PBGC
Protecting America's Pensions
Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

June 5, 2009

[redacted]

Re: Appeal 2008-0499; [redacted]; Case 199334, Retirement Income for Pilots of US Airways, Inc. (the "Plan")

Dear Messrs. [redacted]

This appeal decision responds to your August 28, 2008 appeal on behalf of your client [redacted]. Your appeal concerns PBGC's July 15, 2008 determination of [redacted]' PBGC benefit under the Plan. For the reasons stated below, we must deny your appeal.

PBGC's Determination and Your Appeal

In its July 15, 2008 determination, PBGC informed [redacted] he is entitled to a monthly PBGC benefit of $2,299.45 payable as a Joint and 100% Survivor Annuity.[1] PBGC also informed [redacted] that, because the $2,299.45 monthly amount is less than the amount he is currently receiving, PBGC would send him a single payment that would include interest for the difference he was owed.[2] A copy of [redacted]' June 25th benefit determination with his benefit statement is at Enclosure 1.

In your August 28th appeal brief (the "Appeal" or "AB"), you state on page 1:

> This appeal raises only issues that were resolved by the Appeals Board in its February 29, 2008 decision in Consolidated Appeal Case No. 199334, and is entirely *protective* in nature. . . . Nonetheless, to ensure that no issues remain regarding whether his claims have been exhausted, [redacted] files this appeal and raises these issues for resolution by the Appeals Board, and requests that it resolve these issues in his favor despite its prior decision.

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[1] The $2,299.45 amount is after the deduction PBGC made for the Alternate Payee's portion of his benefits under a Qualified Domestic Relations Order ("QDRO"). The Benefit Determination PBGC enclosed with his determination letter further stated that, if the Alternate Payee predeceases him, his benefit will increase to $3,537.61.

[2] PBGC payment records show that, on December 1, PBGC made a backpayment of $6,702.30 to [redacted].

The Appeal further states that "[redacted] is incorporating all applicable grounds for appeal that were raised in the Consolidated Appeal."[3] The Appeal then makes the following five claims:

1. PBGC did not use an "actuarially equivalent method" of allocating the Plan's assets to benefit liabilities, which has adversely affected pilots such as [redacted] who are entitled to benefits in Priority Category 3 ("PC3"). AB at 2-4.
2. PBGC "violated its fiduciary duties as Plan trustee" when it failed to take any action to recoup funds for the Plan, which you allege "had been unlawfully raided by US Airways to fulfill other pension obligations." AB at 4-6.
3. PBGC "arbitrarily and capriciously" calculated the expected retirement age of participants in its calculations of the assets and liabilities of the terminated Plan. AB at 6-7.
4. PBGC should give PC3 status to benefit increases resulting from the Plan provisions that incorporated the benefit limits under section 415(b) of the Internal Revenue Code ("IRC"). AB at 7-9.
5. PBGC should use its insurance funds to pay all non-forfeitable benefits (up to a statutory maximum) once Plan assets are exhausted. AB at 9-10.

You conclude by asking that the Appeals Board "overturn" PBGC's benefit calculations for [redacted] and "instead calculate benefits as described above" in the Appeal. You further request that the Appeals Board "take action to comply with its fiduciary responsibilities as trustee of the terminated Plan" and that PBGC "suspend any recovery actions related to alleged overpayments." AB at 10-11.

Discussion

This decision addresses, in the order that they are presented, each of the five issues in your August 28, 2008 appeal. Generally, this decision does not repeat at length the factual findings and holdings in the Consolidated Decision, but rather incorporates them by reference.[4] For the reasons stated below and in the Consolidated Decision, the Appeals Board decided that your appeal did not provide a sufficient basis for changing PBGC's determination for [redacted] with respect to the issues you raised.

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[3] The "Consolidated Appeal" is the appeal filed on March 23, 2007 by the law firm of [redacted] ("[redacted]"). On February 29, 2008, the Appeals Board issued a decision (the "Consolidated Decision"), which applies to 769 individuals who were named in the Consolidated Appeal. Also, shortly after the Appeals Board issued the Consolidated Decision, your law firm replaced [redacted] as the representative of the appellants in the Consolidated Appeal.

The Appeal Board, however, did not include [redacted] in the Consolidated Decision because, as of February 29, 2008, he had not yet received a benefit determination from PBGC.

[4] We are providing, at Enclosure 2, a redacted copy of the Consolidated Decision and its Appendices, but without its Enclosures.

Issue 1: PBGC's Methodology for Calculating Benefits in PC3

<u>Your Appeal</u>. In the Consolidated Decision, the Appeals Board denied the claim that PBGC improperly calculated PC3 benefit amounts for participants who were not in pay status three years prior to the date of plan termination ("DOPT-3"). Your Issue #1 in this appeal makes a similar argument to the one the Board previously denied.[5] You state that "PBGC erroneously calculated benefits by freezing the amount of the payment as the one that would have been paid three years prior to Plan termination." AB at 2. You claim, instead, that this PC3 amount for "those Retired Pilots who continued to work [should be] the actuarial equivalent of what they would have received had they retired three years prior to Plan termination." AB at 2.

