October 2, 2024

[Attorney]
[Entity]
[Address]
[Address]
[Address]

Re: Appeal 2023-*[xxxx]* (*[Appellant]*), Case No. *[xxxxxx]*; *[Plan]* ("the Plan")

Dear *[Attorney]*:

I. Introduction

The Appeals Board is responding to your appeal of PBGC's benefit determination of November 21, 2022, submitted on behalf of your client *[Appellant]*. PBGC determined that *[Appellant's]* monthly benefit under the Plan is *[$x,xxx.xx]*, paid in the form of a Straight Life Annuity with no survivor benefits ("SLA"), which is *[$x,xxx.xx]* less than the estimated monthly benefit of *[$x,xxx.xx]* that he was receiving before his benefit was offset under a settlement agreement dated January 14, 2022, pursuant to ERISA § 206(d)(4), for the alleged breach of his fiduciary obligations. Under the agreement, *[Appellant]* agreed to have his benefit under the Plan reduced, or offset, by the actuarial equivalent of *[$xxx,xxx]*. Because of the settlement agreement, PBGC further determined that *[Appellant]* received a net overpayment of *[$xxx,xxx.xx]*, which must be recouped from his future PBGC-payable benefits.

You contend that PBGC should pay *[Appellant]* the pretermination benefits he missed when the Plan ran out of money in 2016, based on your asserted value of the Plan's claim against *[Appellant]*, i.e., *[$xxx,xxx]* (discounted to the Plan's termination date of October 31, 2017), even though neither the claim itself nor the benefit offset arising from the claim settlement under ERISA § 206(d)(4) became part of PBGC's ERISA § 4044 allocation of assets or could be used to satisfy the unpaid pretermination benefits.

You claim that "PBGC erred in treating a fiduciary breach cause of action held by the Plan . . . with a PBGC-determined value of *[$xxx,xxx]*, as having a value of zero dollars." Assuming the validity of that claim, you argue that PBGC "violated a rule that is central to the asset allocation structure under ERISA Section 4044, *i.e.*, that the assets that are 'available to provide benefits' and that thus become part of PBGC's Section 4044 allocation under Title IV of ERISA are net of those assets that are necessary to satisfy pre-termination liabilities." You do not contend, however, that the Plan's fiduciary breach cause of action or the benefit offset resulting

from the settlement agreement became part of PBGC's allocation of the Plan's assets under ERISA § 4044.

You also claim that PBGC "erred in using lower than required interest rates to increase unpaid pre-termination payments."

II. Summary of Decision

We find that PBGC, as the Plan's statutory trustee, had the power to enter into a settlement agreement under ERISA § 206(d)(4) with *[Appellant]* to resolve the Plan's claim against him for fiduciary breach. Because the settlement agreement exchanged the Plan's claim—which PBGC found to have $0 value at the date of plan termination ("DOPT")—for an offset against *[Appellant's]* Plan benefit, neither the Plan's claim nor the offset resulting from the settlement agreement could be used to satisfy pretermination benefit liabilities of *[Appellant]* or provide future benefits under the asset allocation procedures of ERISA § 4044(a).

We further find that PBGC did not err in its use of an interest rate under PBGC regulations to increase the unpaid pretermination benefits, but that issue is mooted by the Board's decision.

Because *[Appellant's]* benefit was offset under the settlement agreement, *[Appellant]* received a net benefit overpayment of *[$xxx,xxx.xx]* as of March 1, 2022, and recoupment of the net overpayment is appropriate. Accordingly, we must uphold PBGC's determination and deny your appeal.

III. Background

PBGC is the United States government agency that administers the federal insurance program for tax-qualified defined benefit pension plans in accordance with the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"). If a plan's sponsor is unable to continue supporting its plan and the plan terminates, PBGC becomes the plan's trustee and pays benefits as defined in the plan, subject to the limitations and requirements in ERISA.

The *[Company]* (the "Company") was the Plan's sponsor. The Plan was established effective October 1, 1995, and covered only two participants, *[Appellant]* and *[Spouse]*. *[Appellant]* sold his ownership interest in the Company in 2002 but remained its president. On October 20, 2017, the Company filed a voluntary petition for Chapter 7 bankruptcy protection.

On February 2, 2018, PBGC initiated mandatory termination proceedings for the Plan under section 4042(a) of ERISA. By agreement with the Company's Chapter 7 Trustee, the Plan's termination date was established as October 31, 2017, and PBGC became the statutory trustee of the Plan on March 19, 2018. Before the Plan was terminated, it did not have assets available to pay benefits that were currently due under the Plan, resulting in the two participants missing sixteen payments through DOPT.

When PBGC becomes statutory trustee of a terminated plan, PBGC collects participant information and copies of the plan's governing documents from the plan's administrator and

audits that data. PBGC relies on the information it receives from a plan administrator unless PBGC's audit of that information shows that it is incorrect, or a participant supplies PBGC with documents showing that the information is incorrect. The terms of the Plan, the provisions of ERISA and PBGC's regulations determine the benefits PBGC can pay.

PBGC records contain the following information relating to *[Appellant's]* PBGC-payable benefit:

- *[Appellant]* was born on *[date of birth]*;
- *[Appellant]* married *[Spouse]* on *[date of marriage]*;
- *[Appellant's]* date of hire was reported to be *[date of hire]*;
- *[Appellant]* was a participant in the Plan beginning *[date of participation]*;
- *[Appellant's]* normal retirement date ("NRD") was *[normal retirement date]*;
- *[Appellant's]* date of termination of employment was reported to be *[date of termination]*;
- On his *[actual retirement date]* Actual Retirement Date, *[Appellant]* began receiving a monthly Plan benefit of *[$x,xxx.xx]*, in the form of an SLA;
- Because the Plan's assets were exhausted before the Plan terminated on October 31, 2017, *[Appellant]* did not receive benefit payments totaling *[$xx,xxx.xx]* from July 1, 2016, through October 31, 2017;
- On June 1, 2018, PBGC commenced paying *[Appellant]* an estimated monthly benefit of *[$x,xxx.xx]*; and
- On September 1, 2018, PBGC paid *[Appellant]* an estimated back payment of *[$xx,xxx.xx]*, including interest.

