



Pension Benefit Guaranty Corporation  
1200 K Street, N.W., Washington, D.C. 20005-4026

July 22, 2016

[REDACTED]

Re: Remand [REDACTED]; Case No. 200185; The [REDACTED]  
Co. Cash Balance Pension Plan (the "Plan")

Dear Mr. [REDACTED]:

This Appeals Board decision constitutes PBGC's final agency action regarding the request of your client, [REDACTED], for a lump-sum payment of his Plan benefit. As you are aware, the United States District Court for the District of Columbia ("District Court") issued a Memorandum Opinion and Order (Enclosure 1) that remanded [REDACTED] claim to the Appeals Board.<sup>1</sup> The District Court instructed the Board to conduct further proceedings consistent with its Opinion.<sup>2</sup>

Having reviewed [REDACTED] factual, statutory and regulatory challenges in accordance with the District Court's remand order, the Appeals Board decides that [REDACTED] is not entitled to a lump-sum payment of his Plan benefit from PBGC.

Prior to the District Court's remand order, the Appeals Board issued a decision on September 29, 2011 (Enclosure 3), that denied [REDACTED] lump-sum payment claim. This decision modifies the Board's September 29, 2011 decision by: (1) discussing relevant statutory and regulatory provisions that we did not address in our prior decision; (2) more fully responding to the issues [REDACTED] raised in his January 28, 2010 appeal; and (3) providing a revised and more complete explanation of the reasons we are denying [REDACTED] lump-sum payment claim.

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<sup>1</sup> United States District Judge Randolph D. Moss issued his Memorandum Opinion ("Opinion") and Order on February 25, 2016, after the Plaintiff ([REDACTED]) and the Defendant (PBGC) had filed separate Summary Judgment motions in [REDACTED] v. PBGC, Civil Action No. 14-1275 (RDM). In this Appeals Board decision, we cite to the pages of the District Court's slip opinion.

A March 15, 2016 letter from William F. Condrón, Jr., Manager of PBGC's Appeals Division (Enclosure 2), informed you that (1) the Appeals Board received the District Court's remand order for [REDACTED]'s case, which was sent back to the Board for further proceedings, and (2) the Appeals Board "will issue a decision based on the administrative record and consistent with the Court's guidance not later than September 30, 2016."

<sup>2</sup> *Opinion*, at 16-17.

## **I. Introduction**

### **A. The Appeals Board's prior decisions and ██████'s civil action**

█████ filed a civil action, ██████ v. PBGC, in the District Court after he exhausted his administrative remedies before PBGC's Appeals Board. In addition to the above-mentioned September 29, 2011 decision, the Appeals Board issued a final decision to him on November 14, 2012 (Enclosure 4). In those two decisions, which addressed ██████'s PBGC-payable benefit under the Plan, the Board:

- found no reason to change PBGC's determination that PBGC must pay ██████'s Plan benefit as a monthly annuity. The Board concluded that applicable provisions under the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"),<sup>3</sup> PBGC regulations, and PBGC policy do not permit PBGC to pay him a lump sum; and
- upheld PBGC's revised determination that ██████ is entitled to a monthly benefit of \$866.54 in the form of a Joint and 50% Survivor Annuity, after application of the statutory limits on PBGC's guarantee. (The \$866.54 amount is an increase from the \$452.77 monthly benefit that PBGC had determined initially.)<sup>4</sup>

We discuss the Board's prior decisions in more detail later in this decision.

In his civil action, ██████ disputed PBGC's denial of a lump-sum payment. He asserted that PBGC should have honored the lump-sum payment application that he had submitted to the former Plan Administrator before the Plan terminated.

### **B. The District Court's remand order**

As the District Court's Opinion states, ██████ made the following two arguments before the Appeals Board as to why, in his view, ERISA and PBGC's regulations did not prohibit the former Plan Administrator from honoring his request for a lump-sum payment:

█████ argued, first, that [ERISA § 4041(c)(3)(D)(i)(I)], which prohibits the payment of lump-sum benefits beginning "on the date on which the plan administrator provides a notice of distress termination" to the PBGC, did not bar a lump-sum payment because ██████ had denied his request *before* it submitted a notice of distress termination to the PBGC. . . . ██████ also argued that [PBGC regulation] § 4044.4(b), which prohibits the distribution of assets "in anticipation of plan termination" in a manner not consistent with ERISA, did not bar a lump-sum

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<sup>3</sup> 29 United States Code ("U.S.C.") §§ 1301-1461 (2012 & Supp. II 2014). This decision generally cites the applicable sections of ERISA without providing the parallel U.S.C. citations.

<sup>4</sup> ██████ currently is receiving a monthly PBGC-payable benefit of \$866.54.

payment because the regulation was *ultra vires* and, in any event, inapplicable under the circumstances.<sup>5</sup>

With respect to ██████'s first argument, the District Court concluded that the Appeals Board's September 29, 2011 decision failed to address "potentially dispositive aspects" of ██████'s ERISA § 4041(c) contentions because the Board's decision relied on a PBGC policy that did not specifically address the situation where a lump-sum payment request "was not only submitted but also *denied* before the plan administrator submitted its termination notice to PBGC."<sup>6</sup> For his second argument, the District Court concluded that the Board's prior decision failed to address "whether and how" PBGC regulation § 4044.4 might apply to ██████'s claim.<sup>7</sup>

Based on the above conclusions, the District Court decided that the Appeals Board's decision must be set aside and remanded to the agency due to "a cardinal rule of judicial review that the Court 'cannot exercise [its] duty of review unless [it is] advised of the considerations underlying the action under review.'"<sup>8</sup> The District Court emphasized, however, the following two points regarding the scope of its Opinion:<sup>9</sup>

First, nothing here should be read to cast doubt on the agency's interpretation of [ERISA § 4041] as embodied in [PBGC] Policy 5.4-9 and as applied to a request for lump-sum benefits that is *made* (but is not *denied*) before a notice of plan termination is submitted to the PBGC. The validity of that interpretation is not before the Court today. Second, nothing here should be read to suggest that the agency in fact acted outside its authority in denying ██████'s request for a lump-sum payment. . . . Without opining on the scope of the PBGC's authority, the Court emphasizes that its decision to set aside the Appeals Board's decision is based solely on the agency's failure to explain adequately its resolution of ██████'s statutory and regulatory challenges.

### **C. Overview of this Appeals Board decision**

For the reasons explained in this decision, the Appeals Board decides the following in accordance with the District Court's remand order:

- PBGC regulation § 4044.4, which prohibits the distribution of assets "in anticipation of plan termination," applies to ██████'s lump-sum payment request. The former Plan Administrator correctly denied ██████ a lump-sum distribution of his Plan benefit in accordance with PBGC regulation § 4044.4.

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<sup>5</sup> *Opinion*, at 7. PBGC's regulations are published in the Code of Federal Regulations at 29 C.F.R. §§ 4000-4999. This decision generally cites the applicable sections of PBGC's regulations without providing the full C.F.R. citations.

<sup>6</sup> *Opinion*, at 11-13.

<sup>7</sup> *Opinion*, at 13-14.

<sup>8</sup> *Opinion*, at 14-15. The District Court cites *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) and *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

<sup>9</sup> *Opinion*, at 16-17.

- PBGC’s prohibition in PBGC regulation § 4044.4 of lump-sum distributions in anticipation of termination is a valid exercise of PBGC’s rulemaking authority, rather than an *ultra vires* rule (as [REDACTED] claims).
- Because the Plan’s former administrator correctly denied [REDACTED]’s lump-sum application based on PBGC regulation § 4044.4, a lump-sum benefit was not “due and payable” to him as of the Plan’s termination date (“DOPT”). Consequently, PBGC is not required to treat [REDACTED]’s lump-sum payment request as a pre-termination liability of the Plan (*see* PBGC regulation § 4044.3) for purposes of PBGC’s allocation of the Plan’s assets as of the Plan’s DOPT pursuant to ERISA § 4044.
- As is provided under PBGC’s regulation § 4022.7 and PBGC policy, PBGC cannot pay a lump-sum benefit to [REDACTED]. Instead, PBGC correctly is paying [REDACTED] the annuity benefit he elected in accordance with the Plan’s provisions and PBGC regulations, with his annuity benefit reduced by the guarantee limitations under ERISA § 4022 and PBGC regulation § 4022.

## **II. The Plan’s termination, PBGC’s guarantee, and PBGC’s allocation of the Plan’s assets**

### **A. The Plan and its termination**

PBGC provides pension insurance in accordance with ERISA. If a plan sponsor is unable to support its single-employer defined benefit pension plan, PBGC becomes trustee of the plan and pays pension benefits as defined in the plan, subject to legal limitations and requirements under ERISA and PBGC’s regulations.

The Plan is a cash balance plan, which was created on May 31, 1998, as the result of the merger of three traditional defined benefit plans. The sponsor of the Plan, [REDACTED] Company (“[REDACTED]” or “the Company”), was a Delaware corporation that operated retail supermarkets and a wholesale food distribution business in [REDACTED]. [REDACTED]’s principal business office was in [REDACTED].

[REDACTED] was the “Plan Administrator” of the Plan.<sup>10</sup> [REDACTED]’s Board of Directors (the “Board of Directors”) appointed an Administrative Committee (“Committee”) to assist in the administration of the Plan.<sup>11</sup>

On May 30, 2003, [REDACTED] filed for Chapter 11 bankruptcy. During a meeting on September 29, 2003, the Board of Directors resolved that [REDACTED] would seek the distress termination of the Plan.<sup>12</sup> [REDACTED] attended the September 29, 2003 meeting as a member of the Board of Directors, but he was excused from the Board’s deliberations involving the Plan.<sup>13</sup>

<sup>10</sup> *See* [REDACTED] *Cash Balance Pension Plan Effective As Of January 1, 1998* (“Plan Document”), at §§ 1.11, 1.34. Excerpts from the Plan Document are provided in Enclosure 5.

<sup>11</sup> *See* Plan Document at § 12.2.

<sup>12</sup> *See* Minutes of the September 29, 2003 meeting of the Board of Directors (Enclosure 6), at 4-5. The minutes are an exhibit to [REDACTED]’s January 28, 2010 appeal to the Appeals Board.

<sup>13</sup> *Id.*

██████████ (as Plan administrator) formally initiated the distress termination process by issuing Notices of Intent to Terminate (“NOITs”) to affected parties other than PBGC on November 11, 2003. ██████████ also issued a PBGC Form 600 (“Distress Termination Notice of Intent to Terminate”) to PBGC on November 19, 2003 (Enclosure 7). The Form 600 stated that ██████████ was proposing a DOPT of January 21, 2004.

On February 17, 2005, PBGC notified ██████████ that PBGC had determined that ██████████ and its controlled group had met the criteria set forth in ERISA § 4041 (c)(2)(B) for the distress termination of the Plan as of January 21, 2004. ██████████ and PBGC executed an agreement on February 23, 2005, that appointed PBGC the statutory trustee of the Plan and established January 21, 2004, as the Plan’s DOPT.