You further assert that PBGC's calculations are actuarially flawed because there is an "inconsistency between the PBGC's methods for projecting Plan liabilities and actually paying benefits . . . ." You state that, in calculating overall Plan liabilities, PBGC assumes that "all participants retire immediately on April 1, 2000 and begin receiving benefits on that date. Yet, the participant benefits actually paid did not all commence on the April 1, 2000 date. They commenced – or will commence – on each Retired Pilot's retirement date itself." AB at 3.

You also argue that PBGC has misapplied the IRC § 415(b) limits by applying the "automatic assumption that he or she had in fact retired on April 1, 2000." You assert that this "penalizes individuals who retire after that date by refusing to apply the limit in place when the benefit itself commences or the actuarial equivalent, as the statute requires."[6] AB at 3-4.

You conclude your appeal on this issue by stating: "The common thread that runs throughout these errors is a failure of actuarial equivalence. In distributing the Plan's assets, the PBGC failed to ensure that the value of a participant's benefits remained the same under varying distribution methodologies." You contend that PBGC's calculation methods violate ERISA and "adversely affected by lowering his benefits." AB at 4.

<u>Our Conclusions</u>. The Appeals Board addressed the issue of PBGC's PC3 benefit calculations on pages 14-17 of the Consolidated Decision. The Board noted that, under PBGC regulations, a benefit amount in PC3 is determined using a number of factors as of three years prior to the date of plan termination. PBGC regulations further provide that the methods of calculating benefits in PC3 for a participant who retired at DOPT-3 and for one who worked past that date are identical. Consequently, PBGC's calculation results in a fixed PC3 amount, which is not dependent on the decision by a particular participant whether to retire when he or she has the option to do so. The Board further concluded that PBGC's regulation, which has been applied by the agency for more than 30 years, is consistent with the statutory language in ERISA section 4044.

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[5] In the Consolidated Appeal, legal counsel had pointed out that, under ERISA and PBGC regulations, the PC3 benefit is determined as if the benefit had commenced at DOPT-3. Counsel asserted that, while PBGC calculates the PC3 benefit as if it had commenced at DOPT-3, PBGC "does not pay it as if it had commenced three years prior to plan termination." Counsel further contended: "Because individuals not in pay status did not receive any benefits three years before plan termination, the amount of the monthly benefits paid to them must be adjusted to make up for the lost payments."

[6] The statutory provisions that your Appeal refers to are under the IRC. Specifically, the Appeal cites IRC § 415(b)(2)(C) and (D) (providing for actuarial adjustments to the 415(b) limit when a benefit begins before age 62 or after age 65) and IRC § 415(b)(9) (special rule for commercial airline pilots).

The Consolidated Decision further, on page 16, provided the following explanation of PBGC's plan asset allocation process:

> The first step in PBGC's asset allocation process (after allocation of assets to PC1 and PC2) is to calculate the monthly benefit amounts for each of the plan participants as of DOPT-3, based on plan provisions that have been in effect for 5 years. PBGC then converts these monthly benefit amounts into "present values," determined as of DOPT, so that the aggregate value of all of the participants' benefits in PC3 can be matched with the value of the plan's assets. This makes it possible for PBGC to determine the percentage of the plan's benefits in PC3 that are funded. This process of matching the value of plan assets to the value of plan benefits, however, does not increase the monthly PC3 benefit amounts above the amounts PBGC had calculated for each participant at DOPT-3, even if the plan's benefits in PC3 are funded at 100%.

The Appeal asserts that, while the method PBGC used to match the Plan's assets with its benefit liabilities is actuarially sound, it is inconsistent with the PC3 benefits PBGC actually is paying. We disagree. PBGC, in valuing the Plan's PC3 benefit liabilities as of DOPT, calculates a present value amount for each participant that is the actuarial equivalence of the entire stream of monthly PC3 amounts that PBGC will pay to the participant after DOPT. The "sum" of these DOPT present values then is matched against the Plan's assets (which are also valued as of DOPT) to determine the extent to which the PC3 benefit amounts are funded. Accordingly, from an actuarial viewpoint, there is no mismatch between the benefits PBGC values for asset allocation purposes and the benefits it pays.

The following two examples help clarify why there is no inconsistency. In the first example, we assume that a US Airways pilot had retired at age 54 at DOPT-3 and his entire $4,000 monthly benefit (payable as a Single Life Annuity) is in PC3. For purposes of the PC3 asset allocation process, PBGC determines the present value of the $4,000 monthly benefit based on payments starting at DOPT and ending at his date of death. In calculating the present value amount, PBGC (among other things) applies the actuarial assumptions for interest and mortality set forth in PBGC's regulation at 29 CFR § 4044.41 - § 4044.75 and in its Appendices. PBGC, however, does not reduce the present value of the PC3 benefit based on the Expected Retirement Age assumptions in its regulation because, in this example, the pilot already was receiving benefit payments at DOPT.

