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

August 29, 2014

[redacted]

Re: Appeal 2013-[redacted]; Case [redacted]; [redacted] (the [redacted] or the "Plan")

Dear [redacted]:

This Appeals Board decision responds to the appeal you filed regarding PBGC's [redacted] 2012 determination that the cash-balance portion of your benefit under the [redacted] Plan will be paid in the form of a 170-Month Certain-Term Annuity. As we explain below, the Board granted your appeal by finding that PBGC will pay you the portion of your cash-balance benefit that was not paid to you before the Plan terminated in the form of a Joint & 100% Survivor Annuity with your spouse as the contingent annuitant, reduced in accordance with the legal limitations on PBGC benefits.

Background

PBGC is the U.S. government agency that provides pension insurance in accordance with Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"). If a plan sponsor is unable to continue supporting its qualified, defined-benefit pension plan, PBGC becomes trustee of the plan and pays benefits as defined in the plan, subject to the limitations and requirements set by Congress under ERISA and PBGC's rules and regulations. Records available to the Appeals Board show that PBGC became statutory trustee of the [redacted] Plan on October 18, 2011. The trusteeship agreement set April 27, 2011 as the Plan's termination date.

The documents that PBGC received from the Plan's former administrator (the [redacted]) show that:

(1) You were born on [redacted];

(2) You retired from [redacted] on [redacted] 2007;

(3) You elected to start receiving your retirement benefits under the [redacted] Plan starting on [redacted] 2007;

(4) You earned two separate benefits under the [redacted] Plan, namely

(a) a grandfathered benefit, which you chose to receive in the form of a Joint & 100% Survivor Annuity ("J&100%SA"); and

(b) a cash-balance benefit, which you chose to receive under the lump-sum option offered by [redacted], with your spouse's written consent.

(5) As a result of the fact that [redacted] did not fund the Plan's trust sufficiently at any time between [redacted] 2007 and the Plan's termination date, you received only partial monthly payouts of your lump-sum benefit in accordance with section 401(a)(4) of the Internal Revenue Code ("IRC") because you were a Highly Compensation Employee ("HCE") at the time your employment with [redacted] terminated.

PBGC's Benefit Determination and Your Appeal

After PBGC reduced the monthly payments that you were receiving to their estimated guaranteed level, you suggested to PBGC that your remaining lump sum should be paid to you in the same J&100%SA form of benefit that you elected for your grandfathered benefit. When PBGC personnel stated that PBGC could not do so, you requested that PBGC send you a formal benefit determination regarding the form of benefit in which PBGC would pay your cash-balance benefit.

PBGC's [redacted] 2012 determination letter told you that PBGC would pay your cash-balance benefit in the form of a 170-month term certain annuity. PBGC's subsequent [redacted] 2012 clarification letter told you that PBGC is "unable to change our determination because of the form of benefit you elected."

Your [redacted] 2013 appeal letter disagreed with PBGC's determination that you elected to receive your cash-balance benefit as a term-certain annuity. Your appeal stated in pertinent part as follows:

> If the lump sum option was intended to be a term certain monthly annuity as stated in your [redacted] determination letter, this fact should have been clearly disclosed at the time of election, including interest rates, length of the term and beneficiary choices if both spouses were deceased. Instead, the communication focused on interim payments until a lump sum could be legally paid, and the lump sum option was never characterized as a term certain monthly annuity. . . .
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> I understand that the PBGC has legal restrictions on lump sum distributions and annuity payments and that my monthly benefit payment has been reduced accordingly. However, I do not believe it is equitable to now be paid less than the PBGC reduced monthly 100% joint and survivor annuity option since the election process was misleading. . . .

Scope of this Appeals Board Decision

PBGC's [redacted] 2012 determination and this Appeals Board decision are concerned only with the form in which your cash-balance benefit will be paid by PBGC. PBGC is currently paying you an estimated guaranteed monthly benefit, which includes both (1) an estimated grandfathered monthly benefit amount under the Plan's traditional benefit formula; and (2) an estimated monthly benefit amount under the cash-balance formula. After PBGC completes its audit of the [redacted] Plan, PBGC will issue you another formal determination letter regarding the final amount of your PBGC-payable benefits under the [redacted] Plan.

The Pre-Termination Restrictions on Lump-Sum Benefits Payable to Former Highly Compensated Employees

Section 401(a)(4) of the IRC provides generally that a plan is a qualified plan only if the contributions and the benefits provided under the plan do not discriminate in favor of highly compensated employees ("HCEs"). On September 19, 1991, final regulations under section 401(a)(4) were published in the Federal Register.[1] Treas. Reg. § 1.401(a)(4)-5[2] describes certain rules regarding "Plan Amendments and Plan Termination" to ensure that a plan does not improperly discriminate in favor of such employees.

