with owners who are not majority owners foregoing benefits. While there is no statutory or regulatory authority for waivers by non-majority owners, as a practical matter, so long as the appropriate standard termination filing is made, the author is not aware of any standard termination submissions that have been denied based upon the waiver of a non-majority owner. The refusal of a non-majority owner to forego benefits should preclude the plan sponsor from being able to file a standard termination (unless the plan sponsor commits to a contribution to make the plan sufficient).

Title IV of ERISA does not cover plans maintained exclusively for substantial owners.²⁴ ERISA §4022(b)(5)(A) provides that a “substantial owner” is an individual who owns more than 10% of a partnership or a corporation. According to the PBGC, if in the normal course of administration, all participants' benefits are paid except to substantial owners, the plan is no longer covered by PBGC.²⁵ This ability to eliminate Title IV coverage without going through the Title IV termination process provides a significant planning opportunity to underfunded plans. If employees have terminated, employees may generally receive a distribution in the normal course of administration. As a result, if the plan sponsor has ceased operations and all the employees have terminated, distributions to all non-substantial owners may be possible. In the author's experience, if the plan is underfunded and takeover by PBGC is inevitable (i.e. the business has closed), PBGC encourages the plan administrator to pay out as many terminees as possible. If all non-substantial owners receive their distribution, Title IV termination is no longer necessary regardless of the plan's funding status. While there is no statutory authority for substantial owners to waive benefits, as further discussed below, the removal of a plan from Title IV coverage will, in effect, result in a waiver by a substantial owner despite the lack of statutory authority.

Practice Tip: If the PBGC raises the issue that a substantial owner who is not a majority owner cannot forego benefits or if the issue is raised by a (non-majority) substantial owner, a potential solution is to pay out all

non-substantial owners and then notify the PBGC that the plan is no longer subject to coverage by PBGC. Arguably, in such case, it then becomes necessary to satisfy only IRS rules.

If the plan sponsor is a professional service organization, a waiver may be possible even when the participant is not a substantial owner. PBGC does not insure professional service organizations with 25 or fewer active participants. **26** If the number of active participants falls below 26, the plan is no longer covered by PBGC. If the professional service organization has ceased business and paid out enough participants that the number remaining to be paid is 25 or fewer, arguably the plan is no longer covered by PBGC. This technique would seem to enable an underfunded plan to skirt PBGC's termination process.

Non-PBGC Covered Plans

If there is a shortfall after payment to all other participants, the owners typically receive an amount "to the extent funded." The legal basis for this practice is derived from I.R.C. §411(d)(3), which states that a plan must provide that upon its termination or partial termination the rights of all affected employees to accrue benefits, to the extent funded as of such date, are nonforfeitable. While some practitioners apply the "to the extent funded" language pro rata to each participant and have the plan document designed accordingly, such a position appears quite aggressive and invites scrutiny. If an underfunded plan is able to extricate itself from PBGC coverage without going through PBGC's termination process, the application of I.R.C. §411(d)(3) is used to resolve the underfunding without any participant agreeing to or disagreeing with a waiver of benefits.

Despite the language in I.R.C. §411(d)(3), there is a concern. In Technical Advice Memorandum 9146005, IRS addressed the issue of whether upon plan termination the accumulated funding deficiency may be corrected by having the participant-owner and spouse waive a portion of their benefit. The IRS stated, "[a]n accumulated funding deficiency that arises under Code section 412 may not be `deemed to be corrected' by the waiving of a key employee's benefits upon plan termination."²⁷

Such waiver violates I.R.C. §§ 411(d)(6), 411(a) and 401(a)(13). The TAM also relies on Revenue Ruling 79-237, which provides that if the accumulated funding deficiency is not reduced to zero by the end of the plan year in which the plan is terminated, the penalties under I.R.C. §4971 will apply.

Defined benefit plans are subject to minimum funding standards set forth in I.R.C. §412. Section 4971(a) provides for the imposition of an initial tax of 10% (5% in the case of a multi-employer plan) on the amount of the accumulated funding deficiency. Section 4971(b) provides for an additional tax equal to 100% of any uncorrected accumulated funding deficiency on which the initial tax is imposed. Upon plan termination the plan sponsor is no longer subject to the minimum funding requirements.²⁸ Although a waiver of benefits does not eliminate the application of I.R.C. §412 and the penalty under §4971, most practitioners take the position that on plan termination these penalties no longer apply. Rev. Proc. 2000-17 provides for a waiver of the 100% tax imposed under § 4971(b). This waiver is applicable to certain terminated defined benefit plans if specific conditions are satisfied. These conditions include that the plan is subject to Title IV of ERISA and is terminated in a standard termination. There is no procedure for waiver of the 100% penalty if the defined benefit plan is not covered by the PBGC. Similarly, Rev. Proc. 2000-17 does not cover the situation in which the plan avoids the PBGC termination process by paying out all non-substantial owners in the course of normal administration. Despite the limited application of the penalty waiver procedure in Rev. Proc. 2000-17, the 100% tax is rarely imposed and generally ignored when participants are paid “to the extent funded.”