In the second example, we assume that the same pilot did not retire at DOPT-3 and is still employed by US Airways at DOPT. Under the Plan's terms, this pilot is unable to start receiving his benefits until he retires from US Airways employment or attains Normal Retirement Age (age 60). In contrast to the first example, PBGC does <u>not</u> assume that the $4,000 monthly benefit in PC3 starts at DOPT. Instead, PBGC adjusts the present value of the PC3 benefit based on the Expected Retirement Age assumptions in PBGC's regulation (see 29 CFR § 4044.55).[7] Thus, based on the Expected Retirement Age assumptions in PBGC's regulation, the present value of the benefit in PC3 in the second example is less than the present value in the first example. From an actuarial viewpoint, this smaller present value reflects that the pilot who

[7] As in the first example, PBGC in the second example applies the applicable actuarial assumptions for interest and mortality.

continues in US Airways employment after DOPT is likely to receive fewer benefit payments from PBGC than the retired pilot in the first example will receive.

The Appeals Board also disagreed with your position that PBGC's treatment of the IRC § 415(b) limits is actuarially unsound. The Appeal essentially asserts that PBGC should apply, for PC3 purposes, the applicable IRC § 415(b) limit on the date of retirement (rather than the limit as of DOPT-3) because the IRC provides for annual increases to the section 415(b) limits and for actuarial adjustments based on the date of retirement. On pages 21-22 of the Consolidated Decision, however, the Appeals Board rejected the position, stating: "PBGC applies the section 415(b) limit in effect as of April 1, 2000 in its PC3 benefit calculations because that is the maximum amount that a retiree could receive from the Plan if he or she was in pay status on that date. . . . We do not see a reason to create an exception for participants whose benefits are capped by the section 415 limits."

We further concluded that your Appeal does not provide a basis for changing our prior ruling. Even though the IRC permits pension plans to increase benefits based on annual increases to the section 415(b) limits and to actuarially adjust the benefit based on the participant's date of retirement, these IRC provisions do not require PBGC to change how it determines benefit amounts in PC3. No change is required because the actuarial (and other) increases you seek apply to benefit amounts that are payable after DOPT-3, while the PC3 benefit amounts PBGC determines are fixed as of DOPT-3.[8]

Issue 2: Your Claim that Funds Were "Improperly Transferred from the Plan"

<u>Your Appeal</u>. You state that PBGC, when it became trustee of the Plan, assumed fiduciary responsibility to the Plan's beneficiaries. You contend that PBGC subsequently violated this duty "when it failed to take any action to recoup funds for the Plan, which had been unlawfully raided by US Airways to fulfill other pension obligations." AB at 4. You further state: "[redacted] was adversely affected by this breach of fiduciary duty, as the assets of the Plan were diminished as a result of these breaches by the PBGC. He requests that the PBGC act to remedy this breach of fiduciary duty." AB at 5.

<u>Discussion</u>. In the Consolidated Appeal, legal counsel asked that PBGC be required either to undertake its own investigation of these alleged improper transfers of Plan assets or request the United States Department of Labor to do so. Counsel further stated that recovery of these funds "would allow appellants who are entitled to benefits from PC-4 or 5 to obtain a greater percentage of the amounts they lost through the termination of the Plan."

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[8] You contend that the Plan through its 415(b) limit provisions "specifically provides for an actuarial adjustment for late benefit commencement, which the PBGC did not apply." AB at 4. Under ERISA and PBGC regulations, however, the PC3 benefit is defined as the benefit that is in pay status or that would be in pay status if the participant had retired at DOPT-3, based on the Plan provisions in effect during the 5-year period before DOPT under which the benefit would be the least. 29 U.S.C. § 1344(a)(3); 29 CFR § 4044.13(a). Thus, the PC3 definition in ERISA and in PBGC regulations precludes the use of an actuarial adjustment for late benefit commencement because the benefits in PC3 are in pay status or are assumed to be in pay status at DOPT-3.

Your appeal on this issue essentially makes the same assertions and contains the same requests for relief as the Consolidated Appeal. As we stated on page 41 of the Consolidated Decision, this issue is not within the scope of what the Appeals Board is authorized to review. Therefore, we are unable to provide you with relief regarding your Issue #2.

Counsel for appellants in the Consolidated Appeal provided certain documents and other information to the Appeal Board regarding this claim. As we stated in the Consolidated Decision, the Appeals Board forwarded the information and documents to an appropriate division in PBGC's Office of the General Counsel. It is our understanding that PBGC's investigation of these matters is ongoing.

Issue 3: PBGC's Expected Retirement Age Regulation

<u>Your Appeal</u>. You assert that PBGC "arbitrarily and capriciously calculated the expected retirement age in calculating assets and liabilities of the terminated Plan." AB at 6. You state that PBGC calculates expected retirement age using the "generic tables" set forth in PBGC's regulation at 29 C.F.R. § 4044.55. You contend that these tables "rely on a number of improper assumptions and generate an expected retirement age that is unreasonably low for the Plan." AB at 7.

You claim that PBGC's use of expected retirement ages derived from the tables "causes the PBGC to unreasonably overestimate Plan liabilities, resulting in lower benefits for the Retired Pilots than would occur if a more accurate estimation of retirement age were calculated." AB at 7. You conclude by stating: "Insofar as the result reached by the PBGC is called for in its regulations, those regulations violate ERISA and are invalid and unenforceable. [redacted] [redacted] hereby requests that the Appeals Board revisit its February 29, 2008, determination to the contrary." AB at 7.