A. The Settlement Agreement of January 14, 2022, with *[Appellant]*

On January 14, 2022, *[Appellant]* signed a settlement agreement between him, as "*[Appellant]*," and PBGC, as the Plan's statutory trustee, relating to the Plan's claims against him for fiduciary breach and prohibited transactions related to loans made with Plan assets to *[Business]*, an [*State*] Limited Partnership for which the Company was the sole general partner.

The background for the Settlement Agreement is reflected in its recitals. They state that "between February 22, 2005, and January 26, 2007, seven loans . . . were made from the Pension Plan's assets to *[Business]*." The recitals state that "PBGC . . . alleges that the Loans were contrary to *[Appellant]*'s duties under 29 U.S.C. §§1104, 1105, and 1106 and resulted in losses to the Pension Plan for which he is personally liable under 29 U.S.C. § 1109(a)."

The Settlement Agreement provides, in relevant part, the following terms of agreement between the parties:

NOW, THEREFORE, in consideration of the foregoing and for good and valuable consideration, the receipt and adequacy of which are mutually acknowledged, and intending to be legally bound hereby, without any admission of liability, the Parties agree as follows:

1. *[Appellant]* agrees that the monthly benefit he is entitled to receive from PBGC under the Pension Plan will be permanently reduced by the actuarial equivalent of *[$xxx,xxx.xx]*.

2. *[Appellant]* shall elect to forego receipt of the actuarial equivalent of *[$xxx,xxx.xx]* of his benefit under the Pension Plan by executing the form attached hereto as Exhibit A (the "*[Appellant]* Waiver Election").

3. *[Appellant]* shall be released from any and all claims for liability under 29 U.S.C. § 1109 that PBGC or the Pension Plan have or may have in connection with the Pension Plan; such release will take effect upon full execution of this Settlement Agreement and the full execution of the *[Appellant]* Waiver Election.

4. *[Appellant]* may appeal PBGC's final determination of his Pension Plan benefit pursuant to 29 C.F.R. Part 4003, Subpart D; except that he may not appeal or otherwise contest the *[$xxx,xxx.xx]* reduction of his Pension Plan benefit set forth in Paragraph 1 above, including but not limited to PBGC's calculation of the reduction of his monthly Pension Plan benefit.

5. This Settlement Agreement shall be governed by ERISA, other applicable federal laws and, to the extent the foregoing does not provide a rule of decision, the laws of the District of Columbia.

* * *

Under Exhibit A to the Settlement Agreement, *[Appellant]* affirmed his election to offset his benefit under ERISA § 206(d)(4), as follows:

I, *[Appellant]*, am a participant in the *[Plan]* (the "Pension Plan"). Pursuant to 29 U.S.C. § 1056(d)(4)(A)(iii) and the Settlement Agreement between the Pension Benefit Guaranty Corporation and me, I hereby elect to forgo receipt of the actuarial equivalent of *[$xxx,xxx]* of the benefit to which I am entitled under the Pension Plan. I understand that this will be a permanent reduction and that I may not revoke this election.

The Settlement Agreement terms did not establish *[Appellant's]* monthly PBGC-payable benefit. The recitals to the agreement stated that "PBGC has not issued a final determination of *[Appellant's]* Pension Plan benefit."

B. The Other Settlement Agreements with *[Fiduciary A]* and *[Fiduciary B]*

In addition to the Settlement Agreement of January 14, 2022, PBGC, as the Plan's statutory trustee, also entered into settlement agreements with *[Fiduciary A]*, *[Entity A]*, and *[Fiduciary B]* to resolve the Plan's claims against them for fiduciary breaches.

As with the Settlement Agreement with *[Appellant]*, the background to the *[Fiduciary A]* and *[Fiduciary B]* agreements is reflected in the respective recitals, which we summarize as follows. On September 24, 2014, *[Entity A]* filed suit on behalf of the Plan against *[Appellant]* and *[Fiduciary B]* for liabilities associated with the seven loans of Plan assets to *[Business]*. In 2015, *[Fiduciary A]* and *[Entity A]* entered into agreements on behalf of the Plan with *[Appellant]* and *[Fiduciary B]* under which both *[Appellant]* and *[Fiduciary B]* were released from any liability related to the seven loans to *[Business]*.

After the Plan terminated, PBGC claimed, on behalf of the Plan, that *[Fiduciary A]* and *[Entity A]* breached fiduciary duties owed to the Plan in entering the settlements with *[Appellant]* and *[Fiduciary B]*, which released them from liabilities for the loans to *[Business]*. PBGC claimed that *[Fiduciary B]*, a Plan fiduciary, breached fiduciary duties in connection with the loans of Plan assets to *[Business]*.

Neither *[Fiduciary A]* nor *[Fiduciary B]* was a plan participant. PBGC settled *[Fiduciary A's]* liability for *[$x,xxx]*, and *[Fiduciary B's]*, for *[$x,xxx]*.

IV. Issues Presented by Your Appeal of PBGC's Benefit Determination

On November 21, 2022, PBGC issued a determination letter regarding *[Appellant's]* benefit under the Plan. The determination stated that he is entitled to a monthly benefit of *[$x,xxx.xx]*, which is *[$x,xxx.xx]* less than the estimated monthly amount of *[$x,xxx.xx]* that he was receiving until April 1, 2022. PBGC determined that the actuarial value of the settlement amount of *[$xxx,xxx]* represents a reduction, or offset, of *[$x,xxx.xx]* of the Plan monthly benefit.

PBGC's determination letter also stated that *[Appellant]* has been overpaid in the amount of *[$xxx,xxx.xx]*. The determination letter informed him that his future benefit payments must be reduced by 10% until the overpayment has been repaid. PBGC stated that *[Appellant's]* estimated monthly benefit of *[$x,xxx.xx]* will continue to be paid until the Appeals Board decides your appeal.

On December 8, 2022, *[Appellant]* requested an extension of time to file an appeal because he had filed a Freedom of Information Act request. This extension of time was granted.

