

2009 Enrolled Actuaries Meeting

**Questions to the Employee Benefits Security Administration
and
Summary of Their Responses**

The following pages set forth the questions posed to staff of the Department of Labor's Employee Benefits Security Administration by representatives of the Enrolled Actuaries Program Committee. Included also are summaries of the responses to those questions. The summary responses are intended to reflect as accurately as possible the statements made by the government representatives, but those responses are merely the unofficial, nonbinding views of the staff as of the time of response and do not necessarily represent the official positions of the Department of Labor. Further, this report on the responses was prepared by representatives of the Enrolled Actuaries Program Committee.

Copyright © 2009, Enrolled Actuaries Meeting

All rights reserved by Enrolled Actuaries Meeting. Permission is granted to print or otherwise reproduce a limited number of copies of the material on the CD-ROM for personal, internal, classroom, or other instructional use, on the condition that the foregoing copyright notice is used so as to give reasonable notice of the copyright of the Enrolled Actuaries Meeting. This consent for free limited copying without prior consent of the Enrolled Actuaries Meeting does not extend to making copies for general distribution, for advertising or promotional purposes, for inclusion in new collective works, or for sale or resale.

QUESTION 1

PPA: Participant Notification: Benefit Statements

ERISA 105(2)(A)(ii) requires that a pension benefit statement “include an explanation of any permitted disparity.” Would the furnishing of a benefit statement that did not include such an explanation be treated as a violation of the requirements of section 105 by the Department of Labor?

EBSA STAFF RESPONSE

Yes. Section 105(a)(2)(A)(ii) specifically requires that a pension benefit statement include “an explanation of any permitted disparity . . . or floor-offset arrangement that may be applied in determining any accrued benefits described in clause (i).” On December 20, 2006, in Field Assistance Bulletin 2006-03, the Department expressed the view that until regulations or guidance is issued with respect to the periodic pension benefit statement requirements in section 105 of ERISA, the Department will, as an enforcement matter, treat a plan administrator as satisfying those requirements if the administrator has acted “in good faith with a reasonable interpretation of those requirements.” It is not clear on what basis the administrator of a plan with a permitted disparity could be found to have acted in good faith with a reasonable interpretation of the statutory requirements when the benefit statement includes no explanation of the disparity. Note applicable civil penalties at section 502(c)(1) for noncompliance with the benefit statement requirements.

QUESTION 2

PPA: Participant Notification: Benefit Restrictions

If an AFTAP certification supports ongoing benefit payments without restriction, but a revised AFTAP certification produces a change in benefit option availability that is required to be announced to employees in an ERISA §101(j) notice, is the notice viewed as untimely where no individual participant had experienced a change in available options based on the prior certification?

EBSA STAFF RESPONSE

Assuming that the first AFTAP certification, constituted, in all material respects, a good faith certification with respect to which no 101(j) notification is required, in the circumstances described in the question, the notice triggered by a subsequent certification for the same period would not, for purposes of section 502(c)(4), be treated as untimely so long as such notice is furnished in accordance with section 101(j) and guidance thereunder as soon as reasonably practicable, but not later than 30 days from the date of the subsequent certification.

QUESTION 3

PPA: Participant Notification: Annual Funding Notice for Multiple Employer Plan

Is the annual funding notice for a multiple employer plan based on the combined status of the plan as a whole, or will separate notices be required for each of the employers in the plan?

EBSA STAFF RESPONSE

In the absence of guidance to the contrary, if all assets of the multiple employer pension plan are, on an ongoing basis, available to pay benefits to all plan participants and beneficiaries covered under the plan, then the information in the annual funding notice should be reflective of the plan as a whole. On the other hand, if the assets of the plan are not so available, then separate notices would be required as if each contributing employer were maintaining a separate plan.

QUESTION 4

PPA: Participant Notification: ERISA 101(f) Notices

Pursuant to DOL Field Assistance Bulletin 2009-01, plans must disclose in the annual funding notice the fair market value of their assets as of the last day of the plan year to which the notice relates. *See* FAB 2009-01, Q7 & Q9. In determining such value, is a plan required to discount for interest those contributions for the plan year that are received after the plan year, but prior to the furnishing of the notice?