### **B. PBGC’s guarantee and its limits**

The pension benefit a retiree receives from PBGC initially depends on the plan’s provisions; PBGC does not pay more than the plan would have paid. Moreover, PBGC does not guarantee all benefits that a pension plan provides. To be guaranteed, a benefit must, first, be “nonforfeitable” (*i.e.*, vested), which means that the participant must have satisfied the pension plan’s requirements to be eligible for the benefit by the date on which the plan terminates.<sup>14</sup> In ██████████’s case, his Plan benefit is nonforfeitable.

ERISA contains two limitations upon PBGC’s guarantee that significantly impact ██████████’s benefits. The first limit, known as the Maximum Guaranteed Benefit (“MGB”) limit, places a cap upon the monthly benefit that PBGC guarantees.<sup>15</sup> The amount of an individual’s MGB depends on a number of factors, including the year in which the pension plan terminated, the participant’s age at the later of DOPT or date of benefit commencement, the form in which the benefit is paid, and the age of the participant’s spouse if the benefit form includes a surviving spouse benefit.<sup>16</sup> For plans terminating in 2004, as the Plan did, the MGB is \$3,698.86 per month (\$44,386.32 per year) for a participant who begins receiving PBGC benefits at age 65 in the form of a straight life annuity (“SLA”) with no survivor benefit.

The second applicable limitation on PBGC’s guarantee, known as the “phase-in limit,” provides that PBGC’s guarantee of a benefit increase under a plan amendment is phased in over five years from the later of the adoption or effective date of the increase.<sup>17</sup>

### **C. Allocation of the Plan’s assets upon its termination**

ERISA’s six-tier asset allocation structure determines how a terminated pension plan’s assets are distributed among various categories of benefits when the assets are insufficient to pay all promised benefits. The six priority categories are referred to as “PC1,” “PC2,” “PC3,” etc. The

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<sup>14</sup> See ERISA § 4001(a)(8); PBGC regulation § 4022.3(a)(1).

<sup>15</sup> See ERISA § 4022(b)(3).

<sup>16</sup> See PBGC regulation § 4022.23.

<sup>17</sup> See ERISA § 4022(b)(1), (7); PBGC regulations §§ 4022.2, 4022.24, and 4022.25.

Plan has no benefits in the first two priority categories (PC1 and PC2), which relate to benefits derived from a participant's own contributions.

The next priority category, PC3, covers a participant's or beneficiary's benefits that were "in pay status" (*i.e.*, were being paid) three or more years before the plan's DOPT, or that would have been in pay status three years before termination if the participant had retired. ██████ does not have a benefit in PC3 because he was not eligible to retire three years before Plan termination, as he had not then met the Plan's vesting requirements. PBGC determined that the Plan had \$71,072,653 in PC3 liabilities, which were 100% funded by the Plan's assets.<sup>18</sup>

PC4 generally covers benefits guaranteed by PBGC that are not covered in higher priority categories. The Plan's assets covered only 20.14% of the Plan's \$127,941,421 in benefit liabilities in PC4.<sup>19</sup> Because PBGC's guarantee covers 100% of the Plan's benefits in PC4, ██████ and other Plan participants are receiving their full PC4 benefits. Thus, PBGC effectively is paying the Plan's PC4 benefits through the combination of the Plan's assets and PBGC's single-employer insurance fund.

PC5 covers other nonforfeitable benefits, including the amounts that PBGC does not guarantee for ██████ due to the MGB and phase-in limitations. PC6 covers all other benefits under the plan (*i.e.*, non-vested benefits).<sup>20</sup> Because the Plan's assets were insufficient to fully fund PC4, there were no remaining assets to fund benefits in PC5 or PC6.<sup>21</sup>

Additionally, as provided under ERISA § 4022(c), a portion of the recoveries that PBGC obtains from plan sponsors for pension plan underfunding is allocated to the unfunded nonguaranteed benefits of pension plan participants and beneficiaries. The ERISA § 4022(c) amount for the Plan does not increase the benefit ██████ is entitled to receive from PBGC.<sup>22</sup>

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<sup>18</sup> *Actuarial Case Memo for ██████ Cash Balance Plan ("Case Memo")*, at 12. We provide relevant excerpts from the *Case Memo* in Enclosure 8.

<sup>19</sup> *Id.* at 12.

<sup>20</sup> PBGC determined that the Plan had benefit liabilities of \$1,549,979 in PC5 and benefit liabilities of \$6,405,736 in PC6. *Id.* at 12.

<sup>21</sup> Overall, the Plan had \$96,841,191 in assets and \$206,969,788 in (total) benefit liabilities as of the Plan's DOPT, resulting in a total Plan underfunding of \$110,128,597. *Id.* at 1.

<sup>22</sup> PBGC allocated the ERISA § 4022(c) amount for the Plan, \$272,022, to benefit liabilities under the Plan in PC5. *Id.* at 12. ERISA § 4044(b)(4), which establishes subcategories within PC5, gives the highest priority within PC5 to nonguaranteed benefit liabilities under the Plan's provisions that were in effect five or more years before the Plan's DOPT. PBGC "used the entire amount in PC5 to partially restore benefits lost to participants from the Accrued at Normal Limitation and the Maximum Insurance Limitation." *Id.* at 12.

█████'s benefit in PC5, which is based on a plan amendment adopted within five years of DOPT, is in a PC5 subcategory that is not funded by the Plan's ERISA § 4022(c) amount.

### III. Factual background

#### A. ██████████'s employment and participation in the Plan

██████████ was born on ██████████ and began working at ██████████ on November 23, 1998. He was employed as ██████████'s President and Chief Executive Officer ("CEO") and was a member of its Board of Directors.<sup>23</sup>

On August 6, 2003, ██████████ resigned his position as ██████████'s President and CEO but remained on ██████████ Board of Directors.<sup>24</sup> ██████████'s employment with ██████████ ended on August 29, 2003, which is a little earlier than five years after he started employment. ██████████ had met the Plan's vesting requirements when his employment ended.

#### B. The Plan's cash balance formula

A cash balance plan is one type of defined benefit pension plan. Unlike most defined benefit plans that describe the participant's benefit in terms of the participant's annuity at normal retirement age, a cash balance plan generally will define the participant's benefit by reference to the amount of a hypothetical account balance.<sup>25</sup>

A typical cash balance plan provides that each year the plan will credit a participant's hypothetical account balance with a pay credit (*i.e.*, a percentage of the participant's pay for the year) and an interest credit (*i.e.*, the hypothetical earnings on the account balance). The plan's documents must specify both the pay credit and the interest credit. The plan's documents also must specify the conversion factor that the plan will use to determine the annuity from the account balance.

Additionally, while a participant in a typical ongoing cash balance plan who separates from employment has the right to receive his or her benefits in an annuity form, the participant often will choose (with spousal consent) to receive a lump-sum distribution of the entire plan benefit. As is the case in a typical cash balance plan, the Plan provided annuity benefits and offered a lump-sum distribution option upon separation of employment.

The Plan's cash balance provisions, which went into effect on June 1, 1998, essentially contain the typical features described above. Specifically, the Plan's cash balance provisions for salaried employees provide that:

- an employee who had been a participant in a prior plan on December 31, 1997, and entered the Cash Balance Plan on June 1, 1998, has an "Opening Account Balance" that equals the

<sup>23</sup> See Enclosure 9 (██████████ press release).

<sup>24</sup> *Id.*

<sup>25</sup> Chapter 5.12-1 of PBGC's *Operating Policy Manual* (Enclosure 10) describes the features of cash balance pension plans.

actuarial equivalent (based on the assumptions stated in the Plan) of the benefit he or she had accrued under the prior plan;<sup>26</sup>

- a salaried employee with a year of Credited Service after December 31, 1997, accrues a “Basic Pay-Based Credit” each year, which equals 3.0% of the “Plan Year Compensation” for the year;<sup>27</sup>
- in addition to the Basic Pay-Based Credit, a salaried employee with compensation of \$60,000 or more during the Plan Year accrues a “Supplemental Pay-Based Credit” each year;<sup>28</sup> and
- the participant has interest credited to his or her Account Balance each year, with the interest credit based on the 30-Year Treasury Rate in effect for the August that precedes the beginning of the Plan Year.<sup>29</sup>

We observe that, under the cash balance provisions that were in effect when ██████ started his ██████ employment, ██████ did not have an Opening Account Balance because his ██████ employment started after ██████ had ended accruals under the prior plans.

We further note that, as required by Internal Revenue Code (“IRC”) § 401(a)(17), the Plan limited the annual compensation that could be used to compute the participant’s Basic Pay-Based Credit and Supplemental Pay-Based Credit. This meant that, based on the \$200,000 IRC § 401(a)(17) limit that was in effect in 2002, the maximum Basic Pay-Based Credit that a participant could earn for that year is \$6,000 (*i.e.*,  $\$200,000 \times 3\% = \$6,000$ ) and the maximum Supplemental Pay-Based Credit also is \$6,000, for a total Pay-Based Credit for 2002 of \$12,000.

By contrast, under a Plan amendment that applied only to ██████ (*see* explanation below), ██████ received a Pay-Based Credit of \$100,028 for each Plan Year, starting on January 31, 2002.

**C. ██████’s (*non-qualified*) SERP benefit**

█████ began accruing a benefit under the Plan’s existing cash balance formula when he started his ██████ employment. Because of his high salary, IRC § 401(a)(17) limited the benefit amount he could accrue under the Plan’s existing cash balance formula.

To increase ██████’s pension benefits, ██████ established the Supplemental Executive Retirement Plan for ██████ (“SERP”), effective January 31, 2001. The SERP was separate from the Plan, was not tax-qualified, and thus was not subject to IRC limitations.

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<sup>26</sup> Plan Document § 3.1.

<sup>27</sup> Plan Document § 3.2.

<sup>28</sup> Plan Document § 3.3. For example, a salaried employee with compensation of \$100,000 or more in a Plan Year accrues a Supplemental Pay-Based Credit that equals 3% of all Plan Year Compensation earned during the year. Thus, for an employee with compensation of \$100,000 or more, the combination of the Basic Pay-Based Credit and the Supplemental Pay-Based Credit equals 6% of all Plan Year Compensation.

<sup>29</sup> Plan Document § 3.4.



Furthermore, the SERP was not covered by the PBGC insurance program under Title IV of ERISA.<sup>30</sup>

**D. [REDACTED]'s tax-qualified benefit under the Plan's Second Amendment**

In 2002, [REDACTED] adopted a Plan amendment, titled "Second Amendment to the [REDACTED] Company Cash Balance Pension Plan" ("Second Amendment").<sup>31</sup> The Second Amendment, which is applicable only to [REDACTED], replaced his (non-qualified) SERP benefit with a significantly larger Plan benefit.<sup>32</sup>

As the Appeals Board stated in its September 29, 2011 decision, the copy of the Second Amendment that PBGC received from [REDACTED] (1) bears the signature of [REDACTED], a former Vice President of [REDACTED] (2) is dated as if signed on April 26, 2002, and (3) contains text that suggests that the amendment was approved by the former Board of Directors of [REDACTED]. The stated purpose of the Second Amendment is as follows:

The employer desires to amend the Qualified Plan to provide as much of the benefit to be provided to [REDACTED] under the SERP as may be so provided while still complying in all respects with the applicable requirements of the [IRC] and [ERISA].