On February 1, 2023, PBGC paid *[Appellant]* a back payment of *[$x,xxx.xx]* (gross), representing a portion of the benefit payments of *[$xx,xxx.xx]* he missed after the Plan's assets

were exhausted in 2016 and before the Plan terminated on October 31, 2017.[1] His net payment after federal income tax withholding of *[$xxx.xx]* was *[$x,xxx.xx]*.

On May 6, 2023, you submitted a timely appeal on behalf of *[Appellant]*. The Appeal asserts that PBGC did not ensure that the assets "available to provide benefits" as part of the allocation of assets under section 4044 of ERISA were "net of those assets that [were] necessary to satisfy pre-termination liabilities."[2] The Appeal's argument is based on its claim that PBGC should rely on "the value of the consideration provided by the defendant . . . in the ultimate settlement" to establish the value of a Plan's claim at DOPT because it "reflects the views of the settling parties . . . regarding the value of the underlying cause of action."[3]

The primary issues presented by your appeal are whether PBGC, as the statutory trustee of the Plan, was within its authority in reaching a settlement agreement with *[Appellant]* for the Plan's claim for fiduciary breach under ERISA § 206(d)(4) and, given PBGC's valuation of the Plan's claim, whether PBGC complied with the asset allocation rules under ERISA § 4044(a) and PBGC regulations.[4]

V. Discussion

A. Relevant Statutory and Regulatory Authority

1. Anti-cutback and Anti-alienation Rules Under ERISA and the Internal Revenue Code ("Code")

Under the "anti-cutback rule," found in both ERISA and the Code, protected benefits under a pension plan may not be decreased by plan amendment.[5] In general, a "protected" benefit includes an accrued benefit, an early retirement benefit, and certain optional forms of benefit.[6] Under the Treasury Regulations, a participant generally may not elect to waive protected benefits.[7]

---

[1] *See* Appeal, Exhibit D, at page 136.

[2] *See* Appeal at 1.

[3] *See* Appeal at 5.

[4] The Appeals Board lacks authority to review PBGC's valuation of a pension plan's assets. *See* 29 Code of Federal Regulations ("CFR") § 4003.1(e).

[5] *See* ERISA § 204(g)(1), 29 United States Code ("USC") § 1054(g)(1); Code § 411(d)(6), 26 USC § 411(d)(6).

[6] *See* ERISA § 204(g)(1), (2); Code § 411(d)(6); Treas. Reg. § 1.411(d)(4) (Q&A 1). Although the Department of Labor administers Title I of ERISA, the Internal Revenue Service ("IRS") has interpretive authority over most provisions of Part 2 of Subtitle B of Title I of ERISA, which includes sections 204 and 206 of ERISA, as well as sections 401 and 411 of the Code. *See* ERISA § 3004(a); Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713, 92 Stat. 3790 ("Except as otherwise provided . . . all authority of the Secretary of Labor to issue the following described documents pursuant to the statutes hereinafter specified is hereby transferred to the Secretary of Treasury: (a) regulations, rulings, opinions, variances and waivers under Parts 2 [29 USC § 1051 et seq.] . . . .")

[7] *See* 26 CFR § 1.411(d)-4 (Q&A 3(a)(3)) ("Waiver prohibition. In general, . . . a participant may not elect to waive section 411(d)(6) protected benefits.").

Under the "anti-alienation rule," also found in both ERISA and the Code, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[8] The anti-alienation rule prevents participants and beneficiaries from assigning or alienating their protected benefits.

ERISA provides exceptions to the anti-alienation rule, which include an exception under ERISA § 206(d)(4) for the offset of a participant's benefit in cases in which the participant is ordered or is required to pay for violations (or alleged violations) of ERISA's provisions for fiduciary responsibilities. Under this exception, the anti-alienation rule does not "apply to any offset of a participant's benefit provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay if—

(A) The order or requirement to pay arises—

* * *

(iii) pursuant to a settlement agreement between . . . [PBGC] and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle by a fiduciary or any other person,

(B) The judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan . . . ."

Congress explained the need to amend ERISA's (and the Code's) anti-alienation rule to permit benefit offsets of plan benefits in cases of fiduciary breaches by plan participants as follows:

> There is no specific exception under [ERISA] or the Internal Revenue Code [permitting] offset of a participant's benefit against the amount owed to a plan by the participant as a result of a breach of fiduciary duty to the plan or criminality involving the plan. Courts have been divided . . . . Some courts have ruled that there is no exception in ERISA for the offset of a participant's benefit to make a plan whole in the case of a fiduciary breach. Other courts have reached a different result. . . . The Committee believes that the assignment and alienation rules should be clarified by creating a limited exception that permits participants' benefits under a qualified plan to be reduced under certain circumstances including the participant's breach of fiduciary duty to the plan.

S. Rep. No. 105-33, at 310 (1997).

[8] *See* ERISA § 206(d)(1), 29 USC § 1056(d)(1); Code § 401(a)(13), 26 USC § 401(a)(13).

2. Asset Allocation Under Title IV of ERISA

When a pension plan terminates, PBGC is responsible for paying benefits in accordance with the provisions of Title IV of ERISA. PBGC generally determines a participant's benefit under the provisions of a terminated plan, then determines how much of the participant's benefit is guaranteed.

A participant may receive more than his PBGC-guaranteed benefit based on the allocation of the terminated plan's assets under the six-tiered allocation method described in § 4044(a) of ERISA. Under § 4044(a), in the case of a terminated plan for which PBGC is the statutory trustee, PBGC is required to "allocate *the assets of the plan* (available to provide benefits) among the participants and beneficiaries of the plan" in the order prescribed by the statute.[9] Thus, for any such plan, the allocation of assets under § 4044(a) of ERISA is limited exclusively to the terminated plan's assets.