EBSA STAFF RESPONSE

In the absence of guidance to the contrary, single-employer plans should discount these contributions to the last day of the plan year to which the notice relates in order to be consistent with section 430(g)(4) of the Internal Revenue Code. In the case of multiemployer plans, we note that, because pursuant to §11.412(c)-12 (the regulations under section 412(c)(10), the pre-PPA counterpart to section 431(c)(8)), contributions for a plan year that are made within 8 ½ months after the end of a plan year are deemed to have been made on the last day of that plan year, and, therefore, it is not necessary for such plans to discount contributions for interest when stating their year-end asset values in their annual funding notices.

QUESTION 5

PPA: Participant Notification: Participant Notice of Missed Contributions

ERISA section 101(d) provides that when there is a failure to make a required contribution to meet minimum funding standards or quarterly installment requirements, the employer shall notify each participant and beneficiary of the failure. Such notice is required to be “made at such time and in such manner as the Secretary may prescribe.” In the 2008 Green Book Q&A #3, the DOL indicated that it would be acceptable for a sponsor to send this information in connection with the now-eliminated section 4011 notice. As an alternative to a stand-alone notice, would it be acceptable for an employer to provide the notice required under section 101(d) as part of the annual funding notice provided under ERISA section 101(f)?

EBSA STAFF RESPONSE

Yes. It is the view of the staff that the section 101(d) information could be helpful to a participant in understanding section 101(f) information and, therefore, section 101(d) information can be included the annual funding notice. *See* DOL Field Assistance Bulletin 2009-01, Q13. The staff notes, however, that, notification under section 101(d) must be furnished within a reasonable period of time after a payment failure described in section 101(d). *See* DOL Reporting and Disclosure Guide for Employee Benefit Plans (www.dol.gov/ebsa/compliance_assistance.html). Therefore, a plan administrator would be able to use the annual funding notice to satisfy the disclosure obligation under section 101(d) only if the annual funding notice is furnished within a reasonable period of time after the payment failure described in section 101(d).

QUESTION 6

PPA: Participant Notification: Liabilities at the End of the Plan Year for 2008 Annual Funding Notice

Assume that Plan A's plan year is the calendar year. ERISA 101(f)(2)(B)(ii)(I)(bb) states that the following must be included in the annual funding notice:

“the value of the plan's assets and liabilities for the plan year to which the notice relates as of the last day of the plan year to which the notice relates determined using the asset valuation under subclause (II) of section 4006(a)(3)(E)(iii) [29 USC 1306(a)(3)(E)(iii)] and the interest rate under section 4006(a)(3)(E)(iv) [29 USC 1306(a)(3)(E)(iv)] , “...

- a) Subclause (II) of section 4006(a)(3)(E)(iii) refers to the fair market value of plan assets on the valuation date for the plan year. For most plans, this date is the first day of the plan year. Is the value of Plan A assets to be reported in the 2008 notice equal to the fair market value as of 12/31/2008 or as of 1/1/2008, the 2008 valuation date?
- b) If the answer to (a) is 12/31/2008, should the discounted value of employer contributions for the 2008 plan year made before the notice is issued be included in such amount?
- c) What liability should be reported under this clause, i.e., should the plan disclose the liability using the definition under ERISA 4006(a)(3)(E)(iii)(A), i.e., the funding target reflecting only vested benefits or should the total funding target be reported?
- d) Should the liability be determined using a valuation date of 12/31/2008 or should it be determined as of 1/1/2008, the valuation date for the 2008 plan year?
- e) If the answer to (b) is 12/31/2008, may reasonable actuarial techniques similar to those permitted under Regulation 4010.8(d) or PBGC Technical Update 96-3 be used to estimate the liability as of the end of the plan year based on the census data and valuation results obtained from an earlier valuation, adjusted for significant events that may have occurred during the period from the earlier valuation date to the last day of the plan year?
- f) The interest rate under section 4006(a)(3)(E)(iv) is defined in terms of the segment rates for the month preceding the month in which the plan year begins. Should Plan A use the segment rates for December 2007, December 2008 or another month to determine the plan liabilities for this part of the notice?

EBSA STAFF RESPONSE

Pending further guidance by the Department, plan administrators should report the fair market value of assets as of the last day of the plan year. For this purpose, the value may include contributions made after the end of the plan year to which the notice relates and before the date the notice is timely furnished but only if such contributions are attributable to such plan year for funding purposes. A plan's liabilities as of the last day of the plan year are equal to the present value, as of the last day of the plan year, of benefits accrued as of that same date. With the exception of the interest rate assumption, the present value should be determined using assumptions used to determine the funding target under section 303. The interest rate assumption is the rate provided under section 4006(a)(3)(E)(iv), but, pending further guidance, plans should use the last month of the year to which the notice relates rather than the month preceding the first month of the year to which the notice relates. The Department recognizes that

in their annual funding notices plans may need to estimate their year-end liability for the plan year to which the notice relates. Therefore, pending further guidance, plan administrators may, in a reasonable manner, project liabilities to year-end using standard actuarial techniques. *See* DOL Field Assistance Bulletin 2009-01, Q7.