<u>Discussion</u>. The Appeals Board discussed this issue on pages 40-41 of the Consolidated Decision. We concluded that the expected retirement age claim in the Consolidated Appeal was based solely on the contention that the regulations are unreasonable or invalid, rather than that PBGC has applied its regulations incorrectly. We further stated that the Appeals Board is not authorized to review the reasonableness of the regulations that PBGC has issued, but rather applies the regulations under the assumption they are valid.

As was the case in the Consolidated Appeal, the assertions in the Appeal on this issue relate solely to the reasonableness and validity of PBGC's regulation. Accordingly, as we concluded in the Consolidated Decision, we do not have the authority to grant you relief with respect to this issue.

Issue 4: PBGC's Application of the Internal Revenue Code Section 415(b) Limits

<u>Your Appeal</u>. You claim that PBGC improperly refused to give PC3 status to Plan benefit increases that result from changes to the IRC section 415(b) limits that occur through the passage of time. You assert that IRC section 415(b) "does not create any new vested benefit, but merely limits what the Plan would otherwise pay to participants and beneficiaries based on accrual formulas in place for more than five years prior to Plan termination." You further state that section 415(b) "merely dictates, as a tax matter, from which source (namely from the Plan, or instead from a non-tax-qualified source) a participant's existing benefits are taken." For these reasons, you contend that PBGC should not exclude benefit increases from PC3 if they result from the pension plan provisions that incorporate the section 415(b) limits. AB at 8.

Additionally, you argue that, even if an increase based on the section 415(b) limit is viewed as a benefit increase for purposes of ERISA, the section 415(b) increase that is incorporated by the Plan's provisions should be included in PC3. You state that this increase is entitled to PC3 status because it is "'based on the provisions of a plan' [that] were 'in effect' for the entirety of the five-year period ending on the date of termination." AB at 8.

For these reasons, you object to PBGC's decision to afford PC3 status "only to those vested benefit payments that did not exceed the § 415(b) limitation in place on April 1, 2000 – three years before the Plan terminated." AB at 8-9. You contend that PBGC "erroneously applied 29 U.S.C. § 1344(a)(3) and unlawfully reduced the Retired Pilots' benefits as a result." You also state that, to the extent that the result reached by PBGC is based on its regulation at 29 C.F.R. § 4044.13(b)(5), "the regulation violates ERISA and is invalid and unenforceable." You ask the Appeals Board to "revisit its February 29, 2008, determination to the contrary." AB at 9.

Our Conclusions. The Appeals Board addressed the issue of IRC § 415(b) limits at length in the Consolidated Decision. On page 21 of the Consolidated Decision, we concluded: "[E]ven though the section 415(b) limits are legal provisions, US Airways' adoption of provisions that incorporated the limits into its formal pension plan documents made the incorporated limits 'provisions of the plan' within the meaning of the PC3 definition in section 4044(a)(3) of ERISA." Thus, we rejected your position that benefit increases resulting from changes to the section 415(b) limits must be treated differently for PC3 purposes than other types of benefit increases.

We also decided that PBGC correctly applied the section 415(b) limit in effect as of April 1, 2000 in its PC3 benefit calculations "because that is the maximum amount that a retiree could receive from the Plan if he or she was in pay status on that date." *Id.* This conclusion is based on 29 U.S.C. § 1344(b)(3), which provides that PC3 covers the benefit that was (or could have been) in pay status "as of the beginning of the 3-year period ending on the termination date of the plan . . . based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least . . . ." 29 U.S.C. § 1344(a)(3).[9] Thus, although the section 415(b) limit – and thus the benefits actually paid to retirees – increased in both 2001 and 2002, these benefit increases are not entitled to PC3 status. Rather, the "lowest annuity benefit payable" under the Plan provisions at any time during the five years before the termination date was the benefit without the 2001 and 2002 increases permitted under section 415(b).

[9] PBGC's regulations similarly state that PC3 benefits are limited to "the lowest annuity benefit payable under the plan provisions at any time during the 5-year period ending on the termination date." 29 C.F.R. § 4044.13(b)(3).

The Consolidated Decision also observed that PBGC's PC3 regulation has a specific provision for "automatic benefit" increases (29 C.F.R. § 4044.13(b)(5)), which PBGC has applied to the Plan with respect to the section 415(b) limits.[10] We thus concluded that PBGC is following its regulation in paying as PC3 benefits the increases in the section 415(b) limits that went into effect before DOPT-3. We further found no basis for extending this "automatic increases" provision to allow PC3 to cover increases to the section 415(b) limits after that date.

We have reviewed your claims on this issue, including your contentions that: (1) PBGC's construction of ERISA is inconsistent with the statutory language and the underlying statutory scheme; (2) PBGC's positions concerning PC3 benefits are contrary to the Congressional purpose in enacting the legislation, and (3) PBGC's interpretation of its PC3 regulation violates ERISA. We found that these are without merit, for the reasons stated above and on pages 19-22 of the Consolidated Decision. As you have not provided a sufficient basis to change the holdings in our prior decision, the Appeals Board denies your appeal on this issue.