Before allocating a plan's assets under the six-tiered method of asset allocation, PBGC must first pay plan liabilities that arose before the plan terminated. PBGC's regulations under ERISA § 4044(a) describe "[p]lan assets available to provide benefits" for purposes of the asset allocation, "to include all plan assets (valued according to § 4044.41(b)), remaining after the subtraction of all liabilities, other than liabilities for future benefit payments, paid or payable from plan assets under the provisions of the plan."[10] The regulation defines "liabilities" to "include expenses, fees, and other administrative costs, and benefit payments due before the allocation date."[11]

In other words, a terminated plan's assets must be used to pay the plan's pretermination liabilities before they are allocated to the six priority categories of benefit liabilities under ERISA § 4044(a). But PBGC can pay pretermination liabilities in accordance with ERISA § 4044(a) and PBGC regulations solely from the terminated plan's assets. Consistent with ERISA § 4044(a) and PBGC regulations, PBGC's Operating Policy Manual ("OPM") provides that "PBGC pays the pre-termination plan liabilities with interest *to the extent the plan's assets are sufficient to pay for them*."[12]

B. Analysis of Your Appeal

1. As statutory trustee of the Plan, PBGC was expressly authorized under ERISA § 4042(d) to enter into the Settlement Agreement under ERISA § 206(d)(4) with *[Appellant]*.

[9] ERISA § 4044(a); 29 USC 1344(a) (emphasis added).

[10] 29 CFR § 4044.3(a).

[11] 29 CFR § 4044.3(a).

[12] OPM 6.3-1(E)(2) (Mar. 30, 2021, 6th Ed.) (Underpayment Reimbursement and Interest Payments) (emphasis added). We provide a copy of OPM 6.3-1 and other relevant sections of the OPM as Enclosure 1. The official title of the OPM is the "OBA [Office of Benefits Administration] Operating Policy Manual."

Under § 4042(a) of ERISA, PBGC must initiate proceedings to terminate a single-employer plan "whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan."[13] When a defined benefit pension plan terminates without sufficient assets to pay the benefits promised to participants and beneficiaries, as in this case, PBGC typically becomes the statutory trustee of the terminated plan.

ERISA § 4042(d) sets forth the powers of a statutory trustee that is either appointed by the court or by agreement between the terminated plan's administrator and PBGC. As a statutory trustee appointed under ERISA section 4042(c), PBGC has broad, enumerated powers, including the following: "to do any act authorized by the plan or this title to be done by the plan administrator or any trustee of the plan"; "to collect for the plan any amounts due the plan . . ."; and "to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan."[14]

As noted earlier, PBGC initiated mandatory termination of the Plan on February 2, 2018, under ERISA § 4042(a), because the Plan did not have assets available to pay benefits that were currently due. PBGC became the statutory trustee of the Plan by agreement with the Chapter 7 trustee of the *[Company]*, the Plan's administrator. Using its authority as the statutory trustee of the Plan, including its power "to collect for the [Plan] any amounts due the [Plan]," PBGC settled the Plan's claims for breach of fiduciary duty against *[Appellant]* under ERISA § 206(d)(4) for the actuarial equivalent of *[$xxx,xxx]* in the form of a benefit offset.

2. *[Appellant's]* benefit under the Plan was reduced, or offset, for the alleged breach of fiduciary duties under the January 14, 2022 settlement agreement pursuant to ERISA § 206(d)(4).

As discussed above, the settlement of a pension plan's claim for fiduciary breach in exchange for an offset of a participant's benefit is an exception to ERISA's anti-alienation rule under § 206(d). Under ERISA § 206(d)(4), as amended, a participant's benefit in a particular pension plan may be reduced, or offset, in settlement of the pension plan's claim for breach of fiduciary duty against the participant. A benefit offset is a reduction of plan liabilities, not an increase in plan assets. *See* Revenue Reconciliation Act of 1997, S. Rep. No. 105-33 at 310 (1997) ("The Committee believes that the assignment and alienation rules should be clarified by creating a limited exception that permits participants' benefits under a qualified plan to be reduced under certain circumstances including the participant's breach of fiduciary duty to the plan.")

Under ERISA § 206(d)(4), *[Appellant]* agreed to an offset of his benefit under the Plan against the amount he is required to pay under the Settlement Agreement for the alleged violation of his fiduciary duties.[15] Based on the Settlement Agreement, PBGC reduced, or offset,

---

[13] *See* ERISA § 4042(a); 29 USC 1342(a) (flush language).

[14] *See* ERISA § 4042(d)(1)(A)(i), § 4042(d)(1)(B)(ii), (iv); 29 USC §§ 1342(d)(1)(A), 1342(d)(1)(B)(ii).

[15] A benefit offset is a "partial or total reduction in a person's pension benefit because the person (1) owes money to the pension plan . . . ." *See* definition of benefit offset at www.pbgc.gov/glossary, retrieved on September 18, 2024.

[Appellant's] estimated monthly benefit of *[$x,xxx.xx]* by the actuarial equivalent of *[$xxx,xxx]*, i.e., *[$x,xxx.xx]* per month, the agreed-upon settlement amount, effective as of DOPT.

The Appeal mischaracterizes the benefit offset in the January 14, 2022 Settlement Agreement under ERISA § 206(d)(4) by repeatedly referring to it as a "benefit waiver" or "waiver."[16] Under ERISA and the Code, a participant is not permitted to waive, assign, or alienate his or her pension benefit.[17] ERISA § 206(d)(4) is the exception to the anti-alienation rule that permitted *[Appellant]* to agree to offset his benefit in payment for the Plan's claim against him for fiduciary breach. While the settlement agreement uses a label of "waiver," the agreement was made under ERISA § 206(d)(4), which results in a benefit offset rather than a prohibited benefit waiver.

Under other narrow exceptions in PBGC regulations, in the context of voluntary plan terminations, i.e., standard and distress terminations, the majority owner of a plan sponsor may elect to forgo receipt of his plan benefits.[18] In a standard termination, the majority owner may "elect to forgo receipt of his or her plan benefits to the extent necessary to enable the plan to satisfy all other plan benefits."[19] In a distress termination, the majority owner may elect, with PBGC's approval, to forgo receipt of his plan benefits to make the plan sufficient for guaranteed benefits.[20]

The exceptions in PBGC regulations allowing majority owners to forgo receipt of their benefits do not apply in *[Appellant's]* circumstances. First, the Plan did not terminate in a voluntary termination (either a standard or distress termination);[21] *[Appellant]* was not a majority owner at the time of plan termination. According to the Appeal, he sold his ownership interest in 2002 even while remaining as president of the Company.[22] Second, despite the labels used in the Settlement Agreement, *[Appellant]* is not "waiving" or "forgoing receipt" of his plan benefits under the PBGC regulations discussed above; rather, he entered into a settlement agreement under § 206(d)(4) of ERISA in which he agreed to reduce, or offset, his benefit to satisfy the Plan's claims against him for breaches of fiduciary duty.