QUESTION 7

PPA: Participant Notification: Defined Benefit Plan Annual Funding Notice (section 101(f) of ERISA) – Single-employer plans

Question 4 of DOL Field Assistance Bulletin 2009-01 provides that, pending further guidance, the Department will not take any enforcement action regarding the failure to furnish an annual funding notice to the PBGC for a single-employer plan with liabilities that do not exceed plan assets by more than \$50 million, provided that the administrator furnishes the latest available annual funding notice to the PBGC within 30 days of receiving a written request from the PBGC. How should plans calculate this \$50 million threshold?

EBSA STAFF RESPONSE

Plans should perform this calculation by subtracting the plan's assets from its liabilities, using assets and liabilities as determined under section 101(f)(2)(B)(ii)(I)(aa) of ERISA.

QUESTION 8

PPA: Participant Notification: Defined Benefit Plan Annual Funding Notice (section 101(f) of ERISA)

Section 101(f)(1) of ERISA requires the administrator of a defined benefit plan to which title IV applies to provide for each plan year a plan funding notice to the Pension Benefit Guaranty Corporation, to each plan participant and beneficiary, to each labor organization representing such participants or beneficiaries, and, in the case of a multiemployer plan, to each employer that has an obligation to contribute to the plan. On what date should plans determine which persons, other than the PBGC, are entitled to receive this notice?

EBSA STAFF RESPONSE

The Department has taken the position that, in the absence of guidance to the contrary, plans may follow the approach taken under 29 CFR 2520.101-4(f) for determining who is entitled to an annual funding notice. That section, which governs the annual funding notice requirements in effect before section 101(f) was amended by the Pension Protection Act of 2006, requires plan administrators to focus on the last day of the plan year to which the notice relates. Specifically, that section provides that persons entitled to an annual funding notice include each participant covered under the plan on the last day of the plan year to which the notice relates, each beneficiary receiving benefits under the plan on the last day of the plan year to which the notice relates, each labor organization representing participants under the plan on the last day of the plan year to which the notice relates, and each employer that, as of the last day of the plan year to which the notice relates, is a party to the collective bargaining agreement(s) pursuant to which the plan is maintained or who otherwise may be subject to withdrawal liability pursuant to section 4203 of ERISA. *See* Field Assistance Bulletin 2009-01, Q15.

QUESTION 9

PPA: Participant Notification: ERISA 101(f) Notices

Are plan administrators required to issue a revised annual funding notice for a plan year if the funding percentage data (*i.e.*, funding target attainment percentage or funded percentage) reported on the notice changes between the date the notice is furnished to participants, beneficiaries and others and the date of the filing of the plan's annual report (schedule SB or schedule MB) for that same year?

EBSA STAFF RESPONSE

Staff believes, generally, that the funding percentage data (“funding target attainment percentage” or “funded percentage”) included in the annual funding notice for a plan year should not differ from the funding percentage data required to be reported on the plan's schedule SB or MB, as applicable, for that same plan year. However, in those circumstances where the data in the notice differs from the data reported on the schedule SB or MB, as applicable, because of error or changes in actuarial assumptions, for example, staff does not believe the plan administrator is obligated, under section 101(f) of ERISA, to revise or restate the annual funding notice for that year. If the difference in the data in the notice and the data in the annual report is substantial, however, plan administrators should consider explaining the discrepancy in the annual funding notice for the next plan year.

QUESTION 10

PPA: Participant Notification: ERISA 101(f) Notices

The appendices to Field Assistance Bulletin 2009-01 include model language that plan administrators may use to satisfy their obligations under section 101(f) of ERISA. Under the heading “Right to Request a Copy of the Annual Report” in Appendix A and Appendix B appears the following sentence: “Or you may obtain a copy of the Plan’s annual report by making a written request to the plan administrator.” What report needs to be provided when the year's report hasn't been finished and filed at the time of a request?