Case law addressing benefit waivers is quite scant. In *Alfred Gallade v. Commissioner*²⁹, the issue raised was whether the owner's waiver of his pension plan benefits and use of the benefits by his wholly owned corporation resulted in a taxable distribution to him. In that case the plan had sufficient funds to pay his benefits. By waiving his benefit on termination, surplus assets existed and such funds reverted to the corporation. The Tax Court found that the waiver constituted an

assignment or alienation of his benefits under the plan and held that the amount waived constituted a taxable distribution from the plan on its termination. The result in the *Gallade* case is not surprising. In that case, there was no shortfall. Therefore, “to the extent funded” position did not exist. Because of the 50% reversion penalty, the *Gallade* set of facts is unlikely to reappear. However, the same issues would arise if due to the waiver there were not a reversion but a reallocation to fund additional benefits to the other participants.

Bankruptcy Priority Claims

This section focuses on priority claims filed by PBGC with respect to defined benefit plans that terminate in bankruptcy. As further discussed below, PBGC's claims should not be considered an administrative expense claim under §507(a)(1) of the Bankruptcy Code because the claim relates to liabilities that accrue pre-petition. If unpaid contributions are attributable to post-petition service, these claims should be considered administrative expenses under §503(b)(1)(A) of the Bankruptcy Code. The normal cost of these expenses should be entitled to priority under Bankruptcy Code §507(a)(1). These post-petition claims are not otherwise addressed herein.

If the plan sponsor of an underfunded defined benefit plan is in bankruptcy or has made an assignment for the benefit of creditors, PBGC typically will file the following three priority claims: (1) a claim for unfunded benefit liabilities; (2) a claim for unpaid pension insurance premiums; and (3) a claim for any amount owed to satisfy minimum funding. Of the three types of claims filed by PBGC, the priority claim for unfunded benefit liabilities is typically very large in comparison to the priority claims for unpaid minimum pension contributions and unpaid pension insurance premiums.

Section 507(a) of the Bankruptcy Code grants first priority to certain administrative expenses listed in §503 including “a tax-(l) incurred by the estate....” PBGC will take the position that under the Bankruptcy Code, upon failure to pay the liability after demand, PBGC is entitled to a lien up to 30% of the collective net worth of the liable parties (i.e. the

controlled group). For purposes of the Bankruptcy Code, the lien is “treated in the same manner as a tax due and owing to the United States.”³⁰ According to the PBGC, this claim for unfunded benefit liabilities meets the definition of a “tax” because it is an involuntary pecuniary burden imposed on individuals or their property for public purposes, including defraying of the government's expenses. This last statement is the key portion of PBGC's position. In order to have a priority claim, PBGC generally needs a court to agree that the expense involves a payment for public purposes. Any amount not entitled to a priority claim will be treated as a general unsecured claim.

Courts have used a functional analysis in determining whether payments may be deemed taxes. With respect to pension contributions, the dispute focuses on whether ERISA contributions are for a public purpose. In *In re CF&I Fabricators of Utah, Inc.*³¹, the Tenth Circuit held that the PBGC's claim for unpaid minimum funding contributions did not qualify as a tax under the Bankruptcy Code because the contributions serve no public purpose. In that case, the PBGC admitted that the contributions were for the protection of individual benefit plans. Thus, the court held that the object of the contributions was not to defray the expenses of government but to finance a private obligation. This argument should also apply to unfunded benefit liabilities.

Internal Revenue Code §412(n) provides for a statutory lien in favor of PBGC when the aggregate unpaid required contributions to a defined benefit plan exceed \$1 million. It further provides that “[A]ny amount with respect to which a lien is imposed under paragraph (1) shall be treated as taxes due and owing the United States”³²

If the unpaid minimum contributions exceed \$1 million, the amount due is considered a “tax” and thus it is possible that PBGC would be entitled to priority treatment. It remains to be seen whether the position taken in *In re CF&I Fabricators of Utah* would apply when the unpaid minimum contributions exceed \$1 million. Although the unfunded benefit liabilities may exceed \$1 million, unless the unpaid minimum contributions exceed \$1 million, PBGC cannot rely on I.R.C. §412(n). In most defined benefit

plans for closely held employers, it is highly unlikely that the unpaid minimum contributions exceed \$1 million. Plans can have large unfunded benefit liabilities and not large unpaid minimum contributions.