---

[16] Appeal at, e.g.,1, 3, 5.

[17] *See* ERISA §§ 204(g), 206(d); Code §§ 401(a)(13)(A), 411(a), 411(d)(6); Treas. Reg. §§ 1.411(d)-4 (Q&A 3(a)(3)), 1.401(a)-13(c)(1)(i); IRS Priv. Ltr. Rul. 91-46-005 (July 5, 1991) (A participant's waiver of benefits violates the anti-alienation and anti-cutback rules).

[18] ERISA establishes the conditions and requirements for voluntary, or sponsor-initiated, terminations of Title IV pension plans under ERISA § 4041. PBGC regulations define "majority owner" in 29 CFR § 4001.2.

[19] 29 CFR § 4041.21(b)(2). The regulation was generally applicable to voluntary plan terminations for which the first notice of intent to terminate was issued on or after January 1, 1998. The proposed rule was issued before the enactment of ERISA § 206(d)(4) under the Taxpayer Relief Act of 1997. According to the preamble, "[b]ecause this offset reduces the benefits that must be taken into account in a voluntary termination, there is no need to revise the regulation to reflect this legislation." 62 Fed. Reg. 60424 (1997).

[20] 29 CFR § 4041.47(d).

[21] As discussed above, PBGC initiated termination of the Plan under section 4042(a).

[22] Appeal at 1.

3. PBGC complied with the asset allocation rules under ERISA § 4044(a) and PBGC regulations with respect to the Plan's claims for fiduciary breach.

Under ERISA § 4044(a), the assets of a plan "*available to provide benefits*" are allocated to participants and beneficiaries in the prescribed statutory order after the payment of the plan's pre-termination liabilities. ERISA § 4044(a) is an "allocation mechanism" for the terminated plan's assets, not a source of "benefit entitlements."[23]

Under PBGC regulation § 4044.3(a), PBGC allocates the "plan assets available to pay for benefits" in the manner prescribed in the regulations, generally, §§ 4044.10 through 4044.17. The regulation states that "plan assets available to pay for benefits under the plan" include "all plan assets (valued according to § 4044.41(b)) remaining after the subtraction of all liabilities, other than liabilities for future benefit payments, paid or payable from plan assets under the provisions of the plan."[24] As quoted above, the regulation defines "liabilities" to include "expenses, fees and other administrative costs, and benefit payments due before the allocation date."[25]

Plan assets are "valued at their fair market value, based on the method of valuation that most accurately reflects such fair market value," according to § 4044.41(b) of PBGC regulations in effect on October 31, 2017, the DOPT.[26] "Fair market value" is defined under PBGC regulation § 4001.2 as follows: "Fair market value means the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."[27]

Under PBGC's OPM, PBGC typically values a terminated plan's claim for fiduciary breach against a participant as $0. As stated in OPM 6.6-2, "PBGC's *claim* [for fiduciary breach] is a plan asset and, because of the difficulties inherent in collecting from an individual, in many if not most cases it will be valued as uncollectible (i.e., as having zero value)."[28] But even if PBGC treats a *claim* for fiduciary breach as having a zero value because of "difficulties inherent in collecting from an individual," PBGC also evaluates any *recoveries* on such claims. Under OPM 8.2-1, "PBGC treats the recoveries on the fiduciary breach claim as plan assets."[29]

---

[23] *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989).

[24] 29 CFR § 4044.3(a).

[25] *Id.*

[26] Effective August 10, 2023, 29 CFR § 4044.41(b) was revised as follows: "Plan assets generally will be valued at their fair market value as defined in § 4001.2 of this chapter. As appropriate, plan assets will be valued at their fair value in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP)."

[27] *See* 29 CFR § 4001.2; *see also* 26 CFR § 20.2031-1(b) (same).

[28] *See* Enclosure 1, OPM 6.6-2, Section D. 8.c (Assignment or alienation of benefits) (emphasis added).

[29] *See* Enclosure 1. Under OPM 8.2-1, "When PBGC pursues a claim for fiduciary breach separately from its global claim against the plan sponsor, PBGC treats the *recoveries* on the fiduciary breach claim as plan assets. [Office of General Counsel] will provide their best estimate (including any pertinent details such as a payment schedule) of the recovery amount and [Asset Evaluation Division] will value that amount as of DOPT and add it to the DOPT value of plan assets." (Emphasis added.)

Consistent with PBGC's OPM 6.6-2, PBGC's original valuation documents reflect that PBGC assigned no value to the Plan's claim for fiduciary breach against *[Appellant]* as of the DOPT of October 31, 2017.[30] Accordingly, as of DOPT, the only Plan assets available to pay *[Appellant]* and *[Spouse's]* pretermination benefits were what was reflected in the valuation documents, i.e., *[$x,xxx.xx]*.

Contrary to the Appeal's argument, PBGC ensured that the Plan's assets available to provide benefits under ERISA § 4044(a) were "net" of the assets required to satisfy pretermination benefits. In other words, PBGC did not allocate any Plan assets under section 4044(a) to the benefit liabilities of participants (i.e., *[Appellant]* and *[Spouse]*) that could have been used to pay the pretermination benefits of *[Appellant]* and *[Spouse]*, because PBGC had no such assets to allocate. The Plan's "financial plan assets," within the meaning of OPM 6.3-1, were available to pay *[Appellant's]* pretermination benefits, but the Plan's fiduciary breach claim, valued at $0, could not be used to pay his pretermination benefits or provide future benefits in the allocation of Plan assets under § 4044(a) of ERISA.[31] Hence the Appeals Board finds that PBGC did not violate ERISA § 4044(a) and PBGC regulations on asset allocation with respect to the payment of pretermination liabilities.

4. The post-DOPT settlement of the Plan's fiduciary breach claims against *[Appellant]* did not change PBGC's valuation of the Plan's assets.

