



# AMERICAN BENEFITS COUNCIL

July 31, 2020

The Honorable Gordon Hartogensis  
Director  
Pension Benefit Guaranty Corporation  
1200 K St., NW  
Washington, DC 20005

Dear Director Hartogensis:

We thank you for all that PBGC has done to help implement recent legislation to address the current crisis. The public/private partnership that has arisen is a tribute to all involved as we struggle together to deal with unprecedented challenges.

In that regard, however, we are writing to express concern about a recent position taken by PBGC in FAQs issued on July 20, entitled "COVID-19-Related Single-Employer Plan Sponsors and Administrators Questions and Answers."

## SUMMARY

The short version of the issue is that, under the CARES Act, an employer is permitted to delay funding contributions otherwise due in 2020 to January 1, 2021. *However, under PBGC's FAQs, employers that use the full funding delay will generally pay a very substantial 4.5% "penalty" in the form of a higher PBGC premium.*<sup>1</sup> We ask you to correct this situation by permitting amended premium filings to take into account prior year contributions made after the original due date for premiums. In our view, such a result is not only consistent with congressional intent underlying the CARES Act, it is also consistent with applicable regulations, as described below.

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<sup>1</sup> If this 4.5% penalty is translated into an equivalent amount of interest for using the last 2 ½ months of the congressionally granted delay, it is like paying 21.6% interest in addition to the interest charged expressly by the CARES Act.

## DISCUSSION

The CARES Act provided that funding contributions otherwise due during 2020 may be paid as late as January 1, 2021 (with interest). So, for example, in the case of a calendar year plan, final contributions for 2019 would normally be due by September 15, 2020, but are now due by January 1, 2021.

### Issue

The issue addressed in the FAQs is: by what date do contributions for 2019 have to be made in order to be taken into account in determining the 2020 variable rate premium? PBGC's answer is: only contributions made by the date that the premium is *originally* filed, which, if filed on the due date, would be October 15, 2020, for calendar year plans. So, if a company takes advantage of the CARES Act delay and does not make final contributions for 2019 until after October 15, 2020, then those contributions are not taken into account in determining the company's 2020 variable rate premium. And those contributions could not be taken into account in an amended premium filing after October 15, 2020.

### Legal analysis

PBGC cites for authority Regulation § 4006.4(c), which says that "prior year contributions are included only to the extent received by the plan by the date the premium is filed." Apparently, PBGC is interpreting this language as limited to the original premium filing. This is surprising. It is not surprising that PBGC would not allow a premium filing to anticipate future contributions but it is surprising that PBGC would preclude amended filings from taking into account contributions made by the date of the amended filing.

The regulation cited in the FAQs says that in order to be taken into account, prior year contributions must be made "by the date the premium is filed." The FAQs, without any authority cited, take the position that the date the premium is filed is the original date of filing, not an amended filing date. We are aware of no authority for this position.

On the contrary, we are aware of authority directly contrary to the FAQ position, including in particular the statutory provisions governing the determination of the PBGC variable rate premium. In the preamble to the cited regulation, as proposed and as finalized, PBGC stated that PBGC interprets the *statutory* definition of "fair market value of plan assets" as incorporating the *statutory* rule requiring inclusion of all contributions attributable to a prior year under the funding rules.<sup>2</sup> Congress has

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<sup>2</sup> 72 Fed. Reg. 30308, 30310 (May 31, 2007) (proposed rule); 73 Fed. Reg. 15065, 15067 (March 21, 2008) (final rule).

allowed employers to make contributions “for” the 2019 plan year up until January 1, 2021, and any contributions made by that date that are designated as being “for” the 2019 plan year thus must be included in the determination of the variable-rate premium for the 2020 plan year.

So the FAQ is directly contrary to the legally compelled position described above, and rests its entire validity on the unsupported view that the regulatory reference to the date of filing can only mean the date of original filing.

### **Inconsistent with past informal positions of PBGC staff**

Moreover, PBGC’s FAQ position is inconsistent with informal positions correctly taken by the PBGC staff in the past under a technically narrower version of the regulation, which only took into account contributions made by the earlier of the due date for payment of the variable rate premium, or the date of payment.<sup>3</sup> This narrower version could be read to suggest that once a payment has been made, additional contributions cannot be taken into account. But PBGC expressly stated the opposite in the 2003 Blue Book, Q&A 9. PBGC stated that the additional contributions made in an amended filing could be taken into account for variable rate premium purposes, because “the intent of [the predecessor regulation] is simply to prohibit variable rate premium computations based on contributions that the plan administrator may expect to be made but that have not been made.” Under this logic, there is no reason not to allow an amended filing after October 15, 2020, to take additional 2019 contributions into account.

### **The case for 2020**

As described above, we strongly believe that under the law, contributions made for a prior year *must* be taken into account into account for premium purposes in an amended filing. Even if PBGC disagrees with this, it is clear that that is a permissible interpretation of the law, giving PBGC interpretive discretion, so that PBGC could permit such treatment for premiums due in 2020. Otherwise, PBGC would be imposing a large penalty on employers that use a funding delay granted by Congress in the CARES Act in response to the crisis.

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<sup>3</sup> The requirement in that earlier regulation that contributions for the prior plan year be made by the due date for the variable-rate premium for the current plan year did not pose any problems, as that due date was always *on or after* the latest date for making a contribution for a prior plan year. We believe that when this requirement was first placed into PBGC’s regulations in 1988 (53 Fed. Reg. 24906, 24915 (June 30, 1988)), it was not contemplated that there would ever come a time (as has now occurred for the first time in 2020) when that due date would be *before* the latest date for making a contribution for a prior plan year. In any event, PBGC eliminated this requirement effective for plan years beginning after 2007 (73. Fed. Reg. 15065, 15074 (Mar. 21, 2008)).

## **Unfairness of retroactive application of FAQ**

The FAQ's retroactive effect is severely problematic for the sponsor of any plan that had previously submitted its variable rate premium filing for the 2019 or 2020 premium payment year with the reasonable expectation on the part of the sponsor that PBGC would issue a refund based on an amended filing to be submitted on or after the date on which contributions are made for the prior year by the deferred deadline under the CARES Act. Such a sponsor just learned, after the fact, that it would have had to have made those contributions by the date of the earlier pre-FAQ variable rate premium filing to get credit for them for premium purposes. At a minimum, the FAQ should only apply prospectively.

## **Renewed call for a delay in the due date for the Form 5500 with a corresponding delay in the due date for premiums**

The solution we are recommending is far from perfect, because it requires amended premium filings. Clearly, the right answer for all purposes is to delay the due date for the Form 5500 until February 1, so that there is no need to submit amended Form 5500s and amended premium filings before the deferred CARES Act deadline for making contributions that were otherwise due in 2020.

## **Large penalty**

Finally, the penalty for using the entire congressionally granted delay is extreme: a 4.5% premium for a 2.5-month delay.

We believe that the position in the FAQs is inconsistent with the law and with congressional intent, and it imposes a substantial penalty on employers using crisis-related relief. We ask that the FAQ be promptly withdrawn and the position reversed.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive, flowing style.

Lynn D. Dudley  
Senior Vice President, Global Retirement and Compensation Policy