Issue 5: PBGC's Obligation To Guarantee Nonforfeitable Benefits

Your Appeal. You contend that PBGC "is required to pay from its insurance funds all non-forfeitable benefits (up to a statutory maximum) once Plan assets are exhausted." You claim that PBGC has not done this in its benefit determinations for Plan participants, even if PBGC's underlying PC3 benefits determinations are assumed to be correct. You assert that PBGC's actions "violate ERISA and adversely affect the Retired Pilots by decreasing their benefits." AB at 10.

You cite a section of the 1973 Senate Report No. 93-383[11] and argue that, "[b]y indicating that the PBGC need not pay benefits from Corporation funds only when all categories of insured benefits had been "paid in full' from plan assets, Congress intended that the PBGC utilize its own funds (that had been created through payments of employer insurance premiums) to make up the difference when all of the above categories of benefits could not be 'paid in full' from remaining plan assets."[12] AB at 12-13.

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[10] PBGC's regulations provide that "automatic benefit increases" scheduled during the fourth and fifth years before plan termination are included in PC3, to the extent they are provided both to retirees and active participants. 29 C.F.R. § 4044.13(b)(5). PBGC, following this exception, provided Plan participants with the Plan's "automatic" increases in 1999 and 2000 based on the increases in the section 415(b) limit in those two years. But the similar automatic increases in 2001 and 2002 do not qualify for this exception, since they became effective less than three years before termination.

[11] The text of the 1973 Senate Report 93-383 that you cite is as follows:

> Plan assets are to be allocated, in order, to voluntary contributions of employees, mandatory contributions of employees, benefits 'in pay status' for at least three years, and insured benefits (other than those falling into any of the prior categories). Where all these categories could be paid in full from plan assets, there would be no insurance corporation loss. S. REP. NO. 93-383, at 84 (1973).

S. Rep. No. 93-383, at 84.

[12] Your reference to the "above category of benefits" appears to relate to the benefits listed in the section of S. R. No. 93-383 you quote. See footnote 11 above.

You then assert that PBGC "must pay all *non-forfeitable benefits*, up to the statutory amount the PBGC can be made to pay. Benefits that do not fall into Priority Category 3 but that are non-forfeitable must be satisfied with remaining Plan assets and then through the PBGC's insurance guarantee." AB at 13. You further argue:

> [f]or example, assuming *arguendo* solely for purposes of this claim that the benefits resulting from increases in the § 415(b) limits do not fall in Priority Category 3 because they were not in pay status three years prior to termination, they would nonetheless still constitute non-forfeitable benefits, because the three-year rollback does not exist under the guarantee provision (29 U.S.C. § 1322) as opposed to the asset distribution provision for Priority Category III benefits . . . .

AB at 13.

***Our Conclusions*.** Issue #5 was not raised by legal counsel in the Consolidated Appeal, and, hence, it was not decided by the Board in the Consolidated Decision. Since you raised this issue in [redacted]' appeal (as well as in other appeals you filed after the date of the Consolidated Decision), it now is ripe for decision by the Appeals Board.

Having fully considered this Issue #5, we deny your claim that PBGC has not paid all of the guaranteed benefits it is required to pay under Title IV of ERISA. In essence, you are advancing alternative procedures for paying guaranteed benefits that would overturn PBGC's longstanding interpretation of its governing statute and over 30 years of PBGC practice. For the reasons given below, we concluded: (1) unlike your alternative, PBGC's regulations and its guaranteed benefit procedures are supported by the plain language of ERISA and its implementing regulations; and (2) PBGC's regulations and its procedures ensure that all eligible Plan participants will receive, at a minimum, their nonforfeitable benefits up to the statutory guarantee limits, as required under ERISA.

The Statutory Framework: PBGC's Guarantee and the Allocation of Plan Assets

Issue #5 addresses the relationship between PBGC's obligation to pay guaranteed benefits and its obligation (as trustee) to pay benefits based on the allocation of the terminated plan's assets. On pages 4-6 of the Consolidated decision, we explained in detail the statutory basis for the benefits that PBGC pays as guarantor and as trustee. We also summarize this statutory basis below.

PBGC does not guarantee all benefits provided by an insured plan. To be guaranteed, a benefit must, first, be "nonforfeitable."[13] In addition, not all nonforfeitable benefits are guaranteed; there are statutory and regulatory limits on PBGC's guarantee. These include the

[13] See 29 U.S.C. § 1301(a)(8) and 29 C.F.R. § 4022.3, which define "nonforfeitable benefit."

maximum guaranteed benefit ("MGB") limit[14] and the phase-in limit,[15] both of which affect the benefits that PBGC is permitted to pay to Plan participants.

ERISA's six-tier asset allocation scheme determines how a pension plan's assets are distributed among various categories of benefits when the assets are insufficient to pay all promised benefits.[16] Since PBGC-guaranteed benefits are in PC4, some benefits come ahead of guaranteed benefits in the allocation scheme and some come behind them. Because only a very small portion of benefits in the Plan fall into PC1 and PC2, the relevant benefits that come ahead of guaranteed benefits in this case are those in PC3.