Under OPM 8.2-1, section G.2, PBGC may revise its valuation of a plan's assets as of a plan's DOPT "in the case of mistake of fact or extraordinary material change of circumstances." The OPM provides an example of "a substantial unexpected recovery in a legal action pertaining to a terminated and trusteed pension plan."

---

[30] *See* Memorandum on Plan Asset Reconciliation for *[Plan]*, together with Form 1108 Reconciliation Worksheet Summary report, signed January 7, 2021, included in Appeal Exhibit D, at pages 14-22, 30, and provided as Enclosure 2 for convenience. The memorandum reflects that the "Total Value of Plan Assets without DUEC" is *[$x,xxx.xx]*. *See Id.* at 16*; see also* Memorandum re Re-evaluation of Plan Assets for the *[Plan]*, dated June 8, 2022, included in Exhibit D to the Appeal, at pages 112-113, and provided as Enclosure 3, i.e., *[$x,xxx.xx]* (Assets) – *[$xx.xx]* (Accrued Expenses) = *[$x,xxx.xx]*. "DUEC" stands for Due and Unpaid Employer Contributions, a liability to the Plan owed by the plan sponsor (the Company) and the members of its controlled group.

[31] *See* Enclosure 1, OPM 6.3-1 (Underpayment Reimbursement and Interest Payments), Section E.2. ("Assets") ("PBGC pays the pre-termination plan liabilities with interest to the extent the plan's assets are *sufficient* to pay for them.") (emphasis added). The policy explains that PBGC determines "sufficiency" to pay pre-termination liabilities based on "*Financial Plan Assets*," not "*Valuation Plan Assets*." Financial Plan Assets include (1) *the DUEC Recovery*, and (2) the value at DOPT of all other plan assets, including intangible plan assets. PBGC could not obtain a "*DUEC Recovery*" because the Plan sponsor liquidated in Chapter 7 bankruptcy, and there were no viable controlled group members. As shown in Enclosure 2, the other financial plan assets were minimal, and PBGC assigned no value to the Plan's claim for fiduciary breach at DOPT. *Valuation Plan Assets* include "*Valuation DUEC Recovery*," which is "the value determined by multiplying (a) the DUEC for a plan by (b) the section 4062(c) recovery ratio (e.g. the [Small Plan DUEC Recovery Ratio] for small plans)." (The Plan was a small plan because its "outstanding amount of benefit liabilities" were $20 million or less.) Although Valuation DUEC Recovery is allocated to a plan's participant benefits under section 4044(a), the amount is attributable to PBGC's recoveries against other plan sponsors—not the plan's assets at termination. The Plan's *Valuation DUEC Recovery* is *[$xx,xxx.xx]*, but this amount cannot be used to satisfy pre-termination liabilities because it is not a Financial Plan Asset.

In January 2022, PBGC, as the Plan's statutory trustee, entered into post-DOPT settlement agreements with *[Appellant]* and two non-Plan participants to resolve the Plan's claims for fiduciary breaches. PBGC recovered *[$x,xxx]* and *[$x,xxx]*, in cash or other negotiable instrument from *[Fiduciary A]* and *[Fiduciary B]*, respectively, under individual settlement agreements.[32] Given these recoveries, PBGC revised its valuation of plan assets as of DOPT in accordance with the OPM. PBGC used the cash recoveries from these settlements, i.e., "financial plan assets" within the meaning of OPM 6.3-1, with *[Fiduciary A]* and *[Fiduciary B]* to pay *[Appellant]* a portion of his missed pretermination benefits.

But PBGC did not treat *[Appellant's]* benefit offset as a "recovery" on the fiduciary breach claim.[33] The benefit offset required by the Settlement Agreement decreased Plan liabilities rather than increase Plan assets. In other words, *[Appellant's]* benefit offset was unlike the cash recoveries arising from the settlements with *[Fiduciary A]* and *[Fiduciary B]*. The Appeals Board finds that PBGC could use the recoveries from the *[Fiduciary A]* and *[Fiduciary B]* settlements to pay a portion of *[Appellant's]* pretermination benefits because those settlements increased the Plan's assets, but PBGC cannot use a benefit offset to pay *[Appellant's]* pretermination benefits.

The Appeal asserts that the foregoing rationale "misses the point that the *Plan asset at issue* is not the benefit waiver, but rather is the cause of action that ultimately was settled by *[Appellant]* agreeing to that benefit waiver. And it is clear that there is a significant value to that benefit waiver in that it releases PBGC and the Plan from a costly liability."[34] Apart from the Appeal's mischaracterization of the benefit offset as a "benefit waiver," the Appeal seems to argue inconsistent positions in the same paragraph. It first claims that the Plan's fiduciary breach claim is the Plan's asset "at issue" but then concludes that there is significant value to the benefit offset, i.e., a release from "a costly liability."

Contrary to the Appeal, neither PBGC nor the Plan was "released from a costly liability" under the Settlement Agreement. Under the terms prescribed by ERISA § 206(d)(4), *[Appellant]* is required to pay his debt arising from his (alleged) fiduciary breaches in the form of an offset of his Plan benefit. The Plan's claim represents the Plan's loss because of fiduciary-enabled loans of Plan assets made to a third party *[Business]* in violation of ERISA's fiduciary standards. Under the Settlement Agreement, *the Plan is being made whole*, not released from a "costly liability."[35] (Moreover, any consequential reduction of the Plan's unfunded guaranteed benefits was

---

[32] *See* Exhibit D to the Appeal, at pages 112-113, and provided as Enclosure 3.

[33] *See* Memorandum on Plan Asset Reconciliation for *[Plan],* included in Exhibit D to the Appeal, at pages 99-105, and provided as Enclosure 4; *see also* Exhibit D to the Appeal at 112-113, provided as Enclosure 3. The memorandum in Enclosure 3 reflects the recoveries of *[$x,xxx.xx]* (*[$x,xxx]* discounted to DOPT) from the post-DOPT settlements with *[Fiduciary A]* and *[Fiduciary B]*, and the availability of *[$x,xxx.xx]* for pretermination benefits, i.e., *[$x,xxx.xx] + [$x,xxx.xx] = [$x,xxx.xx]*.

[34] *See* Appeal at 5 (emphasis added).