The Second Amendment attempted to meet its intended purpose by adding a new "Schedule VI" to the Plan's provisions, which applied only to [REDACTED] and which increased his (pre-amendment) cash balance benefit under the Plan. The Second Amendment contained the following features:

- [REDACTED]'s "Participant Account" under the Plan was credited with an "Opening Account Balance" of \$318,449, effective January 31, 2001;<sup>33</sup>

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<sup>30</sup> Also, [REDACTED]'s obligations to [REDACTED] under the SERP were not secured or segregated from [REDACTED]'s other corporate obligations. Consequently, if [REDACTED] had retained a SERP benefit, he would have had only an unsecured claim against [REDACTED]'s corporate assets for his SERP benefit when [REDACTED] went into bankruptcy on May 30, 2003.

<sup>31</sup> The Appeals Board's September 29, 2011 decision for [REDACTED] (Enclosure 3) provides a copy of the Second Amendment.

<sup>32</sup> A pension arrangement of the type [REDACTED] provided to [REDACTED] through the Second Amendment is commonly referred to as a QSERP (*i.e.*, a "Qualified Supplemental Executive Retirement Plan") because it provides a highly-compensated employee or employees with a supplemental benefit under a tax-qualified pension plan that is often based on a benefit formula that is more favorable than that which applies to other plan participants.

<sup>33</sup> The term "Participant Account" refers to [REDACTED]'s (hypothetical) account under the Plan's cash balance provisions.

- [REDACTED]'s Participant Account was to receive an (additional) Pay-Based Credit of \$100,028 effective as of January 31 of each year from 2002 through 2005, which was contingent upon [REDACTED] being employed by the Employer on such date (and subject to certain additional conditions based on the Employment Agreement between [REDACTED] and [REDACTED]); and
- [REDACTED]'s Participant Account further was increased by "Interest Credits" based on an interest rate of 6%, in lieu of the regular interest rate under the Plan.

When the Second Amendment was adopted, which was fewer than two years before the Plan's DOPT, the value of [REDACTED]'s benefit under the SERP was \$318,449, which corresponded to the Opening Account Balance provided to him under the Second Amendment. Accordingly, the replacement of his prior (unfunded) SERP benefit with a tax-qualified benefit under the Plan immediately increased the Plan's benefit liabilities. Moreover, unlike his SERP benefit, [REDACTED]'s Plan benefit under the Second Amendment was guaranteed by PBGC, subject to ERISA's limitations.

Additionally, because the Second Amendment increased the Plan's liabilities, Penn Traffic's minimum funding obligations under the IRC increased with respect to the Plan.<sup>34</sup> Under the funding rules in effect at that time, however, the increased pension costs resulting from the Second Amendment could be funded through a series of minimum funding contributions, which [REDACTED] could make over several years.<sup>35</sup>

**E. [REDACTED]'s efforts to obtain a lump-sum distribution from the former Plan Administrator**

On August 15, 2003, which was nearly three months after [REDACTED]'s bankruptcy filing, [REDACTED] dated and signed a Plan benefit election form (Enclosure 12), which requested that his entire Plan benefit be paid as a lump sum. [REDACTED]'s employment with [REDACTED] ended on August 29, 2003.

On September 29, 2003, the Board of Directors directed the Committee to deny [REDACTED]'s request for a lump-sum distribution. See Enclosure 6, at 5. This denial of a lump-sum payment occurred at the same meeting when the Board of Directors resolved to seek termination of the Plan. The Committee, in a letter dated October 17, 2003 (Enclosure 13), notified [REDACTED] that his request for a lump sum was denied. The October 17, 2003 letter explained:

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<sup>34</sup> The impact of the Second Amendment upon the Plan's funding is discussed in the Actuarial Valuation Report for the Plan year beginning on January 1, 2002 (excerpts in Enclosure 11). The Actuarial Valuation Report states, in part:

**Changes in Plan Provisions**

Effective January 31, 2001, the Plan was amended to provide benefits that were previously provided from a Supplement Executive Retirement Plan ("SERP") for [REDACTED]. The increase in benefits from the Cash Balance Plan to [REDACTED] results in a dollar for dollar decrease in benefits provided from the SERP. The increase in normal cost of the Cash Balance Plan resulting from this amendment is approximately \$106,000 in 2002.

<sup>35</sup> See IRC § 412.

At its September 29, 2003 meeting, the Board of Directors of the ██████████ Company resolved to terminate the Plan. Because applicable law prohibits the payment of lump sum distributions in anticipation of the termination of the Plan, your benefit request is being denied. We can, however, begin pension distributions to you in the form of a monthly annuity (the only distribution form permitted under a terminating plan): payout will ultimately be subject to the Pension Benefit Guaranty Corporation's maximum guaranteed benefit limitations.

██████████ appealed the denial of his request for a lump sum on November 3, 2003 (Enclosure 14). He also made a supplemental appeal filing to the former Plan Administrator on November 17, 2003 (Enclosure 15). We found no evidence that ██████████ received a decision from ██████████ regarding his November 3, 2003 appeal.

**F. ██████████'s request to PBGC for a lump-sum payment and the Appeals Board's two prior decisions**

On the General Information Form (PBGC Form 702) that ██████████ signed and dated on July 12, 2005 (Enclosure 16), he informed PBGC of his view that that he is entitled to a lump sum.<sup>36</sup> He submitted a benefit application to PBGC on April 15, 2007 (Enclosure 17), which requested that PBGC start his payments on May 1, 2007, in the form of a Joint and 50% Survivor Annuity ("J&50%SA"), which was the Plan's automatic benefit form for a married participant.

PBGC started paying ██████████ an estimated pension benefit effective May 1, 2007, in the amount of \$275.90 per month. PBGC then finished its valuation of the Plan's benefits and sent ██████████ a benefit determination dated December 16, 2009 (Enclosure 18), which increased his monthly PBGC-payable benefit to \$452.77. PBGC's benefit calculation did not include the increase in ██████████'s Plan benefit resulting from the Second Amendment because PBGC found that this amendment had not been properly executed.

██████████ submitted a timely appeal to the Appeals Board on January 28, 2010 (Enclosure 19). His appeal raised two issues: (1) whether he is entitled to a lump-sum payment from PBGC, and (2) if his lump-sum payment request is denied, whether PBGC miscalculated the annuity amount he is entitled to receive.

The Appeals Board's September 29, 2011 decision (Enclosure 3) affirmed PBGC's determination that ██████████'s Plan benefit was payable as a monthly annuity, rather than as a lump sum. A divided Appeals Board, however, decided (by a 2 to 1 vote) that the Second Amendment was executed by the former Plan Administrator and was a valid amendment to the Plan. Accordingly, the Board ordered PBGC to: (1) recalculate ██████████'s monthly benefit to take into account any increases in his PBGC-payable benefit resulting from the Plan's Second

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<sup>36</sup> ██████████ stated:

Under terms of my Pension Plan, I am entitled to a lump sum. I am entitled to a greater benefit than I am informed the PBGC is required to pay. Absent breaches of fiduciary duty by the Plan's fiduciaries, I would have received a lump sum well in advance of the PBGC's takeover of the Plan. Therefore, my communication with the PBGC concerning this matter as well as any acceptance of benefits from the PBGC are without prejudice to my claims for those breaches of fiduciary duty.

Amendment; and (2) send ██████████ a new determination letter, with a new 45-day right to appeal the amount of his monthly benefit. The Board's September 29, 2011 decision also indicated that it was likely that the benefit amount guaranteed by PBGC would be less than ██████████'s Plan benefit amount due to ERISA's guarantee limits.

PBGC issued a revised determination letter to ██████████ on November 3, 2011 (Enclosure 20). The Benefit Statement enclosed in PBGC's November 3, 2011 letter (also in Enclosure 20) shows that ██████████ is entitled to a monthly benefit of \$866.54 payable as a J&50%SA.

██████████ timely appealed PBGC's revised determination on December 8, 2011 (Enclosure 21), asserting that his PBGC-guaranteed benefit of \$866.54 per month was too small because PBGC incorrectly applied the MGB limit before it applied the phase-in reduction. In a decision dated November 14, 2012 (Enclosure 4), the Appeals Board rejected ██████████'s contention concerning the order of calculations and denied his appeal.

#### **IV. Legal Background**

##### ***A. Statutory requirements relating to lump-sum payments by ongoing pension plans***

ERISA and the IRC allow ongoing defined benefit pension plans to offer lump sums as a benefit option, and many pension plans provide them. Under Title I of ERISA and the IRC, an annuity and a lump sum must be actuarially equivalent—that is, they must have the same present value. *See* ERISA § 205(g); IRC § 417(e). Thus, an annuity will have the same present value as the lump sum if (1) the pension plan remains ongoing, or (2) if a terminating plan has sufficient assets to fund the annuity benefit.<sup>37</sup> If an underfunded plan terminates, however, ERISA's limitations on PBGC's guarantee may reduce the present value of the monthly payments that are due after the plan's DOPT.

##### ***B. Payment of lump sums by a terminating plan***

As discussed below, ERISA § 4041(c)(3)(D) and PBGC regulation § 4044.4 place restrictions on lump-sum payments by terminating plans.

###### **1. ERISA § 4041(c)(3)(D)**

Congress, through the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"), revised the termination provisions of ERISA § 4041 to provide separate procedures for standard terminations and distress terminations.<sup>38</sup> ERISA § 4041(c)(3)(D), which

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<sup>37</sup> If a pension plan has sufficient assets to provide all benefits when it terminates, the plan ordinarily will purchase insurance annuity contracts for those participants who do not receive lump-sum distributions of their entire plan benefits. *See* ERISA § 4041(b)(3).

<sup>38</sup> A distress termination is a termination of an underfunded pension plan initiated by a plan sponsor when, because of financial distress, the sponsor and its "controlled group" cannot continue the plan. *See* ERISA § 4041(c)(2)(B). Frequently, the distress termination will occur after a bankruptcy filing. *See* ERISA § 4041(c)(2)(B)(i), (ii).

is one of these SEPPAA provisions, provides that beginning on the date on which the plan administrator provides a notice of distress termination to PBGC,<sup>39</sup> the statutory requirements for approval of the termination will be met only if, *inter alia*, the plan administrator “pays benefits attributable to employer contributions . . . only in the form of an annuity . . . .” PBGC’s implementing regulations similarly provide that, beginning on the first day that a notice of intent to terminate is issued, the plan administrator may not “[p]ay benefits attributable to employer contributions, other than death benefits, in any form other than as an annuity . . . .”<sup>40</sup>

## 2. PBGC regulation § 4044.4

PBGC regulation § 4044.4 precludes a plan that has not yet terminated from paying lump sums “in anticipation of termination” to the extent that doing so would change the way that plan assets would otherwise be allocated under ERISA § 4044. Specifically, under subsection (a) of PBGC regulation § 4044.4, a plan administrator “violates ERISA” if plan assets are “allocated or distributed upon plan termination” in an order other than the one prescribed in ERISA § 4044. Subsection (b) of the regulation further provides that a distribution “made in anticipation of plan termination is considered to be an allocation of plan assets upon termination,” and is “covered by” the § 4044.4(a) prohibition against an allocation that “violates ERISA.”<sup>41</sup>

### **C. Payment of lump sums by PBGC**

Shortly after ERISA was enacted, PBGC decided it generally would not pay guaranteed benefits as lump sums.<sup>42</sup> Instead, PBGC decided that it would guarantee “the life annuity alternative provided in the plan.”<sup>43</sup>

The current version of PBGC regulation § 4022.7(a), whose wording differs only slightly from PBGC’s 1975 proposed regulation and PBGC’s 1975 final regulation, implements PBGC’s decision not to pay guaranteed benefits as lump sums as follows:

If a benefit that is guaranteed under this part is payable in a single installment or substantially so under the terms of the plan, or an option elected under the plan by the participant, the benefit will not be guaranteed or paid as such, but the PBGC will guarantee the alternative benefit, if any, in the plan which provides for the payment of equal periodic installments for the life of the recipient.