As trustee, PBGC allocates the Plan's assets as of its termination date ("DOPT") into the six priority categories, starting with PC1 and then continuing through the other categories until all of the plan's assets are exhausted. To the extent that a participant's benefit amount within a priority category is funded, PBGC pays the benefit (even if that benefit amount is not covered by PBGC's guarantee). PBGC also uses its guarantee funds to ensure that, regardless of what happens to a plan and even if all plan assets are exhausted, the participant will receive no less than the guaranteed benefit amount. As previously discussed, the benefit that PBGC guarantees is set forth in 29 U.S.C. § 1322(a) and is "subject to the limitations" contained in 29 U.S.C. § 1322(b).

In some cases, participants may receive more than their guaranteed amount, based on an allocation of the Plan's assets under 29 U.S.C. § 1344(a). PBGC's regulations reflect this understanding; they define a participant's "Title IV benefit" as "the guaranteed benefit plus any additional benefits to which plan assets are allocated pursuant to section 4044 of ERISA and part 4044 of this chapter." 29 C.F.R. § 4001.2.[17]

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[14] The MGB is a statutory cap on the amount of PBGC's guarantee. The amount of an individual's MGB depends on a number of factors, including the year in which the pension plan terminated, the age of the participant at the later of DOPT or when benefits begin, the form in which the benefit is paid, and the age of the participant's spouse if the benefit will provide surviving spouse benefits. 29 U.S.C. § 1322(b)(3); *see also* 29 C.F.R. § 4022.22 - .23 (PBGC's MGB regulation).

[15] The phase-in limit provides that PBGC's guarantee of benefit increases under a pension plan amendment is phased in over five years from the later of the adopted or effective date of the amendment. 29 U.S.C. § 1322(b)(1), (7); 29 C.F.R. §§ 4022.2, 4022.24, 4022.25.

[16] The highest priority categories (PC1 and PC2) are reserved for benefits derived from a participant's own contributions. The next priority category (PC 3) covers a participant's benefits that were "in pay status" (i.e., were being paid) three or more years before the plan's termination date, or that would have been in pay status three years before termination if the participant had retired, based on the Plan provisions in effect during the 5-year period before DOPT under which the benefit would be the least. PC4 generally is for benefits guaranteed by PBGC. PC5 is for other nonforfeitable benefits (generally, benefits that would be guaranteed but for the limits described on page 9 of this decision). PC 6 covers all other benefits under the plan (i.e., non-vested benefits).

[17] This is exactly what occurred for many pilots: their PBGC benefit determinations show amounts well in excess of the guarantee limits due to the allocation of the Plan's assets to their nonguaranteed benefits in PC3. These additional amounts, however, are not benefits "guaranteed" by PBGC, as they exceeded the limitations in 29 U.S.C. § 1322(b).

Benefit Amounts PBGC Is Paying to Plan Participants

PBGC applied the above-stated principles in determining the benefits it may pay to Plan participants. For the Plan, PBGC determined that the value of the Plan's assets as of DOPT ($1,193,118,694) covered 100% of the Plan's benefits through PC3 ($1,153,957,540). Accordingly, PBGC is paying 100% of the Plan benefits amounts in PC3.[18] PBGC further determined that the Plan's assets were exhausted in PC4, since there was only $39 million in assets to cover $590 million in PC4 benefits. Although Plan assets covered only a relatively small percentage of the benefits in PC4, PBGC is paying 100% of PC4 benefit amounts because it fully guarantees those benefits.

Because the Plan's assets were exhausted in PC4, PBGC determined that there were no remaining assets for PBGC to allocate to the last two priority categories – PC5 (which ERISA defines as "other nonforfeitable benefits") and PC6 ("other benefits under the plan"). Also, since the PC5 and PC6 categories contain benefits that PBGC does not guarantee (which is a direct result of the ERISA limits discussed above), PBGC also concluded that it is unable to pay benefits in PC5 and in PC6 as guaranteed benefits.

In the Appendix to this decision, we explain how PBGC has applied the above-stated principles in determining [redacted] [redacted]' PBGC benefit amount.

Discussion

Your reading of PBGC's guaranteed benefit obligation represents a major departure from the way PBGC has consistently interpreted ERISA's statutory language and from over 30 years of PBGC practice in making benefit determinations. As we read the Appeal, you are asserting that PBGC must use its guarantee funds (up to the limits stated in 29 U.S.C. § 1322(b)) to pay any shortfall in a participant's benefits between the amount satisfied by the Plan assets and the full nonforfeitable benefit amount under the Plan. In the Appendix, we discuss how your method, as we understand it, would be applied to [redacted] [redacted]' benefits.[19]

We carefully reviewed ERISA's guaranteed benefit provisions and have concluded the statutory language does not support your position. PBGC's obligation to pay guaranteed benefits is set forth in 29 U.S.C. section 1322(a), which states:

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[18] Not all participants, however, have benefits in PC3. As stated in footnote 16, PC3 covers benefits that were in pay status three or more years before DOPT, or that would have been in pay status three years before DOPT if the participant had retired. A large number of pilots were not eligible to retire three years before DOPT and, accordingly, do not have benefits in PC3.

[19] Your Appeal did not provide an example as to how PBGC would calculate guaranteed benefits under your method. Accordingly, the method set forth in the Appendix is based upon our interpretation of the language in your Appeal. It appears that, under your method, [redacted] [redacted] would receive approximately $2,400.00 per month more than what he currently is receiving, if his benefit was paid in the Single Life Annuity form.