EBSA STAFF RESPONSE

Section 101(f)(2)(B)(ix) of ERISA states that an annual funding notice must include “a statement that a person may obtain a copy of the annual report of the plan filed under section 104(a)” Accordingly, a plan administrator must furnish, upon request, only copies of filed annual reports. Thus, for example, if, following the receipt of an annual funding in April of 2010, for the 2009 plan year, a plan participant requests a copy of the plan’s 2009 annual report, which is completed but not yet filed, the plan administrator is not required under section 101(f) to furnish the 2009 report to the requesting participant. Staff notes that plans may supplement the model language quoted above with additional language explaining that the annual report for the plan year to which the notice relates has not yet been filed and when such report is expected to be filed. *See* DOL Field Assistance Bulletin 2009-01, Q13.

QUESTION 11

PPA: Participant Notification: ERISA 101(f) Notices

Upon termination of a single-employer defined benefit pension plan, when does the obligation under section 101(f) of ERISA to file an annual funding notice stop?

EBSA STAFF RESPONSE

The Department has never addressed this specific issue. However, the Department has taken the position that a summary annual report (SAR) must be issued for the plan year in which a plan terminates and PBGC becomes a statutory trustee even if the deadline for that SAR is after the termination. *See* Advisory Opinion 82-66A (Dec. 15, 1982). Staff find this opinion instructive, and believe that pending regulations or other guidance under section 101(f) of ERISA to the contrary, plans should furnish annual funding notices for the plan year in which they terminate even if the termination occurs before the due date of the annual funding notice for that year. For example, a plan that operates on a calendar-year basis and that terminates on June 1, 2010, must furnish its annual funding notice for that plan year no later than 120 days after the close of that plan year.

QUESTION 12

PPA: Participant Notification: Defined Benefit Plan Annual Funding Notice (section 101(f) of ERISA)

Section 101(f)(1) of ERISA requires the administrator of a defined benefit plan to which title IV applies to provide for each plan year a plan funding notice to the Pension Benefit Guaranty Corporation (PBGC) and others. To what specific address at PBGC should plans send their annual funding notices?

EBSA STAFF RESPONSE

PBGC has advised that it will accept electronic or hard copies of annual funding notices. Notices should be sent to the mailing addresses and e-mail addresses as noted below for single-employer plans and multiemployer plans:

	Single-employer plans	Multiemployer plans
Hard copies	Pension Benefit Guaranty Corporation ATTN: Single-Employer AFN Coordinator 1200 K Street, NW, Suite 270 Washington, DC 20005-4026	Pension Benefit Guaranty Corporation ATTN: Multiemployer Data Coordinator 1200 K Street NW., Suite 930 Washington, DC 20005-4026
Electronic copies	Single-employerAFN@PBGC.gov	Multiemployerprogram@PBGC.gov

QUESTION 13

Fiduciary Issues: 408(b) Payment for Services

The proposed 408(b) prohibited transaction guidance calls for disclosure and written contractual agreement for fees paid both by the plan and by the plan sponsor. If the plan sponsor pays all fees other than direct investment costs, is this disclosure required?

EBSA STAFF RESPONSE

The Department has long taken the view that, generally, there is no prohibited transaction under section 406 of ERISA when the plan sponsor pays all of the fees of a plan service provider. The Department notes that the proposed regulations under section 408(b)(2) have not been finalized.

QUESTION 14

Fiduciary Issues: Fiduciary Status Rendering AFTAP Cert

Is the Enrolled Actuary to a plan a functional fiduciary if rendering an AFTAP certification at their discretion? That is, without specific direction from the plan fiduciary as to the time the certification is to be rendered? Or by selecting one of the few remaining actuarial assumptions that are discretionary?

EBSA STAFF RESPONSE

No. Making an AFTAP certification and selecting actuarial assumptions appear to be the type of functions that an actuary would perform in the normal course of rendering actuarial services to a plan. The staff does not believe that the performance of that service by an enrolled actuary would in and of itself cause an enrolled actuary to become a fiduciary within the meaning of ERISA section 3(21). *See* 29 CFR 2509.75-5, Q-D-1. However, the staff notes that ERISA specifically provides that the enrolled actuary is engaged on behalf of the plan's participants. *See* ERISA section 103(a)(4)(A). Therefore, it is expected that enrolled actuaries will carry out their responsibilities in a manner that not only is consistent with the law and professional standards, *see* 20 CFR 901.20, but in the interest of the participants on whose behalf they have been engaged.