In one case, *In re CSC Industries v. Belfance*³³, the Sixth Circuit addressed the issue of whether missed minimum funding contributions were entitled to a tax priority under the Bankruptcy Code. While the court agreed with the district court's conclusion that the claim was not entitled to a tax priority in the bankruptcy context, the court ruled against PBGC on a narrower ground. It found that a statutory lien under I.R.C. §412(n) was never imposed on the missed minimum funding contributions and as a result, PBGC's claim could not be treated as a tax.

A strong argument can be made that the insurance premiums owed to PBGC represent a payment for public purposes that helps to defray government expenses. Insurance premiums are paid so that PBGC has funds to cover its responsibilities regarding the takeover of underfunded defined benefit plans. As a result, PBGC can be successful in obtaining a priority lien for unpaid insurance premiums.

Practice Tip: If PBGC files priority claims, claims for unfunded benefit liabilities and unpaid minimum contributions can be successfully fought. In such case the PBGC claims will be treated as general unsecured claims.

An issue exists as to whether PBGC regulations control in bankruptcy for purposes of determining the interest assumptions used to calculate the present value of the PBGC's liability claims. To date, courts have held that PBGC claims are determined under bankruptcy rules.³⁴ To value future benefits, courts have used an interest rate that a prudent investor would obtain. Since this rate would exceed PBGC rates, the net effect is to reduce (often by a large amount) the amount of the PBGC's claim.

Avoiding or Minimizing Underfunding Liabilities

Plan liabilities are equal to the present value of all accrued benefits as of the date of termination using the actuarial equivalence stated in the plan. These factors are the pre- and post-retirement interest and mortality

assumptions in I.R.C. §417(e) as amended by the Retirement Protection Act of 1994 (which was part of the General Agreement on Tariffs and Trade (“GATT”)) and set a floor for determining the actuarial equivalent of the accrued benefit. GATT changed §417(e) so that the applicable interest rates were tied to the 30-year Treasury rate (adjusted monthly) and not the PBGC rate. In addition, a specified mortality table was mandated. Plans would then select the time period during which the applicable interest rate remains constant. Most plans use an annual period, although monthly or quarterly periods could be selected by the plan.³⁵ When interest rates are low, the so-called GATT rate will be less (and possibly significantly less) than the interest assumptions stated in the plan. In such case, the calculation of lump sum payouts to termines will create greater payouts than the amount calculated for funding purposes and often causing the plan to be underfunded.

The timing of distribution payouts can significantly affect whether a plan has unfunded liabilities and the size of the unfunded liabilities. The following example demonstrates how the change in the applicable interest rate can be used. Suppose that a defined benefit plan terminates on June 1, 2003 and that the plan completes the standard termination process and is able to commence distributions on December 15, 2003. The plan year is the calendar year. The plan provides that the applicable interest rate for calculating the present value of accrued benefits is determined by using the GATT rates for the month preceding the first day of the plan year. As a result, lump sum distributions made in December 2003 are based upon the applicable interest rates for December 2002. Lump sum distributions made in January 2004 are based upon the applicable interest rates for December 2003. If the plan is underfunded and the owner is foregoing a portion of his accrued benefit, an increase in interest rates helps to reduce the plan's shortfall and lessens the amount of waiver by the owner.

Practice Tip: This change in the applicable interest rate provides a planning opportunity. Depending upon whether the plan is overfunded or underfunded and the direction of the interest rate, the funding status of the plan may benefit or be harmed. If the plan is underfunded and

interest rates have risen, the shortfall will decrease if, in the above example, lump sum distributions are made in January and not December. If the owner's benefit was being reduced by the shortfall, the decreased lump sum to terminees will directly benefit the owner. Distribution letters to the participants should be carefully worded to provide for the possibility that the amount of the lump sum may change. In utilizing this change of rates, plan administrators should treat distributees similarly.