> Subject to the limitations contained in subsection (b), the [PBGC] shall guarantee in accordance with this section the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a single-employer plan which terminates at a time when this title applies to it.

This provision links PBGC's guarantee to the benefits "under a single-employer plan," without any reference to whether or not the plan benefits are funded by plan assets or to the amounts that PBGC will be paying from its own funds.

Furthermore, PBGC's guarantee obligation is defined not only in terms of what it is required to guarantee – i.e., "nonforfeitable benefits . . . under a single-employer plan which terminates" – but also by the statutory limits ERISA has placed upon the guarantee. This is evident from section 1322(a), which states that PBGC's guarantee is "[s]ubject to the limitations contained in subsection (b)." 29 U.S.C. § 1322(a).

As with section 1322(a), we examined the statutory language regarding the guarantee limits in section 1322(b) and concluded that it also does not support your position.[20] For example, the MGB limit in 29 U.S.C. section 1322(b)(3) places a cap upon "the amount of monthly benefits . . . provided by a plan, which are guaranteed under this section with respect to a participant."[21] The MGB's cap thus applies to benefits "provided by a plan," without any reference to whether the plan benefits are funded by plan assets or are to be paid from PBGC's insurance funds. Similarly, the other limits in section 1322(b) are described in terms of "benefits provided by a plan,"[22] "benefits guaranteed under this section,"[23] and "benefits accrued under a plan,"[24] but do not refer to whether the benefits are funded by plan assets.

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[20] 29 U.S.C. § 1322(b), as in effect when the Plan terminated, sets forth four guaranteed benefit limits: the MGB; the phase-in of pension plan amendments that increase benefits; phase-in of benefits payable to substantial owners; and benefits payable to participants in plans that have been found to be non-qualified under the Internal Revenue Code. Only the first two of those limits affect the benefit amounts payable to Plan participants.

The Appeal does not specifically describe any of these limits with respect to Issue #5, but rather refers more generically to "the statutory maximum." AB at 10-11. (Although the Appeal, at page 10, cites 29 U.S.C. § 1322(b)(7), which applies to phase-in, the Appeal does not specifically discuss that limit.) Thus, it is unclear whether your Appeal is referring to the MGB only, the MGB in combination with the other limits, or whether you have some other definition in mind.

[21] 29 U.S.C. § 1322(b)(3) further defines the amount of the MGB's cap, stating that the monthly guaranteed amount:

> shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to. . . $750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under §230 of the Social Security Act) in effect at the time the plan terminates and the denominator of which is the contribution and benefit base in effect in calendar year 1974.

[22] 29 U.S.C. § 1322(b)(1).

[23] 29 U.S.C. § 1322(b)(5).

[24] 29 U.S.C. § 1322(b)(6).

If the drafters of ERISA had intended to link PBGC's "statutory maximum" to the amounts PBGC pays from its own funds, we would expect ERISA's provisions to state this explicitly. Indeed, another ERISA limit – the "aggregate limit on benefits guaranteed" – is described in terms of amounts payable "from the Corporation,"[25] i.e., the amounts PBGC pays from its own funds as guarantor. For the aggregate limit, which applies to individuals who receive PBGC benefits from more than one pension plan,[26] ERISA explicitly states at 29 U.S.C. § 1322B:

> Notwithstanding §§1322 and 1322A, no person shall receive *from the Corporation* pursuant to a guarantee by the corporation of basic benefits with respect to a participant under all multiemployer and single employer plans an amount, or amounts, with an actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the amount determined under §1322(b)(3)(B) as of the date of the last plan termination. [Emphasis added.]

Thus, PBGC applies the statutory cap under the aggregate limit only with respect to benefits PBGC pays from its own funds as guarantor.[27] By contrast, because the MGB and other limits in 29 U.S.C. § 1322(b) do not refer to payments made from PBGC's funds, those limits logically apply to the full plan benefit amount irrespective of whether or not it is funded by plan assets.

Other provisions in Title IV support this plain-meaning interpretation. For example, 29 U.S.C. § 1341(c)(3)(B)(ii) provides that if a terminating plan's assets are "sufficient for

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[25] 29 U.S.C. § 1301(a)(4) states that "corporation" means "the Pension Benefit Guaranty Corporation," except where the context clearly requires a different meaning.

[26] We are not aware of any appellants who are affected by the aggregate limit based on their participation in another PBGC-trusteed pension plan.

[27] We note that the Senate Report 93-383 provides a detailed explanation of the purpose of the aggregate limit and the way it operates, stating:

> To prevent avoidance of the limitations by including an individual in two or more plans, this maximum limitation is also to apply to all payments by the Corporation with respect to a participant, inclusive of all types of benefits and number of plans in which he participated. For example, the benefits of a participant entitled to retirement benefits under plans of two unrelated employers would be guaranteed only to the extent of the $750-per-month limitation, even though the participant had insured vested benefits of $500 per month under each of these plans (or $1,000 per month combined). If one plan were to fail with no assets available for payment of this benefit, the insurance system would pay $500 per month (or its equivalent). If the second plan were then to fail with no assets available for payment of this benefit, the insurance system would cover only $250 per month of the vested benefits under the second plan.