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<sup>39</sup> ERISA § 4041(c)(3)(D) refers to the requirement in ERISA § 4041(a)(2) for a 60-day “Notice of Intent to Terminate.” ERISA § 4041(a)(2) provides:

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section, the plan administrator shall provide to each affected party (other than [PBGC] in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of [PBGC].

<sup>40</sup> PBGC regulation § 4041.42.

<sup>41</sup> PBGC regulation § 4044.4(a), (b).

<sup>42</sup> 40 Fed. Reg. 24206, 24207 (June 5, 1975).

<sup>43</sup> *Id.*

PBGC's general rule that it will not pay a guaranteed benefit as a lump sum is subject to only limited exceptions, set forth in PBGC regulation § 4022.7(b). Lump sums are permitted, for example, when the total value of the participant's benefit is \$5,000 or less, or when the participant is entitled to a refund of his or her own contributions. None of the exceptions in PBGC regulation § 4022.7(b) applies to ██████████'s circumstances.

**D. PBGC's authority to recover lump-sum distribution amounts paid within three years of plan termination**

ERISA § 4045, titled "Recapture of Payments," provides PBGC with additional authority to protect the statutory allocation structure. Under ERISA § 4045, PBGC, as trustee,

is authorized to recover for the benefit of a plan from a participant the recoverable amount (as defined in subsection (b) of this section) of all payments from the plan to him which commenced within the 3-year period immediately preceding the time the plan is terminated.<sup>44</sup>

The formula for determining the "recoverable amount" is complex but essentially provides that PBGC may recover, on behalf of the plan, that portion of a lump-sum payment that exceeds the present value at DOPT of the guaranteed benefit that the participant would have received as an annuity.<sup>45</sup> The decision to pursue recapture of a recoverable amount pursuant to ERISA § 4045 is discretionary with PBGC, rather than required by the statute.

PBGC does not have an ERISA § 4045 claim regarding ██████████'s Plan benefit because he did not receive a lump-sum distribution. If the former Plan Administrator had made a lump-sum distribution of his Plan benefit, however, PBGC would have been authorized to pursue repayment of the "recoverable amount" under ERISA § 4045.<sup>46</sup>

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<sup>44</sup> ERISA § 4045 provides protection to PBGC and pension plan participants because:

- any amounts that PBGC recovers from participants who received pre-DOPT distributions are used to increase the plan's assets as of DOPT; and
- any additional plan assets obtained through ERISA § 4045 are then allocated to (higher-priority) PBGC-guaranteed benefits or (higher-priority) nonguaranteed benefits of plan participants, in accordance with the ERISA § 4044 allocation structure.

<sup>45</sup> More precisely, the "recoverable amount" ordinarily is the excess of what the participant received "within the 3-year period immediately preceding the time the plan is terminated" (e.g., as a lump sum) minus the sum of A + B, where A is the amount the participant would have received during those three years if he or she had elected a straight-life annuity ("SLA") on the date the first payment was made, and B is the present value of the participant's "future benefits guaranteed under this subchapter" if paid as an SLA (starting on the date the first payment was made). ERISA § 4045(b)(2).

The formula also adjusts the recoverable amount if the participant's payments (including any lump-sum distribution) are less than \$10,000 within a 12-month period.

<sup>46</sup> If ██████████ had received a lump-distribution of his entire Plan benefit immediately before the Plan's DOPT, the recoverable amount essentially would consist of the portion of his lump-sum payment that exceeds the present value of his guaranteed benefit.

### **E. The treatment of unpaid lump-sum payment requests under PBGC Policy 5.4-9**

Chapter 5.4-9 of PBGC's Operating Policy Manual, titled "Lump-Sum Payments" ("PBGC Policy 5.4-9"), describes "the provisions under which PBGC pays all or part of a benefit or estimated benefit in a lump sum to a participant, beneficiary, or alternate payee."<sup>47</sup> PBGC has issued four editions of this policy, with the 1<sup>st</sup> edition (Enclosure 22) issued on June 25, 2009, and the (most-recent) 4<sup>th</sup> edition (Enclosure 23) issued on July 30, 2015.

Subsection C.5. of the 4<sup>th</sup> edition (which replaced subsections D.1. and D.2 of the 1<sup>st</sup> edition) provides:<sup>48</sup>

**Unpaid Plan Application for a Lump-Sum Payment.** PBGC generally will not honor a plan application for a lump-sum payment (whether *de minimis* or not) that was not paid by the plan administrator regardless of when the application was filed with the plan administrator or when the payment was originally due.

### **V. Discussion**

██████████ terminated his ██████████ employment on August 29, 2003. The earliest date that the Plan could have made a lump-sum distribution to him would have been September 1, 2003, which was fewer than five months before the Plan's January 21, 2004 DOPT.<sup>49</sup> In a letter dated October 17, 2003, the former Plan Administrator (*i.e.*, ██████████) denied ██████████'s lump-sum distribution request "[b]ecause applicable law prohibits the payment of lump sum distributions in anticipation of the termination of the Plan."

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<sup>47</sup> PBGC Policy 5.4-9 applies "to all plans trusted by PBGC including plans that are sufficiently funded, whether for guaranteed benefits or benefit liabilities." See PBGC Policy 5-4.9, at § B. ("Scope and Effective Date").

<sup>48</sup> The Appeals Board's September 29, 2011 decision addressed a provision in the 1<sup>st</sup> edition of Policy 5.4-9 that applies to the situation where a lump-sum payment request had been received by a former plan administrator – but had remained unpaid as of DOPT – in a plan where a distress termination filing had occurred. The corresponding provision in the current (4<sup>th</sup>) edition of the policy is broader in scope because (1) it applies to lump-sum applications in PBGC-initiated plan terminations (as well as distress terminations), and (2) it clarifies that PBGC will not honor a plan application for a lump-sum payment "regardless of when the application was filed with the plan administrator or when the payment was originally due."

The 4<sup>th</sup> edition of PBGC Policy 5.4-9 (as well as each of the earlier editions) states: "This policy statement is effective upon issuance." Consequently, we are applying the current edition of Policy 5.4-9 in deciding ██████████ appeal. Even if the 1<sup>st</sup> edition of Policy 5.4-9 had remained in effect, however, we would deny ██████████'s appeal in our decision on remand. This is because our denial of his lump-sum payment claim is based on the relevant provisions in ERISA and PBGC regulations, which provide the underlying legal authority for both the current and prior editions of PBGC Policy 5.4-9.

<sup>49</sup> ██████████ who had attained age 55 and had completed 5 years of vesting service, was eligible for Early Retirement under the Plan. Plan Document §§ 1.14, 1.15, and 1.51. He could elect to start receiving his Early Retirement Benefit as of a Benefit Commencement Date that was after his Separation from Service date (*i.e.*, on the date after his employment relationship with his employer and all related employers had ended). Plan Document §§ 1.41 and 4.3. The Plan defines "Benefit Commencement Date" as the first day of the month for which an amount is payable from the Plan as an annuity or any other form." Plan Document § 1.5. Based on these Plan provisions, the earliest Benefit Commencement Date for ██████████ was on September 1, 2003, *i.e.*, the first day of the month after his August 29, 2003 Separation from Service date.

The language of ██████████'s October 17, 2003 letter to ██████████ indicates that the denial of his lump-sum distribution request is based on PBGC regulation § 4044.4. We conclude, for the reasons explained below, that ██████████'s denial represents a correct application of this PBGC regulation. We further conclude that, under ERISA and applicable PBGC regulations, PBGC is not required to provide ██████████ with the lump-sum benefit that ██████████ had correctly denied him before the Plan terminated.

**A. PBGC regulation § 4044.4 is intended to prevent lump-sum distributions in a manner contrary to ERISA § 4044**

PBGC regulation § 4044.4 provides that a plan administrator “violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed in section 4044 of ERISA.”<sup>50</sup> The regulation further provides that a distribution to a participant “made in anticipation of plan termination is considered to be an allocation of plan assets upon termination.”<sup>51</sup> Consequently, the regulation precludes a lump-sum payment in anticipation of termination that would be in a manner contrary to ERISA § 4044.

When PBGC regulation § 4044.4 was issued, PBGC recognized that lump-sum distributions to participants would, under certain factual circumstances, detrimentally impact upon the asset allocation structure in ERISA § 4044 by causing benefit payments “in excess of the guaranteed benefit limits” and/or a “misallocation to certain priority categories.” PBGC, for this reason, adopted PBGC regulation § 4044.4 to “minimize the possibility of abuse” of PBGC’s termination insurance program that could occur through the distribution of plan assets contrary to ERISA § 4044 during the time period when plan termination was anticipated but had not yet occurred.<sup>52</sup> See additional discussion later in this decision.

In ██████████'s case, payment of his entire Plan benefit as a lump sum shortly before the Plan’s termination would have been “in a manner other than that prescribed in section 4044 of ERISA,” as is explained below. Accordingly, a pre-DOPT lump-sum distribution of his entire Plan benefit would have had the impact that PBGC regulation § 4044.4 was intended to prevent.

The Benefit Statement that PBGC enclosed with its revised determination of ██████████'s benefit (Enclosure 20) shows the following:

- His monthly plan benefit, based on his May 1, 2007 retirement date and the J&50%SA form he elected, is \$3,826.39.
- As a result of the MGB limit upon PBGC’s guarantee, the monthly Plan amount of \$3,826.39 must be reduced to \$3,229.10.
- Additionally, because ERISA’s “phase-in rule” limits PBGC’s guarantee of benefit increases that have been in effect for fewer than five years before DOPT, the monthly

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<sup>50</sup> PBGC regulation § 4044.4(a).

<sup>51</sup> PBGC regulation § 4044.4(b).

<sup>52</sup> 46 Fed. Reg. 9480, 9481 (Jan. 28, 1981).



benefit after application of the MGB (*i.e.*, \$3,229.10 per month) must be further reduced, resulting in a PBGC-guaranteed benefit of \$866.54 per month.<sup>53</sup>

Consequently, in the absence of a lump-sum distribution, [REDACTED] is entitled to a monthly PBGC-guaranteed benefit of \$866.54, which is 22.65% of his monthly Plan benefit of \$3,826.39. PBGC is unable to pay him the remaining \$2,959.85 of his monthly Plan benefit (*i.e.*, the remaining 77.35%) because that portion of his benefit, which ERISA assigns to PC5, is not guaranteed and is not funded by the Plan's assets.<sup>54</sup>

Because ERISA and the IRC require that an annuity and a lump sum be actuarially equivalent, a pre-termination lump-sum distribution to [REDACTED] would have been equivalent to the \$3,826.39 monthly annuity benefit that PBGC computed. Consequently, a pre-termination lump-sum distribution effectively would have provided [REDACTED] with 100% of his monthly Plan benefit of \$3,826.39, as compared to the \$866.54 monthly benefit he is entitled to receive based on PBGC's guarantee.