QUESTION 15

Fiduciary Issues: Expenses Payable from the Trust

May plan assets be used to pay for any of the following actuarial tasks?

- a) Forecast of future years' minimum required contributions for purposes of plan sponsor budgeting.
- b) Determining the effect of yield curve/asset method choices as an aid in selecting whether to use the full yield curve or the segmented rates, and whether to use market value of assets or a smoothed asset method.
- c) Forecast of pension expense (for plan sponsor's balance sheet reporting).
- d) Asset Liability Modeling (ALM) studies to determine asset allocations that will best match investment objectives.

EBSA STAFF RESPONSE

As a general matter, we note that the Department has long taken the position that there is a class of discretionary activities which relate to the formation, rather than the management and administration, of plans, explaining that these so-called settlor functions include decisions relating to the establishment, design and termination of plans and generally are not fiduciary activities governed by ERISA. Expenses incurred in connection with the performance of settlor functions would not be reasonable expenses of a plan as they would be incurred for the benefit of the employer and would involve services for which an employer could reasonably be expected to bear the cost in the normal course of its business operations. However, reasonable expenses incurred in connection with the implementation of a settlor decision would generally be payable by the plan. In this connection, *see* Advisory Opinion 2001-01, <http://www.dol.gov/ebsa/regs/aos/ao2001-01a.html>, and the Guidance on Settlor vs. Plan Expenses, http://www.dol.gov/ebsa/regs/AOs/settlor_guidance.html. Specifically, in relation to these questions, hypothetical fact pattern #2 explains that plan design expenses incurred in advance of the adoption of the plan or a plan amendment or for cost projections to determine financial impact of the plan change on the sponsor are settlor expenses and may not be paid by the plan.

- a) No. Calculation of the contribution required by the plan sponsor does not relate to the administration or management of the plan or its assets and thus is not a reasonable administrative expense of the plan.
- b) No, to the extent that the question involves calculations to establish the plan sponsor's minimum funding obligations. Expenses involved in those calculations are plan sponsor settlor expenses that do not relate to the administration or management of the plan.
- c) No. Calculations performed for the plan sponsor's financial statement are not related to the administration or management of the plan.

d) Yes. To the extent that the ALM studies are done to assist the plan's investment fiduciary in selecting asset allocations for plan investments, such expenses relate to the management of the plan's assets and, when reasonable for the services provided, may be paid for from plan assets. *See* Advisory Opinion 2006-08A (Oct. 3, 2006).

QUESTION 16

Other: Timing of Suspension of Benefits Notices

A DB plan sends a Suspension of Benefit Notice two months before an active employee's normal retirement date. §2530.203-3, titled "suspension of pension benefits upon reemployment of retirees", states in (b)(4) that such notices are to be sent 1) by first class mail or personal delivery, and 2) "during" the first month of suspended payments.

Does the timing of the notification *to an ongoing employee* make it void? Did "during" really mean "by the end of the first month of suspended payments"? Often these employees are identified in the plan's annual actuarial valuation and it would be convenient to deal with them all immediately. Would sending such a notice 2 years early make it void? Did PPA '06 change this requirement in any way?

Under what conditions can these be e-mailed now?

EBSA STAFF RESPONSE

Section 203(a)(3)(B) of ERISA provides that the right to the employer-derived portion of an accrued pension benefit shall not be treated as forfeitable solely because an employee pension benefit plan provides that the payment of benefits is suspended during certain periods of reemployment which occur subsequent to the commencement of payment of such benefits. The Department's regulations at 29 CFR 2530.203-3(b)(4) specifically provide that "[n]o payment shall be withheld by a plan pursuant to this section unless the plan notifies the employee by personal delivery or first class mail during the first calendar month or payroll period in which the plan withholds payments that his benefits are suspended." It is Staff's view that notification to an ongoing employee, or notification to an employee at any time other than "during the first calendar month or payroll period in which the plan withholds payments that his benefits are suspended" would not comport with the timing requirement in 29 CFR 2530.203-3(b)(4). The notice both alerts the participant that his or her benefits are about to be affected, and provides information about his or her rights under the plan. The PPA did not change this notification requirement.

With regard to providing a section 2530.203-3 notice by way of e-mail, plans that wish to use electronic means by which to satisfy the suspension of benefits notice requirements may rely on guidance issued by the Department of Labor at 29 CFR 2520.104b-1(c).