[35] *See* S. Rep. No. 105-33, at 310 (1997) (settlements involving the offset of participant benefits under ERISA § 206(d)(4) are intended "to make a plan whole in the case of a fiduciary breach"), at page 7-8, *infra.* Given that the Plan's losses resulting from the Plan's loans to *[Business]* were in the range of *[$xxx,xxx]* to *[$x]* million, *see* Appeal at 2, the Plan was not made completely whole under the Settlement Agreement.

incidental to the Settlement Agreement resolving *[Appellant's]* liability to the Plan and is irrelevant to this appeal.[36])

The Appeal further suggests that PBGC should rely on "the value of the consideration provided by the defendant . . . in the ultimate settlement" to establish the value of a plan's claim at DOPT because it "reflects the views of the settling parties . . . regarding the value of the underlying cause of action."[37] PBGC regulations state, however, that plan assets are valued at their fair market value.[38] The Appeal has offered no evidence or authority that the fair market value of the Plan's fiduciary breach claim should be based on the dollar amount of a settlement agreement under ERISA § 206(d)(4)—a statutory resolution that only the Secretary of Labor or PBGC can enter into with participants like *[Appellant]* who violate or (allegedly) violate their fiduciary duties.

5. The Appeal's hypotheticals are not helpful.

The Appeal posits hypotheticals that are not analogous to *[Appellant's]* circumstances or helpful in resolving his appeal. For example, the Appeal asserts that if "the [Plan's] losses had been $100,000 less than they were, the Plan would have had $100,000 more than it in fact had as of the DOPT. None of that $100,000 would have gone to PBGC."[39] Given that PBGC terminated the Plan because it lacked sufficient assets to pay benefits that were currently due, the hypothetical about the Plan having an extra $100,000 is counterfactual.

By similarly claiming, for example, that "PBGC is keeping for itself funds that should be used to satisfy *[Appellant's]* unpaid retirement benefits,"[40] the Appeal confuses the settlement of the Plan's pretermination fiduciary breach claims against *[Appellant]* with the Plan's post-termination unfunded guaranteed benefits, which PBGC, the corporate guarantor of defined benefit pension plans, insures under Title IV of ERISA. As previously discussed, the Settlement Agreement of January 14, 2022, reduced the Plan's liability for *[Appellant's]* pension benefit *to compensate the Plan* for its losses related to the *[Business]* loans enabled by *[Appellant]*; it did not enrich PBGC, the agency responsible for paying monthly guaranteed benefits to participants like *[Appellant]* in terminated underfunded pension plans.

The Appeal further asserts that "if *[Appellant]* had paid the Plan $100,000 shortly before the DOPT to settle the Plan's claim for fiduciary breach, none of that $100,000 would have gone to PBGC," but rather would have been used to satisfy the pre-termination liabilities.[41] But

---

[36] ERISA defines "amount of unfunded guaranteed benefits" essentially as the excess of the actuarial present value of a plan's guaranteed benefits under § 4022 of ERISA over the current value of the plan's assets, both as of the plan's termination date. *See* ERISA § 4001(a)(18); 29 USC § 1301(a)(18). If a benefit offset reduces a participant's guaranteed benefit under a pension plan, a benefit offset will reduce the plan's amount of unfunded guaranteed benefits.

[37] *See* Appeal at 5.

[38] 29 CFR §§ 4044.3(a), 4044.41(b), as in effect at DOPT.

[39] *See* Appeal at 4.

[40] *See also* Appeal at 4, 5, 6.

[41] *See* Appeal at 4.

[Appellant] did not settle the Plan's fiduciary breach claim for $100,000 "shortly before the DOPT," and it seems unlikely he would then have been inclined to do so, given that he received a "full release" of liability in 2015 from *[Fiduciary A]* (in his capacity as the Plan's administrator) for the *[Business]* loans."[42] Instead of a pre-termination settlement for $100,000, *[Appellant]* agreed to a post-termination benefit offset under ERISA § 206(d)(4) to resolve *the Plan's* fiduciary breach claim, which, unlike the settlement agreements reached with *[Fiduciary A]* and *[Fiduciary B]*, provides no cash recoveries for paying pre-termination benefits and no assets available for allocation under ERISA § 4044(a).

The Appeal declares that "PBGC could benefit financially from a reduction in the [Plan's] losses or, correspondingly, in any settlement of the fiduciary breach claim that those losses related to, only to the extent that the amount of that reduction or the value of that settlement (in each case, as of the Plan's DOPT) was more than sufficient to make *[Appellant]* and *[Spouse]* whole for their losses of pre-termination benefits."[43] As discussed above, PBGC entered into the Settlement Agreement as the Plan's statutory trustee, not on its own behalf. Taken to its logical conclusion, the Appeal's theory would have prevented PBGC from settling the Plan's claims for breach of fiduciary duty against *[Appellant]* under ERISA § 206(d)(4) because the benefit offset cannot be used to pay his and *[Spouse's]* pretermination benefits. The Appeal cites no authority for its novel proposition, and the Appeals Board finds no such restrictions on PBGC's powers as statutory trustee under ERISA § 4042(d), discussed above, regardless of whether the exercise of these powers to settle a plan's fiduciary breach claims would affect the payment of pretermination liabilities or indirectly reduce the Plan's unfunded guaranteed benefits.

The Appeals Board further rejects the Appeal's implicit argument that if PBGC, as a statutory trustee, settles a plan's fiduciary breach claim with a participant-fiduciary under ERISA § 206(d)(4) leaving pre-termination benefits unpaid, PBGC must pay the pre-termination benefits using corporate funds that are not derived from that plan's assets. As discussed above, ERISA section 4044(a) is an "allocation mechanism" limited exclusively to the terminated plan's assets, not a source of "benefit entitlements."[44] PBGC may pay pre-termination benefits only to the extent the plan's assets are sufficient and available to pay for them.[45] If there are no such assets with which to pay pre-termination benefits, PBGC cannot pay them.

6. The IRS EPCRS is not applicable to PBGC-trusteed plans.

The Appeal also argues that PBGC "erred in using lower than required interest rates to increase unpaid pre-termination payments."[46] To increase *[Appellant's]* pre-termination benefits under the Plan, the Appeal asserts that PBGC should follow the IRS's Employee Plans

---

[42] *See* Exhibit C to the Appeal, page 2. After DOPT, PBGC apparently found that the earlier settlement involved "inadequate consideration," and it took the position that the release *[Appellant]* received from *[Fiduciary A]* & *[Entity A]* was invalid. *See Id*.