The calculations of the Plan's former actuary indicate that a lump-sum distribution to [REDACTED] prior to the Plan's DOPT likely would have been in excess of \$563,867.<sup>55</sup> If the Plan had made such a lump-sum distribution to him, the Plan's assets would have been diminished, dollar-per-dollar, by the amount of the lump-sum payment. Furthermore, this dilution of the Plan's assets would not have been restored (*e.g.*, by employer contributions) during the less-than-five-month period between [REDACTED]'s earliest possible lump-sum payment date and the Plan's DOPT.

Consequently, a pre-DOPT lump-sum payment to [REDACTED] would have been "in a manner contrary to ERISA § 4044" within the meaning of PBGC regulation § 4044.4 because the payment would have diminished the Plan assets available for allocation to higher priority categories upon

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<sup>53</sup> The Benefit Statement enclosed with PBGC's revised determination noted:

- Benefit increases that occur within 5 years of plan termination are guaranteed for each full year the amendment is in effect at the greater of (1) 20% of the monthly benefit increase, or (2) \$20.00 per month.
- For the purposes of this "phase-in" limitation, a benefit increase is in effect from the later of the adoption date and effective date of the amendment.
- Because the benefit increases under the Second Amendment were adopted on April 26, 2002, with an effective date of January 31, 2001, and were in effect for only one full year before the date of plan termination, PBGC may guarantee only 20% of the increase.

<sup>54</sup> Under the ERISA § 4044 allocation structure: (1) none of [REDACTED]'s monthly Plan benefit of \$3,826.39 is assigned to any of the highest three priority categories (*i.e.*, PC1, PC2, and PC3); (2) \$866.54 of his monthly Plan benefit is assigned to PC4, which covers PBGC-guaranteed benefits; and (3) the remaining \$2,959.85 of his monthly Plan benefit is assigned to PC5, which covers "all other nonforfeitable benefits under the plan." *See* ERISA § 4044(a). Although the Plan had sufficient assets at DOPT to cover all benefit liabilities through PC3 and some of the liabilities in PC4, there were no (remaining) Plan assets to fund PC5 or PC6.

<sup>55</sup> An email dated April 7, 2003, from the Plan's actuarial consultant to [REDACTED] (Enclosure 24) indicates that [REDACTED]'s cash balance account under the Plan was \$563,867 as of January 31, 2003. The actual lump-sum value of his Plan benefit may have been somewhat greater than \$563,867 as a result of benefit accruals that occurred between January 31, 2003, and his employment termination date. Also, under the Plan's provisions and as required by the IRC, the actual lump sum payable to a participant upon termination of employment ordinarily will differ from his or her (hypothetical) account balance under the Plan's cash balance formula.

the Plan's termination. Furthermore, a pre-DOPT lump-sum distribution to ██████████ would have violated PBGC regulation § 4044.4 because it would have occurred in anticipation of the Plan's termination, for the reasons discussed next.

**B. The former Plan Administrator correctly applied PBGC regulation § 4044.4 in denying ██████████'s lump-sum payment request**

Subsection (b) of PBGC regulation § 4044.4 provides that, in determining “whether a distribution, transfer, or allocation of assets has been made in anticipation of plan termination PBGC will consider all of the facts and circumstances, including” the facts and circumstances that are specifically listed in the regulation. As explained below, the former Plan Administrator correctly denied ██████████'s lump-sum payment request because a lump-sum payment to him would have been “in anticipation of termination” under the standard set forth in the regulation.

**1. The Plan's termination was a likely prospect when ██████████ made his lump-sum payment request**

PBGC regulation § 4044.4 is designed to guide plan administrators in deciding whether to pay lump sums (or to purchase annuities from an insurance company) at a time when plan termination is a likely prospect.<sup>56</sup> The following circumstances demonstrate that the Plan's distress termination was a likely prospect when the former Plan Administrator considered and denied ██████████ lump sum application:

- On May 30, 2003, which was nearly three months before ██████████ applied for a lump sum, ██████████ filed for bankruptcy. Shortly thereafter, the Company decided to stop making funding contributions to its pension plans.
- In August 2003, the Company obtained funding estimates (Enclosure 25) for five Company-sponsored pension plans (including the Plan).<sup>57</sup> These estimates show that as of June 30, 2003: (1) the Plan had assets of \$84,765,470 and accrued benefit obligations of \$121,951,000, which results in a funding deficit of \$37,185,530;<sup>58</sup> and (2) the Plan's sponsor would need to make estimated minimum funding contributions totaling \$43,422,488 for the 2003 through 2007 time period if the Plan were to remain ongoing.

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<sup>56</sup> See *Braniff Airways, Inc. v. Bankers Trust Co. (In re Braniff Airways, Inc.)*, 27 B.R. 222, 227 (Bankr. N.D. Tex. 1982).

<sup>57</sup> Exhibit 5 to ██████████'s January 28, 2010 appeal is a 1-page summary (dated August 11, 2003) that shows the funding condition of ██████████'s pension plans. This document also shows estimated “required contributions” for the years 2003 through 2007. ██████████ refers to this document in his appeal letter, stating that it is “an excerpt from submission by the Company's counsel in August 2003.” See Enclosure 19, at 2.

<sup>58</sup> The Enrolled Actuary Certification that the Plan's actuary signed on May 10, 2004 (Enclosure 26), which is based on the (different) actuarial assumptions that are required for terminating pension plans, shows that the Plan had \$83,979,634 in assets and \$209,710,327 in benefit liabilities as of the proposed termination date of January 21, 2004, which results in funding deficit of \$125,730,693. PBGC, in its actuarial valuation of the Plan dated August 24, 2009, concluded that the Plan had \$96,841,191 in assets and \$206,969,788 in benefit liabilities as of the Plan's January 21, 2004 DOPT, which results in funding deficit of \$110,128,597. See Enclosure 8, at 1.

- After an extensive discussion at the September 29, 2003 meeting, the Board of Directors resolved to terminate all of the Company's pension plans.<sup>59</sup>
- The minutes for the September 29, 2003 Board of Directors meeting detail some of the financial difficulties that ██████████ was experiencing before and after its bankruptcy filing. The minutes also reflect that the Board of Directors (1) discussed a Business Plan under which a number of the Company's stores would be closed, and (2) reviewed possible scenarios under which all or substantially all of the Company's stores and assets would be sold.<sup>60</sup>
- As discussed above, ██████████ formally initiated the distress termination process on November 11, 2003. ██████████ later filed a PBGC Form 601 ("Distress Termination Notice Single-Employer Plan Termination") and other supporting documents with PBGC (Enclosure 26).<sup>61</sup> The supporting documents explain the basis for ██████████'s conclusion that, "unless the Cash Balance Plan is terminated, ██████████ will be unable to pay its debts when due and will be unable to continue its business."<sup>62</sup>
- PBGC reviewed the information in ██████████'s Distress Termination filing that related to the financial condition of the Company and its pension plans. *See* PBGC Memorandum dated February 7, 2005 (Enclosure 27). PBGC then issued a Notice of Determination pursuant to ERISA § 4041(c)(2) on February 17, 2005 (Enclosure 28). PBGC's determination stated that the Plan's contributing sponsor (██████████) and each member of its controlled group met ERISA's distress termination criteria as of the proposed January 21, 2004 termination date for the Plan.<sup>63</sup>

The minutes of the September 29, 2003 Board of Directors meeting state that the Board reviewed background information "about the pension plan issues currently confronting the Company" and related materials that had been prepared by ██████████'s management.<sup>64</sup> The minutes further state:

The Board then addressed whether it will be feasible to continue to maintain some or all of the pension plans as presently constituted, in light of the Company's Chapter 11 business plan and the likely funding requirements needed for these plans. It was noted

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<sup>59</sup> Enclosure 6, at 4-5.

<sup>60</sup> Enclosure 6, at 3-4.

<sup>61</sup> ██████████'s May 19, 2004 letter requested that information in its distress filing be protected as confidential business information. Although ██████████ emerged from bankruptcy after the Plan's DOPT, the Company again filed for Chapter 11 bankruptcy protection in 2009. On January 25, 2010, ██████████ sold its assets to another company (██████████), and ██████████'s 2009 bankruptcy case was closed in 2015. Consequently, we find there no longer is a need to treat information in ██████████'s 2004 distress filing as confidential business information.

<sup>62</sup> Enclosure 26, "Statement of ██████████ Company in Support of [its Distress Termination Application]," at 1.

<sup>63</sup> PBGC concluded that ██████████ and six members of its controlled group met the distress criterion in ERISA § 4041(c)(2)(B)(iii)(I). Under that criterion, the sponsor and/or controlled group member must demonstrate to the satisfaction of PBGC that "unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business." PBGC also concluded that six additional members of ██████████'s controlled group could not support the Plan because they were "shell companies" with no assets.

<sup>64</sup> Enclosure 19, at 4-5.

that since filing for Chapter 11, the Company's senior management and restructuring professionals have been reviewing the financial status of all of the Company's pension plans, including the Cash Balance Plan, and have engaged in on-going discussions with potential plan sponsors and funding sources regarding the need to terminate one or more of the Company's pension plans, including the Cash Balance Plan, as a condition to consenting to any such restructuring.<sup>65</sup>

Consequently, the Board of Directors' minutes show that ██████████ had considered the need to terminate the Plan since the date the Company filed for bankruptcy, which occurred nearly three months before ██████████ resigned his ██████████ employment as President and CEO.

The minutes of the September 29, 2003 Board meeting also state that "the Board then discussed the pending lump sum payout requests made by ██████████ and [another participant] and an extensive discussion regarding the facts and circumstances of such requests followed." The Board then directed the Committee to deny the requests. The Committee subsequently notified ██████████ that his lump-sum distribution request was denied because it would be "in anticipation of termination." The information in PBGC records and in ██████████'s appeal fully supports the Board of Directors' conclusion that a distribution to ██████████ would have been in anticipation of termination.<sup>66</sup>

In arguing to the contrary, ██████████'s appeal refers to the August 14, 2003 letter that ██████████ Vice President of Human Resources for ██████████ had sent to employees (Enclosure 29), which stated that "[a]ll of our pension plans are operating normally and our retirees are receiving payments as due and employees are earning benefits under the terms of the plans."<sup>67</sup>

██████████'s statements in the August 14, 2003 letter do not contradict our conclusion that the Plan's termination was a likely prospect when ██████████ applied for a lump-sum payment (one day later) on August 15, 2003. Although the August 14, 2003 letter provided certain assurances to ██████████'s employees, the letter also: (1) informed the employees that the company had not made pension contributions after the May 30, 2003 bankruptcy filing; (2) stated that the suspension of pension contributions "was common in bankruptcy," and the Company had initiated discussion with Union representatives to address the issue; and (3) explained that benefits under the Company's defined benefit pension plans were covered under PBGC's insurance program. Most significantly, the August 14, 2003 letter was silent concerning whether ██████████'s pension plans would remain ongoing after the Company exited bankruptcy.