In closing out a standard termination, the plan administrator has an extended period of time to distribute plan assets. Distributions must be made by the later of 180 days after the PBGC review period ends, or 120 days after the plan's receipt of a favorable IRS determination letter. The IRS determination deadline is available only if the plan administrator submits a determination letter request on plan termination on or before the date the plan administrator files Form 500 with the PBGC. The PBGC regulations permit a plan administrator to request an extension of time to file for a determination letter.³⁶ Such request is deemed granted unless PBGC otherwise notifies the plan administrator within 60 days after receipt of the request, or, if later, by the end of PBGC's 60-day review period. PBGC regulations also provide for an extension of the 180-day deadline under certain circumstances. Typically, these extensions involve missing participants. For an underfunded plan, this extended payout period permits the plan sponsor a longer opportunity to minimize the whipsaw effect that occurs between the use of GATT rates and the plan's actuarial equivalence in calculating the lump sum payouts.

Conclusion

As discussed above, there are numerous planning opportunities and pitfalls when a plan sponsor wishes to terminate a defined benefit plan with unfunded benefit liabilities. Timely resolution of potential controlled groups can help avoid a financial disaster for the owner of the plan sponsor. Careful planning of timing of distributions can minimize benefit reduction to owners. In addition, removal from PBGC coverage can facilitate the termination of a plan that otherwise cannot meet the

standard termination rules.

Footnotes

1 ERISA §4041(b)(1)(D). Schedule EA-S which accompanies PBGC Form 500 must be signed by an enrolled actuary. The actuary must certify that the plan is projected to have sufficient assets to pay all benefits.

2 To qualify for a distress termination, the plan sponsor (and controlled group members) must either: (a) file a petition seeking liquidation in bankruptcy or reorganization; or (b) show that termination is necessary to enable payment of debts in order to stay in business or to avoid unreasonably burdensome pension costs caused by a declining workforce. ERISA §4041(c)(2)(B).

3 PBGC may involuntarily terminate the Plan if: the plan fails to satisfy the minimum funding standards of § 412 of the Internal Revenue Code; the plan will be unable to pay benefits when due; a reportable event has occurred involving a distribution to a substantial owner; or the long-run potential loss to PBGC will unreasonably increase if the plan is not terminated. The PBGC must terminate a plan if it determines that the plan cannot pay benefits that are currently due. ERISA §4042(a).

4 ERISA §4042(b), (c).

5 ERISA §§4022, 4061.

6 ERISA §4062(a).

7 29 C.F.R. §4001.3.

8 See, e.g., *Connors v. Incoal, Inc.*, 995 F.2d 245 (D.C. Cir. 1993).

9 See, e.g., *Central States S.E. and S.W. Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992).

- 10 Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987).
- 11 Central States v. Miller, 868 F. Supp 999 (N.D. Ill. 1994).
- 12 Commissioner v. Groetzinger, *supra* at fn. 10.
- 13 ERISA §4048(a)(2) and (3).
- 14 ERISA §4048(a)(4). The statute does not provide for standards with respect to the selection of the termination date.
- 15 PBGC v. Heppenstall, 633 F.2d 293 (3rd Cir. 1980).
- 16 *Id.* at 297. In *United Steel Workers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3rd Cir. 1983) the court used a three-step approach to determine the date: (1) identify the interests of the plan participants and PBGC; (2) establish parameters which maximize those interests; and (3) set the termination date accordingly.
- 17 PBGC v. Valley-Vulcan Mold Co., 17 EBC 1015 (W.D. Pa 1993).
- 18 *Farmstead Foods Pension Plan v. PBGC*, 991 F.2d 1415 (8th Cir. 1993).
- 19 See *PBGC v. Valley-Vulcan*, *supra* at fn. 17.
- 20 *PBGC v. FEL Corp.*, 798 F. Supp. 239 (D. N.J. 1992).
- 21 29 C.F.R. §4041.21(b)(1).
- 22 29 C.F.R. §4041.21(b)(2).
- 23 29 C.F.R. §4041.2.
- 24 §4021(b)(9).
- 25 See PBGC Web site, <http://www.pbgc.gov/faqterm.htm>, FAQ #3.
- 26 ERISA §4021(b)(13).

27 I.R.S. Technical Advice Memorandum 9146005.

28 See Prop. Treas. Reg. §1.412(b) - 4(a).

29 Alfred Gallade v. Commissioner, 106 T.C. 355 (1996).

30 ERISA§4068.

31 150 F.3d 1293, 1297 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999).

32 I.R.C. §412(n)(4)(C).

33 232 F.3d 505 (6th Cir. 2000).

34 See *In re CSC Industries, Inc.*, *supra*, at fn. 33, and *In re CF&I Fabricators of Utah*, *supra*, at fn. 31.

35 Treas. Reg. S 1.417(e) – 1T.

36 29 C.F.R. §4041.30.