[43] Appeal at 4.

[44] *Mead Corp. v. Tilley*, 490 U.S. at 723.

[45] *See* OPM 6.3-1, Enclosure 1.

[46] Appeal at 6.

Compliance Resolution System's ("EPCRS") instructions on making "a corrective distribution" because of a "delayed payment."[47] The Appeal urges the Appeals Board to apply the Plan's provisions on "actuarial equivalence" and increase each of *[Appellant's]* pre-termination benefit payments by 5% from the due date until paid.[48]

But the payments to *[Appellant]* were not simply delayed. The Plan was unable to make *[Appellant's]* pre-termination benefit payments because the fiduciary-enabled loans made to *[Business]* with Plan assets caused the Plan to run out of money. Because the Plan's assets were exhausted, rendering it unable to pay *[Appellant's]* benefits, PBGC was required under ERISA to terminate the Plan. It became the statutory trustee of the Plan, as discussed above, and settled the Plan's claims for fiduciary breach against *[Appellant]* under ERISA § 206(d)(4) relating to the *[Business]* loans.

The IRS's EPCRS is a "system of correction programs *for sponsors of retirement plans* that are intended to satisfy the requirements of § 401(a) . . . of the [Code] but that have not met these requirements for a period of time."[49] PBGC is not the "sponsor" of the Plan, and the Plan has been terminated. The Appeal fails to explain why the IRS's EPCRS, applicable to ongoing plans, would apply to PBGC in its administration of terminated plans under Title IV of ERISA and PBGC regulations.

As discussed above, PBGC regulations govern the payment of pre-termination liabilities in terminated plans, including missed benefit payments. PBGC regulations specify the interest rate at which PBGC credits interest on *post-termination* underpayments, and PBGC has determined under its OPM to pay the same interest rate on the underpayment of *pre-termination* benefits.[50] Given that PBGC is not required under ERISA to increase pre-termination benefit payments by a specific interest rate, the Appeals Board has no authority to find that PBGC's interest rate for post-termination benefit underpayments should not also apply to pre-termination benefit underpayments. As such, the Appeals Board rejects the Appeal's argument that PBGC erred in using the interest rate specified in PBGC's regulations.

7. Determination of *[Appellant's]* net benefit overpayment.

If PBGC pays benefits to participants in amounts that are greater than what ERISA allows, PBGC must recoup the net overpayment of benefits.[51] PBGC recoups the net overpayment of benefits by reducing a participant's future benefit payments until the overpayment is repaid.[52] PBGC's method of recoupment is designed to minimize hardship on participants for the following reasons:

---

[47] Appeal at 7. The Appeal refers to IRS Rev. Proc. 2021-30, § 6.02(4)(d), at pages 31-32.

[48] Appeal at 7.

[49] IRS Rev. Proc. 2021-30, § 1.01 (Purpose) (emphasis added).

[50] *See* 29 CFR § 4022.81(c)(4) (For months after May 1998, the regulations specify the applicable federal mid-term rate pursuant to Code § 1247(d)(1)(C)(ii)); OPM 6.3-1, Section C.3, Enclosure 1.

[51] 29 CFR § 4022.81.

[52] 29 CFR § 4022.82.

- PBGC is recouping by reducing future benefit payments and is not demanding immediate repayment of the overpayment balance as a lump sum;

- PBGC generally limits its reductions for recoupment to not more than 10% of the benefit; and

- PBGC does not charge interest on overpayment balances.

For this pension plan, the starting date for determining the amount of a participant's net overpayment is February 2, 2018, when PBGC issued the Notice of Determination regarding Plan termination.[53]

In the table below, we replicate PBGC's calculation of your net overpayment of *[$xxx,xxx.xx]* as follows:

Table — Your Net Benefit Overpayment Calculation

Dates Paid	*Actual Monthly Amount Paid*	*PBGC-Payable Monthly Benefit (Correct Entitlement)*	*Monthly Overpayment*	*Monthly Underpayment*	*Months Paid*	***Total (Net Overpayment)***
11/01/2017 – 05/01/2018	$0.00	*[$x,xxx.xx]*	N/A	*[$x,xxx.xx]*	7	*[$xx,xxx.xx]*
11/01/2017 – 05/01/2018 Interest on underpay-ments						*[$xxx.xx]*
06/01/2018 – 03/01/2022	*[$x,xxx.xx]*	*[$x,xxx.xx]*	*[$x,xxx.xx]*	N/A	46	*[$xxx,xxx.xx]*
04/01/2022 – 02/01/2023	*[$x,xxx.xx]*	*[$x,xxx.xx]*	N/A	N/A	11	$0
09/01/2018 Lump-sum payment						*[$xx,xxx.xx]*
						[$xxx,xxx.xx]

[53] 29 CFR § 4022.81(c).

VI. Decision

As explained in this decision, the Appeals Board upholds PBGC's determination of November 21, 2022, that *[Appellant]* is entitled to a monthly benefit of *[$x,xxx.xx]*, paid in the form of a Straight Life Annuity with no survivor benefits. *[Appellant's]* benefit will be reduced to *[$x,xxx.xx]* per month to recoup the net benefit overpayment in accordance with PBGC regulations.

This is the agency's final decision on this matter, and you may, if you wish, seek review of this decision in an appropriate U.S. District Court. If you have any questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,

James L. Eggeman
Member, Appeals Board

cc: *[Appellant]*
[Address]
[Address]
[Address]

Enclosures (4):

1. Relevant provisions of the PBGC Office of Benefits Administration Policy Manual (32 pages)

2. Memorandum on Plan Asset Reconciliation for *[Plan]*, together with Form 1108 Reconciliation Worksheet Summary report, signed January 7, 2021 (10 pages)

3. Memorandum re Re-evaluation of Plan Assets for the *[Plan]* dated June 8, 2022 (2 pages)

4. Memorandum on Plan Asset Reconciliation for *[Plan]* (7 pages)