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<sup>65</sup> *Id.*, at 5.

<sup>66</sup> The financial conditions of ██████████ and its controlled group that resulted in the Board's decision to seek a distress termination of the Plan likely were known to ██████████'s management, including ██████████ on August 15, 2003, when ██████████ applied for a lump-sum payment, and on September 1, 2003, which is the earliest date that a lump-sum distribution could have been made to him. There is nothing in PBGC's records or in ██████████'s appeal that would indicate the Company's financial position was materially different on those dates than on the date of the Board of Directors' meeting.

<sup>67</sup> Enclosure 19, at 3, footnote 3. ██████████'s letter of August 14, 2003, is also discussed in Mr. ██████████'s November 3, 2003 appeal to the former Plan Administrator and in his supplemental appeal filing to the former Plan Administrator dated November 17, 2003. *See* Enclosure 14, at 2-3, and Enclosure 15, at 2-4.

2. The former Plan Administrator's denial of ██████'s lump-sum payment request was in accordance with the standard in PBGC regulation § 4044.4(b)

PBGC regulation § 4044.4(b) sets forth the following standard regarding when a distribution will be considered to have been made in anticipation of a pension plan's termination:

In determining whether a distribution, transfer, or allocation of assets has been made in anticipation of plan termination PBGC will consider all of the facts and circumstances including—

- (1) Any change in funding or operation procedures;
- (2) Past practice with regard to employee requests for forms of distribution;
- (3) Whether the distribution is consistent with plan provisions; and
- (4) Whether an annuity contract that provides for a cutback based on the guarantee limits in subpart B part 4022 of this chapter could have been purchased from an insurance company.

█████'s denial of ██████'s lump-sum payment request was in accordance with the standard quoted above. Contrary to ██████'s assertion in his January 28, 2010 appeal,<sup>68</sup> the first of the four enumerated circumstances, *i.e.*, “any change in funding or operation procedures,” specifically applies to his situation. As discussed above: (1) the Plan's assets were insufficient to meet the Plan's future benefit liabilities; (2) ██████ would need to make estimated contributions of \$43,422,488 to the Plan during the years 2003 through 2007 to meet the IRC's minimum funding standards; and (3) ██████ lacked the financial resources to make such funding contributions.<sup>69</sup>

Furthermore, the first of the four enumerated circumstances fully supports, by itself, the former Plan Administrator's decision not to pay him a lump sum. As discussed previously, a lump-sum payment to ██████ would have diluted the Plan's assets and, thereby, reduced the funds available to pay the benefits of other Plan participants. Consequently, if the former Plan Administrator had honored ██████'s lump-sum payment request, the Plan's “funding” would have been impacted in a way that would have been detrimental to the intended purpose of PBGC regulation § 4044.4, *i.e.*, the protection of the ERISA § 4044 asset allocation structure.

█████'s January 28, 2010 appeal asserts that PBGC regulation § 4044.4 is inapplicable to him because “past practice required that Fisher be paid a lump sum” and “a lump sum

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<sup>68</sup> Enclosure 19, at 5; *see also* Enclosure 15, at 2-3.

<sup>69</sup> Because the Plan's minimum funding account contained “credit balances” that had been carried-over from prior Plan Years into the 2003 Plan Year, ██████ was not required to make any minimum funding contributions for the Plan during 2003. Minimum funding contributions to the Plan in excess of \$10 million, however, would have been required during 2004 if the Plan had remained ongoing. As explained in PBGC's Memorandum dated February 7, 2005, regarding ██████'s distress termination application (Enclosure 27), future cash flow projections for ██████'s business operations demonstrated that the Company would not have sufficient corporate funds to make required minimum funding contributions if the Plan had remained ongoing.

distribution was consistent with plan practices.”<sup>70</sup> His appeal appears to be referring to the second and third of the four enumerated circumstances in PBGC regulation § 4044.4.<sup>71</sup> The regulation states that “PBGC will consider all of the facts and circumstances, including” the four that are listed in the regulation. Accordingly, it is unnecessary for all four of the listed circumstances to be satisfied in order for a violation of PBGC regulation § 4044.4 to occur.

In any event, the former Plan Administrator’s decision not to follow the Plan’s usual practices in considering ██████’s lump-sum request was justified. Most of ██████’s Plan benefit amount is not guaranteed by PBGC upon the Plan’s termination, primarily because ERISA’s phase-in limitation applies to the substantial benefit increase he received under the Plan’s Second Amendment. The phase-in limitation does not similarly affect the PBGC-guaranteed benefits that would be payable to other Plan participants upon Plan termination because the Second Amendment applied only to ██████. Consequently, ██████ was in a different situation from other Plan participants who requested lump-sum payments.<sup>72</sup>

We reject ██████’s argument that he is entitled to a lump-sum distribution because certain other employees received such distributions before and after his application was denied. First, we note that the minutes for the Company Board meeting on September 29, 2003, show that the lump-sum payment request of another Plan participant was denied at the same time as ██████’s. While the records that PBGC received from ██████ show that several Plan participants received lump-sum distributions close to the date of the Plan’s issuance of NOITs, this does not mean that the former Plan Administrator’s lump-sum payments to other Plan participants necessarily violated PBGC regulation § 4044.4.<sup>73</sup> The relevant consideration for deciding ██████’s appeal is whether the former Plan Administrator had correctly applied PBGC regulation § 4044.4 in denying his lump-sum payment request. In ██████’s case, we conclude that the former Plan Administrator had correctly applied PBGC regulation § 4044.4.

Finally, ██████ asserts that his facts and circumstances are distinguishable from those in the *Braniff* bankruptcy, where the Bankruptcy Court denied participant requests for lump-sum

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<sup>70</sup> Enclosure 19, at 5.

<sup>71</sup> In referring to the last of these four criteria, ██████’s January 28, 2010 appeal states that “no annuity contract was implicated because payment would have been in the form of a lump sum.” Enclosure 19, at 5. While we agree with ██████ that the fourth criterion in § 4044.4 is not implicated, we do not draw any inference from this conclusion in determining whether PBGC regulation § 4044.4 applies to him because the fourth criterion is directed solely at a type of pension plan transaction (*i.e.*, an insurance annuity purchase) that is not at issue in this appeal.

<sup>72</sup> PBGC’s actuarial valuation of the Plan identifies only two individuals (not including ██████) whose PBGC-payable benefits are affected by the phase-in limitation. *See* Case Memo at 11 (Enclosure 8). The phase-in limitation applies to these two participants because the compensation limit under IRC § 401(a)(17), which was incorporated into the Plan’s provisions, had increased in 2002 and had caused relatively modest increases to their Plan benefits. The benefit increase based on IRC § 401(a)(17) is subject to phase-in because the increase went into effect fewer than three years before the Plan’s DOPT.

<sup>73</sup> We observe that a lump-sum distribution to a participant prior to a pension plan’s issuance of NOITs frequently provides the participant with a benefit that has the same value as the annuity benefit that PBGC would pay. The most typical instance where this occurs is when the participant’s entire plan benefit is guaranteed by PBGC. A lump-sum distribution that does not provide benefits in excess of PBGC’s guarantee would be in compliance with PBGC regulation § 4044.4 if the “facts and circumstances” standard set forth in that regulation is satisfied.

payments on the basis that the payments would have been in anticipation of plan termination and would have violated PBGC regulation § 4044.4.<sup>74</sup> We recognize that ██████'s situation does not involve a "run on the bank" that appears to have occurred in the *Braniff* case. However, as the Bankruptcy Court stated in *Braniff*, a central purpose of PBGC regulation § 4044.4 is "to maintain the respective positions of the participants in a plan's assets."<sup>75</sup> The denial of ██████'s lump-sum payment request based on PBGC regulation § 4044.4 thus is consistent with the regulation's purpose of maintaining ERISA's statutory structure for the allocation of a terminating plan's assets.

**C. The former Plan Administrator's decision on ██████'s lump-sum payment request was not unreasonably delayed or improper**

██████'s November 3, 2003 appeal to the former Plan Administrator, which is referenced in his January 28, 2010 letter to the Appeals Board, states that the Board of Directors and Committee had "knowingly delayed" his lump-sum payment request by not making a decision until September 29, 2003, which was approximately six weeks after the date of his benefit application.<sup>76</sup> ██████ further contends that "in the ordinary course, the requested benefit would have been paid well before then."<sup>77</sup>

We conclude that ██████ in its capacity as the Plan's administrator, did not unreasonably delay a decision on ██████'s lump-sum payment request. ██████'s decision was in compliance with section 11.7 of the Plan Document (Enclosure 5), which is explained in the Plan's Summary Plan Description as follows:

If your request [for Plan benefits] is fully or partially denied, you will receive written notice giving reasons for the denial within 90 days (or 180 days if special circumstances exist). If you receive no response within these time limits, you should consider the claim denied.<sup>78</sup>

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<sup>74</sup> ██████ views *Braniff* as distinguishable because, in that case, the employer's CEO had publicly announced that the company was "dead" months before it filed formal plan termination notices and because "contrary to past practice, more than 150 participants filed for lump-sum benefit distributions following the bankruptcy filing." See Enclosure 14 at 2-3.

<sup>75</sup> *Braniff*, 27 B.R. at 2270.

<sup>76</sup> Enclosure 14, at 1-2.

<sup>77</sup> *Id.* See also Enclosure 19, at 5.

██████'s appeal also states that the Committee "processed other Plan participants' applications for benefits, including lump sum benefits, and caused the Plan to pay such benefits, both before and after the Board's decision to terminate the Plan." Enclosure 19, at 3.

<sup>78</sup> See March 2003 Summary Plan Description, at 21 (Enclosure 30). This Summary Plan Description provision complied with applicable Department of Labor regulations (published at 29 C.F.R. § 2560.503-1(b)(2) and (f)(1)), which require ERISA-covered pension plans to provide participants with written notice in the summary plan description that the plan generally had up to 90 days to deny a claim for pension benefits, or up to 180 days to deny a claim if special circumstances exist.

Moreover, in light of the unique characteristics of ██████'s benefit and his position as the President and CEO of ██████, the Company's Board of Directors reasonably considered his lump-sum application at its September 29, 2003 meeting, rather than instructing the Committee to process his request on an earlier date.

██████'s appeal also asserts that the denial of his lump-sum payment request was improper because the Plan's Committee had improperly delegated its authority to determine his benefit to the Board of Directors.<sup>79</sup> We disagree. The Plan provides that "the Company shall be the Plan Administrator and shall have the final responsibility for administration of the Plan."<sup>80</sup> The Committee, which consists of three or more persons who "may be appointed and serve at the pleasure of the Board," is authorized "to assist in the administration of the Plan."<sup>81</sup> Based on the Plan's provisions, the Company, acting through its Board of Directors in the capacity of Plan Administrator, did not improperly usurp the authority of the Committee when it denied Mr. Fisher's lump-sum payment request.

Finally, ██████ contends that ██████'s lump-sum denial was improper because it is "highly probable that the denial of the lump sum was effected in order to protect the Company's financial position in subsequent negotiations with the PBGC so that the Plan would be less underfunded than if it had paid the lump sum."<sup>82</sup> ██████'s unsubstantiated speculation about the motives of the Company fails to establish that the Company's lump-sum denial was improper. Rather, the above-discussed circumstances establish that the Company had denied his lump-sum payment request based on a correct application of PBGC regulation § 4044.4 to his factual circumstances.