S. Rep. 93-383, at 82 (1973). Thus, for the aggregate limit, the legislative history clearly indicates that the statutory "cap" on PBGC's payment obligation is based on what PBGC is required to pay from its own funds. There is nothing in the legislative history, however, that indicates that the guarantee limit under 29 U.S.C. § 1322(a), (b) – which is defined in a different way than the aggregate limit in 29 U.S.C. § 1322B – is to be determined based on what PBGC must pay from its own funds as guarantor.

guaranteed benefits," even though not sufficient for all benefits, the plan administrator must "distribute the plan's assets" and "carry out the termination of the plan," without any further action by PBGC. In this situation, ERISA does not provide for PBGC to use its funds to supplement the benefits payable from plan assets, even though the plan assets do not cover all benefit liabilities. By contrast, if the plan's assets are not sufficient for guaranteed benefits, PBGC must commence termination and trusteeship proceedings and use its own funds to pay benefits up to the guaranteed amounts. 29 U.S.C. § 1341(c)(3)(B)(iii).

Accordingly, under ERISA's statutory scheme, PBGC is responsible for assuring that each participant upon plan termination will receive no less than the guaranteed benefit amount, which is prescribed in section 1322 of the statute. The plan benefit amount that PBGC guarantees, however, is restricted by both: (1) 29 U.S.C. § 1322(a), which limits PBGC's guarantee to "nonforfeitable benefits;" and (2) 29 U.S.C. § 1322(b), which establishes additional limits (including the MGB and phase-in) upon the amount provided under the plan. Thus, PBGC as guarantor is not responsible for assuring payment of plan benefit amounts that exceed these statutorily-prescribed limits, regardless of whether or not part of the benefit is funded by plan assets.

The Appeal refers to two sentences in a 1973 Senate Report (see footnote 11) that: (1) list the first four priority categories in the proposed legislation (voluntary employee contributions, mandatory employee contributions, benefits "in pay status" for at least three years, and "insured benefits"); and (2) state that no insurance corporation losses will occur where all four categories could be paid in full from plan assets. This part of the Senate Report, however, does not explicitly explain the "losses" PBGC would incur if plan assets do not fully cover benefits in the first four priority categories. In our view, the most logical inference from the language in the Senate Report is that PBGC's liability in that situation would be for unfunded "insured benefits" – that is, PBGC would be liable for any plan benefit amounts that are within ERISA's guarantee limits and that plan assets do not cover. Accordingly, despite your assertion to the contrary, the language you quote is not at odds with PBGC's view of its guarantee and the plan asset allocation process.[28]

In conclusion, PBGC's guarantee assures that a pension plan's obligation to pay nonforfeitable benefits is carried out up to the statutory limits. In the case of the Plan, PBGC: (1) is assuring that all eligible participants receive their nonforfeitable benefits up to the statutory guarantee limits, and (2) is providing all of the nonguaranteed benefits amounts in PC3, based on PBGC's determination that PC3 is 100% funded by plan assets. *See* the discussion of [redacted]' benefits in the Appendix. Accordingly, we reject your contentions that PBGC has violated ERISA and has created shortfalls in the benefits owed to Plan participants.

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[28] Thus, the Appeals Board agrees with PBGC's longstanding position that, if plan assets only partially cover benefits in PC3, PBGC as guarantor will: (1) pay any remaining benefit amounts in PC3 that are within the guarantee limits; and (2) pay in full the guaranteed benefit amounts that are in PC4; and (3) not pay the (nonguaranteed) benefit amounts in PC5 and PC6. Similarly, if plan assets cover benefit liabilities through PC3 and partially into PC4, PBGC as guarantor will pay the remaining (unfunded) guaranteed amounts that are in PC4, but will not pay benefits in PC5 or PC6.

Decision

Having applied the provisions of the Plan, the provisions of ERISA, other applicable law, and PBGC regulations and policies to the facts in this case, the Appeals Board denies your appeal.

This decision is PBGC's final Agency action. [redacted] [redacted], if he wishes, may seek review of this decision in an appropriate federal district court.[29] If you or your client need any other information concerning PBGC benefits, please contact PBGC's Authorized Plan Representative at 1-800-400-7242.

Sincerely,

Charles Vernon

Charles Vernon
Appeals Board Chair

Enclosures:

1. [redacted] [redacted]' Benefit Determination Letter dated July 15, 2008 and Benefit Statement (4 pages)
2. Redacted Copy of Appeals Board's Consolidated Decision dated 2/29/08 (60 pages)
3. [redacted] [redacted]' Estimated Benefit Statement dated January 25, 2007 showing benefits payable as a Straight Life Annuity (2 pages)

cc: [redacted] [redacted]

[29] We note that [redacted] [redacted], as well as a number of other Plan participants, are Plaintiffs (represented by your law firm) in *Davis v. PBGC*, No. 1:08:cv01064(JR) (D.D.C. 2008). In *Davis*, Plaintiffs have challenged the Appeals Board's February 29, 2009 decision in the Consolidated Appeal.