Having considered all of the arguments in his appeal, we deny ██████'s claim that his "pre-termination application for a lump sum benefit from the Plan was improperly denied and, therefore, he [is] still entitled to a lump-sum benefit."

**D. PBGC's prohibition of distributions in anticipation of termination is a valid exercise of its rulemaking authority**

██████'s appeal contends that PBGC regulation § 4044.4 is "*ultra vires*" to the extent it precludes lump-sum distributions that a pension plan would otherwise pay on a date before the Plan Administrator's initiation of a distress termination.<sup>83</sup> The appeal asserts: (1) the preclusion of lump-sum distributions under ERISA § 4041(c)(3) applies only if distress termination notices have been issued; (2) if Congress had wanted to preclude lump-sum payments in other

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<sup>79</sup> Enclosure 19, at 2; *see also* Enclosure 15, at 3-4.

<sup>80</sup> Plan Document § 12.1; *see also* Plan Document § 1.34 (which defines the "Plan Administrator" as "the Company or such other person or persons as designated by the Board"); and Plan Document § 1.7 (which defines the "Board" as ██████'s Board of Directors). Because there is no evidence that the Company (who acts through its Board of Directors) had designated any individual or entity to be the Plan Administrator, the Company was the Plan Administrator at the time ██████ had applied for his Plan benefit.

<sup>81</sup> Plan Document § 12.2.

<sup>82</sup> Enclosure 19, at 3-4.

<sup>83</sup> Enclosure 19, at 5.



circumstances, it would have done so; and (3) “a regulatory agency cannot, by promulgation of a regulation, rewrite a statute.”<sup>84</sup>

ERISA provides PBGC with broad authority to adopt rules and regulations.<sup>85</sup> We explain below why PBGC regulation § 4044.4 is a valid exercise of PBGC’s rulemaking authority, notwithstanding the arguments in Mr. Fisher’s appeal.

Shortly after ERISA was enacted, PBGC issued a proposed regulation on “Allocation of Assets under section 4044 of ERISA.”<sup>86</sup> After some refinements during the rulemaking process, PBGC issued its final asset allocation regulation on January 28, 1981.<sup>87</sup> Section 4044.4 of this regulation, which has not been substantially modified since it was issued in 1981, is titled “Violations” and contains two subsections.

Subsection (a) of PBGC regulation § 4044.4, which [REDACTED] does not challenge in his appeal, provides that a “plan administrator violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed in section 4044 of ERISA and this subpart [of PBGC’s regulation].” Subsection (b) provides that a “distribution, transfer, or allocation of assets to a participant or to an insurance company for the benefit of a participant, made in anticipation of plan termination, is considered to be an allocation of plan assets upon termination, and is covered by paragraph (a) of this section.” Subsection (b) also sets forth the standard for determining “whether a distribution, transfer, or allocation of assets has been made in anticipation of plan termination.”

As stated in the preamble to PBGC’s regulation, the purpose of subsection (b) of PBGC regulation § 4044.4 is to “minimize the possibility of abuse” of PBGC’s termination insurance program through the “distribution of plan assets contrary to section 4044 of the Act, in anticipation of plan termination, whether directly to a participant or through the purchase of an insurance contract.”<sup>88</sup> The preamble elaborates that distributions in anticipation of termination could result in abuse because they could cause benefit payments “in excess of the guaranteed benefit limits” and/or a “misallocation to certain priority categories.”<sup>89</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> ERISA § 4002(b)(3) provides that PBGC may adopt rules and regulations “relating to the conduct of its business and the exercise of all other rights and powers granted to it by [Title IV of ERISA]” and “as may be necessary to carry out the purposes of [Title IV].”

<sup>86</sup> 40 Fed. Reg. 51,368 (Nov. 4, 1975). This proposed regulation provided, as a “general rule,” that upon termination of a plan, “the assets of such plan shall be allocated to benefits provided by the plan in the manner prescribed by this part.” *Id.* at 51,370-71. It further stated that it would be a “violation” of ERISA to allocate plan assets other than as prescribed by section 4044 and that a distribution, transfer, or allocation of assets to a participant “in contemplation of termination” would be treated as an allocation upon termination. *Id.* at 51,371.

The allocation regulation was adopted as an interim regulation a year later without change to either of the above-discussed provisions. 41 Fed. Reg. 48480, 48482 (Nov. 3, 1976).

<sup>87</sup> 46 Fed. Reg. 9480 (Jan. 28, 1981).

<sup>88</sup> *Id.* at 9841.

<sup>89</sup> *Id.*

The preamble to PBGC’s asset allocation regulation also explains that PBGC’s final allocation regulation excludes

The two-part analysis that the Supreme Court established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) applies to an administrative agency's interpretation of its governing statute. Under the first prong of the *Chevron* analysis, if Congress has "directly spoken to the precise question at issue," the agency must give effect to "the unambiguously expressed intent of Congress."<sup>90</sup> But if a statute is "silent or ambiguous" on the issue, the second prong of the *Chevron* analysis requires the court to uphold the agency's interpretation if it is "based on a permissible construction of the statute."<sup>91</sup>

When ERISA was enacted in 1974, it did not specifically address whether a plan administrator could make benefit distributions, such as lump-sum payments or insurance annuity purchases, during the time period when a pension plan termination was contemplated but had not yet occurred. Consequently, the first prong of the *Chevron* analysis does not apply to PBGC's decision, early in its history, to prohibit such distributions when abuse of ERISA's asset allocation structure would result.

The Appeals Board concludes that PBGC regulation § 4044.4 is a permissible exercise of PBGC's rulemaking authority under ERISA, and, therefore, satisfies the second prong of the *Chevron* analysis. ERISA § 4002(a) states that the purposes of ERISA Title IV, which are to be carried out by PBGC, are:

- (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
- (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and
- (3) to maintain premiums established by the corporation under [ERISA § 4006] at the lowest level consistent with carrying out its obligations under this subchapter.

As the aforementioned history of the regulation indicates, the purpose of PBGC regulation § 4044.4 is to ensure that ERISA's intended structure for the allocation of a terminated plan's assets to its benefits is not disrupted by transactions (*e.g.*, lump-sum distributions or purchase of insurance annuities) that occur within the time period when plan termination is likely. PBGC regulation § 4044.4 thus coincides with the underlying purposes of ERISA Title IV because the regulation protects both pension plan participants and PBGC's termination insurance program.<sup>92</sup>

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from the allocation process benefits payable by an insurer to an individual participant under an "irrevocable commitment." PBGC decided to exclude irrevocable commitments from the allocation process because they "cannot be used to satisfy other plan obligations." *Id.* The preamble notes that "[o]bjections to the 'irrevocable commitment' rule have been raised on the grounds that it could result in an abuse of the termination insurance program." *Id.* The "anticipation of termination" provision in PBGC's final version of PBGC regulation § 4044.4 applies to both irrevocable commitments and direct payments to participants.

<sup>90</sup> *Chevron*, 467 U.S. at 842.

<sup>91</sup> *Id.* at 843.

<sup>92</sup> The denial of a pre-termination lump-sum payment sometimes will result in additional plan assets being available at DOPT to fund higher-priority PBGC-guaranteed benefits and sometimes will be available to fund the higher-priority

In arguing to the contrary, ██████████'s appeal places reliance upon the actions of Congress that occurred several years after the issuance of PBGC regulation § 4044.4.<sup>93</sup> Specifically, the appeal refers to the distress termination provisions that were enacted as part of the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA").<sup>94</sup> In that legislation, Congress revised the termination provisions of section 4041 of ERISA to provide separate procedures for standard terminations and distress terminations. Under ERISA § 4041(c)(3)(D)(ii), which is one of the distress termination provisions, the plan administrator must pay benefits attributable to employer contributions "only in the form of an annuity" upon the filing of a notice of intent to terminate with PBGC.<sup>95</sup>

SEPPAA's distress termination provisions were enacted to remedy the Congressional finding that "the current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers."<sup>96</sup> Consequently, in enacting the distress termination requirements and procedures, Congress intended that "the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system [would occur] only in cases of severe hardship."<sup>97</sup>

Although SEPPAA provided additional protection to PBGC's termination insurance program by creating the distress termination requirements and procedures, SEPPAA is silent concerning whether or not a plan administrator is obligated to make lump-sum distributions in the time period before a distress termination is initiated. There further is no evidence that, when SEPPAA was enacted, Congress intended to override the requirements in PBGC regulation § 4044.4, which had become a final regulation five years before SEPPAA's enactment. Indeed, it would be illogical to find an implicit Congressional intent to decrease PBGC regulatory authority in legislation that was intended to expand, rather than reduce, protections to PBGC.<sup>98</sup> Finally, SEPPAA did not make

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nonguaranteed benefits. In Enclosure 31, we provide two examples that show the impacts of lump-sum denials under different situations. The first example presents a scenario where a portion of the plan assets that would be expended for a participant's lump sum becomes available to fund higher-priority guaranteed benefits of another participant. The second example presents a scenario where a portion of the plan assets that would be expended for a participant's lump sum becomes available to fund higher-priority nonguaranteed benefits of another participant. In both examples, PBGC's termination insurance program is protected, which is consistent with ERISA § 4002(a)(2) and (3).

<sup>93</sup> Enclosure 19, at 5. *See also* Enclosure 14, at 2.

<sup>94</sup> SEPPAA was enacted on April 7, 1986 as Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1985. *See* Pub. L. No. 99-272, § 11009.

<sup>95</sup> ERISA § 4041(c)(3)(D)(ii).

PBGC's implementing regulation similarly provides that once the plan administrator has issued a notice of intent to terminate, a plan administrator may not "[p]ay benefits attributable to employer contributions, other than death benefits, in any form other than as an annuity . . . ." 29 C.F.R. § 4041.42(b).

<sup>96</sup> Pub. L. No. 99-272, § 11002(a)(4).

<sup>97</sup> *Id.* at § 11002(c)(4).

<sup>98</sup> Furthermore, "repeals by implication are disfavored and 'will not be presumed unless the intention of the legislature to repeal [is] clear and manifest.'" *Adirondack Medical Center v. Sebelius*, 891 F.Supp.2d 36, 46 (D.D.C. 2012), *citing Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009).

any changes to ERISA § 4044, which is the statutory provision upon which PBGC’s “anticipation of termination” regulation is based.<sup>99</sup>

Accordingly, the context of SEPPAA’s distress termination provisions and its legislative purpose do not support the view that ERISA § 4041(c)(3)(D)(ii) is intended to provide participants with an unrestricted entitlement to lump-sum distributions before a NOIT is issued. Rather, the more reasonable interpretation is that the SEPPAA provisions were intended to provide protection to PBGC and to pension plan participants after the plan administrator initiates a distress termination filing, without diminishing PBGC’s authority to regulate distributions that would be in anticipation of termination.

Finally, PBGC regulation § 4044.4 is consistent with ERISA’s statutory structure because it prevents the payment of benefit amounts that PBGC ordinarily would be authorized to recover under ERISA § 4045 after a distress termination occurs. As previously explained, the “recapture provision” in ERISA § 4045 allows PBGC to recover a portion of any lump sums paid during the three years before termination (generally, the amount above PBGC’s guarantee). It would be anomalous to require plan administrators to honor the lump-sum applications of participants in situations where lump-sum amounts that are paid in anticipation of termination could later be recovered by PBGC under ERISA § 4045.

***E. ██████████ was not owed a lump-sum payment when the Plan terminated***

ERISA § 4044(a) provides that, in the case of plan termination, “the assets of the plan (available to provide benefits)” are allocated among the participants and beneficiaries of the plan in accordance with the six priority categories specified in the statute. PBGC’s implementing regulation (PBGC regulation § 4044.3) provides that plan assets that are available to pay benefits as of the allocation date include all plan assets “remaining after the subtraction of all liabilities, other than liabilities for future benefit payments.” The liabilities of the plan that are subtracted from plan assets “include expenses, fees, and other administrative costs, and benefit payments due before the allocation date.”<sup>100</sup>

Based on these provisions, PBGC will generally pay benefits that were due and payable before the plan’s termination date if the plan’s assets are sufficient to pay them. However, except for *de minimis* amounts, PBGC ordinarily will not pay such pre-termination benefit liabilities as lump sums but instead will pay them in the alternative annuity form, as provided under PBGC regulation § 4022.7.

Even though ██████████ had applied for a lump-sum payment before the Plan’s DOPT, a lump sum was not due and payable to him when the Plan terminated. The former Plan Administrator correctly denied his lump-sum payment request based on PBGC regulation § 4044.4, for the

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<sup>99</sup> SEPPAA further does not address lump-sum distributions in pension plans that are terminated by PBGC under ERISA § 4042 without a (prior) distress termination filing by the plan administrator. PBGC regulation § 4044.4 applies to distributions in anticipation of termination in such PBGC-terminated plans, as well as to plans that are terminated under the distress termination procedures in ERISA § 4041(c).

<sup>100</sup> *Id.* In the case of a distress termination, the allocation date is on the plan’s DOPT.

reasons explained above. Consequently, the only benefit liability as of the Plan's DOPT for ██████, who did not elect to start his pension payments before the Plan's DOPT, was the Plan's liability to him for future benefit payments. PBGC cannot pay ██████'s Plan benefit in full due to ERISA's guarantee limits and because the Plan lacked sufficient assets to fund the nonguaranteed portion of his benefit. Consequently, ██████'s pre-DOPT application for a lump sum does not require PBGC to pay him a more valuable benefit.

In arguing to the contrary, the appeal states that the former Plan Administrator's failure to pay ██████ a lump sum violated ERISA § 404(a)(1)(D), which requires fiduciaries to act in accordance with the terms of the plan.<sup>101</sup> We disagree. ERISA § 404(a)(1)(D) provides:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and — . . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I and Title IV of ERISA].

Consequently, a fiduciary's duty under ERISA § 404(a)(1)(D) to follow plan documents is qualified by the condition "insofar as such documents and instruments are consistent with the provisions of . . . [Title IV of ERISA]."

Similarly, ERISA § 4023, which is in Title IV of ERISA, provides:

Notwithstanding any other provision of this Act, a fiduciary of a plan to which section 1321 of this title applies is not in violation of the fiduciary's duties as a result of any act or of any withholding of action required by this title.<sup>102</sup>

In ██████'s case, payment of a lump sum would have violated PBGC regulation § 4044.4, which implements ERISA § 4044. Therefore, having considered the ERISA provisions that apply to the former Plan Administrator's responsibilities, we conclude that the former Plan Administrator did not breach its required fiduciary duties under ERISA when it denied ██████'s lump-sum payment request.

**F. PBGC regulations and PBGC Policy 5.4-9 require that ██████'s benefit be paid as an annuity**

As previously explained, PBGC regulation § 4022.7 provides that PBGC will pay a lump sum after plan termination only in limited circumstances, none of which applies to ██████.

Furthermore, PBGC's determination that it will not pay ██████ a lump sum is consistent with PBGC Policy 5.4-9. Subsection C.5 of that Policy provides that PBGC "generally will not

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<sup>101</sup> Enclosure 19, at 2-4.

<sup>102</sup> In this provision, "this Act" refers to ERISA, "section 1321 of this title" refers to pension plans covered by PBGC under ERISA § 4021, and "this title" refers to Title IV of ERISA (which established PBGC's insurance programs).

honor a plan application for a lump-sum payment (whether *de minimis* or not) that was not paid by the plan administrator regardless of when the application was filed with the plan administrator or when the payment was originally due.”

PBGC Policy 5.4-9 reflects PBGC’s interpretation of ERISA and applicable PBGC regulations. The Policy takes into account not only ERISA’s distress termination provisions, but also other provisions under ERISA and PBGC regulations, which include: (1) ERISA’s structure for allocating a terminated plan’s assets to benefits under ERISA § 4044; (2) PBGC’s authority under ERISA § 4045 to recover a portion of a lump sum paid within three years of plan termination; (3) the limitation upon lump-sum distributions in anticipation of termination under PBGC regulation § 4044.4; and (4) PBGC regulation § 4022.7, which provides that PBGC will not guarantee or pay lump sums after plan termination, but, instead, will guarantee the annuity equivalent.<sup>103</sup> We conclude that PBGC Policy 5.4-9 further supports the denial of ██████’s lump-sum payment request.

The benefit that PBGC is required to pay ██████ as a monthly annuity is subject to ERISA’s guarantee limits and ERISA’s requirements for allocating the terminated plan’s assets to its benefit liabilities. PBGC is paying ██████ his monthly benefit in the form he elected in accordance with the Plan’s provisions and the requirements in ERISA and PBGC regulations. Accordingly, having reviewed ██████’s appeal in accordance with the District Court’s remand order, we conclude that: (1) ██████’s lump-sum payment request must be denied; and (2) as stated in the Appeals Board’s November 14, 2012 decision, ██████ is entitled to a monthly benefit of \$866.54 in the form of a Joint and 50% Survivor Annuity.

### Decision

Having reviewed ██████’s appeal in accordance with the remand order of the United States District Court for the District of Columbia, the Appeals Board has decided that ██████ is not entitled to a lump-sum payment of his Plan benefit. This decision modifies the Appeals Board’s September 29, 2011 decision by providing a revised and more complete explanation of the reasons we are denying ██████’s lump-sum payment claim.

The Appeals Board is not making any changes to its November 14, 2012 decision regarding the amount of ██████’s PBGC-payable benefit. As stated in that decision, ██████ is entitled to a monthly benefit of \$866.54 in the form of a Joint and 50% Survivor Annuity based on his benefit start date of May 1, 2007, and he currently is receiving that monthly amount.

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<sup>103</sup> The Appeals Board’s September 29, 2011 decision, in explaining underlying legal basis for the 1<sup>st</sup> edition of PBGC Policy 5.4-9, referred only to the distress termination provisions in ERISA § 4041 and in PBGC regulation § 4041.42. In retrospect, our prior decision should have referred to and explained other relevant provisions in ERISA and PBGC regulations, which provide legal support not only for the 1<sup>st</sup> edition of Policy 5.4-9 but also for its three later editions.

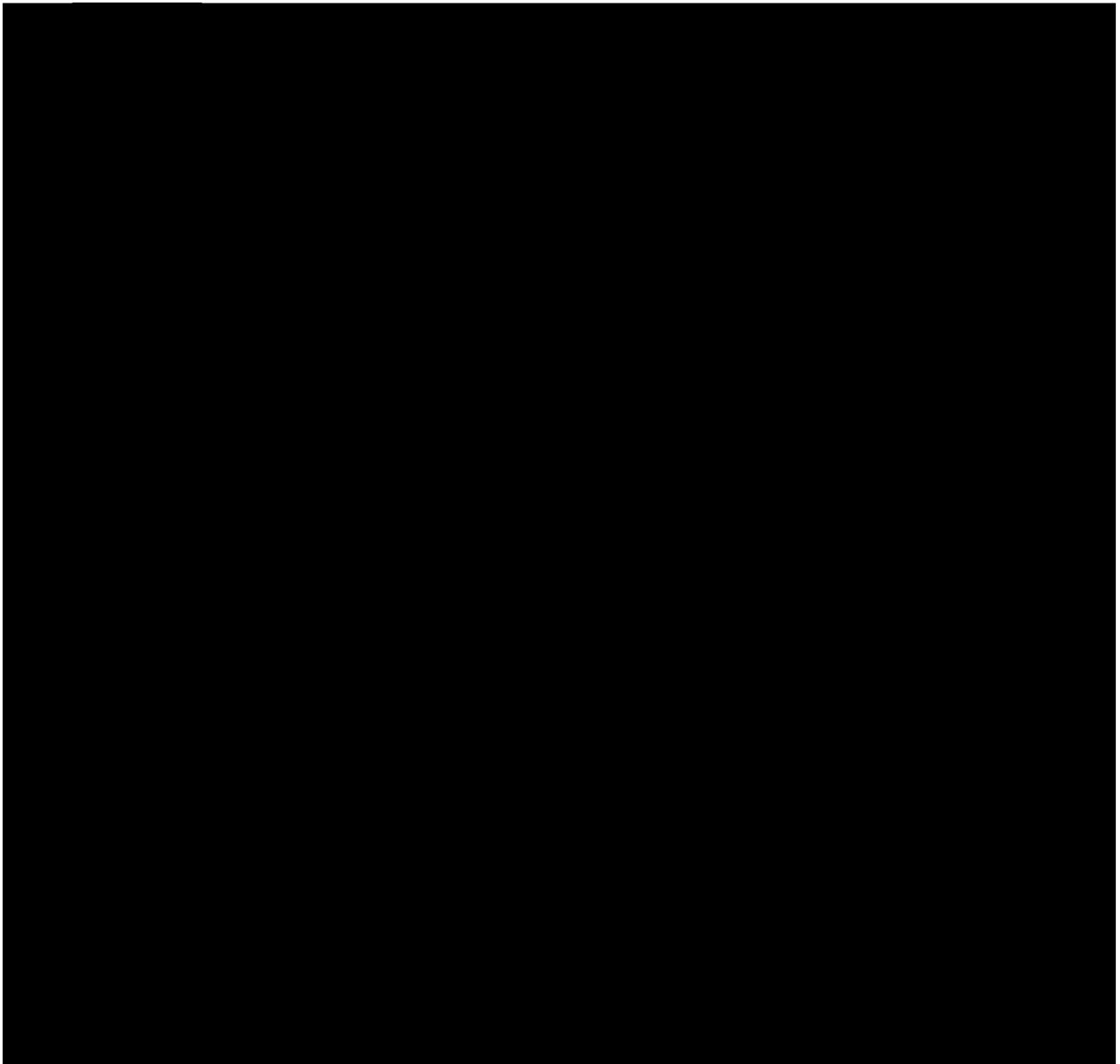
This decision is PBGC's final agency action on the Appeal, and [REDACTED] may seek review of this decision by the District Court. If [REDACTED] needs other information regarding his PBGC benefits, he may contact PBGC's Authorized Plan Representative at 1-800-400-7242.

Sincerely,



Charles Vernon  
Appeals Board Chair

Enclosures (31):





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