Within that section of the treasury regulations, subsection 1.401(a)(4)-5(b) describes certain "Pre-termination restrictions" that are required in qualified plans as follows:

> (b) *Pre-termination restrictions-*
>
> (1) *Required provisions in defined benefit plans.* A defined benefit plan has the effect of discriminating significantly in favor of HCEs or former HCEs unless it incorporates provisions restricting benefits and distributions as described in paragraph (b)(2) and (3) of this section at the time the plan is established or, if later, as of the first plan year to which §§ 1.401(a)(4)-1 through 1.401(a)(4)-13 apply to the plan under § 1.401(a)(4)-13(a) or (b). This paragraph (b) does not apply if the Commissioner determines that such provisions are not necessary to prevent the prohibited discrimination that may occur in the event of an early termination of the plan. The restrictions in this paragraph (b) apply to a plan within the meaning of § 1.410(b)-7(b) (i.e., a section 414(l) plan). Any plan containing a provision described in this paragraph (b) satisfies section 411(d)(2) and does not fail to satisfy section 411(a) or (d)(3) merely because of the provision.

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1 *See* T.D. 8360, 57 F.R. 35536 (August 10, 1992).

2 26 C.F.R. § 1.401(a)(4)-5.

(2) *Restriction of benefits upon plan termination.* A plan must provide that, in the event of plan termination, the benefit of any HCE (and any former HCE) is limited to a benefit that is nondiscriminatory under section 401(a)(4).

(3) *Restrictions on distributions-*

(i) *General rule.* A plan must provide that, in any year, the payment of benefits to or on behalf of a restricted employee shall not exceed an amount equal to the payments that would be made to or on behalf of the restricted employee in that year under-

(A) A straight life annuity that is the actuarial equivalent of the accrued benefit and other benefits to which the restricted employee is entitled under the plan (other than a social security supplement); and

(B) A social security supplement, if any, that the restricted employee is entitled to receive.

Discussion

1. PBGC's treatment of your lump-sum election as an election of a Term Certain Annuity

In 2011, PBGC began developing a revised working procedure that it has used to calculate and determine the benefits payable by PBGC to HCEs who elected to receive their retirement benefits in the form of lump sum before their plan's termination date. At the heart of this procedure is PBGC's treatment of such lump-sum elections as if they were elections of a Term Certain Annuity ("TCA").

PBGC decided to treat such lump-sum elections as if they were elections of a TCA after observing that:

(1) if the HCE's plan had not terminated, the HCE would have generally continued receiving the same monthly amount until he received full payment of the lump sum in those cases where the HCE's plan sponsor continued not funding the plan sufficiently; and

(2) as a result of the PBGC's trusteeship of the HCE's plan, the plan sponsor would never have the opportunity to fund the plan sufficiently.

PBGC's decision to treat the lump-sum elections of HCEs as if they were elections of TCAs allows PBGC to continue paying an HCE's benefit in the same manner it was being paid before the plan's termination. In turn, this treatment allows HCEs who have been receiving monthly benefits and have adjusted their lifestyles to a steady stream of income to continue to receive the same monthly benefit, subject to ERISA's limitations on the benefits PBGC is allowed to pay.

2. The Appeals Board has concluded that PBGC will pay your benefit in the form of a Joint and 100% Survivor Annuity because it is unclear whether your spouse consented to an election of a lump sum not paid in a single payment

As a result of the enactment of REA,[3] ERISA generally requires that the benefit of a married participant be payable in the form of a qualified joint and survivor annuity ("QJSA"), which provides an annuity for the life of the participant with a survivor annuity of not less than 50% (and not greater than 100%) of the amount of the participant's benefit. Under ERISA, a participant may waive the QJSA and elect an optional form of benefit providing no survivor benefit or a survivor benefit for someone other than the participant's spouse, but only with the written consent of the spouse.

As explained by the Justice Kennedy in the Supreme Court's decision in Boggs v. Boggs,[4]

> The statutory object of the qualified joint and survivor annuity provisions, along with the rest of § 1055, is to ensure a stream of income to surviving spouses. Section 1055 mandates a survivor's annuity not only where a participant dies after the annuity starting date but also guarantees one if the participant dies before then. See §§ 1055(a)(2), (e). These provisions, enacted as part of [REA], enlarged ERISA's protection of surviving spouses in significant respects. Before REA, ERISA only required that pension plans, if they provided for the payment of benefits in the form of an annuity, offer a qualified joint and survivor annuity as an option entirely within a participant's discretion. 29 U.S.C. §§ 1055(a), (e) (1982 ed.). REA modified ERISA to permit participants to designate a beneficiary for the survivor's annuity, other than the nonparticipant spouse, only when the spouse agrees. § 1055(c)(2). Congress' concern for surviving spouses is also evident from the expansive coverage of § 1055, as amended by REA. Section 1055's requirements, as a general matter, apply to all "individual account plans" and "defined benefit plans." § 1055(b)(1).

Treasury regulations describe the requirements of a spouse's consent to a participant's election of a form of benefit other than the plan's automatic QJSA (which in this case is a Joint and 50% Survivor Annuity). In particular, Q&A 31 in Treas. Reg. § 1.401(a)-20 provide as follows:

> Q-31: What rules govern a participant's waiver of a QPSA or QJSA under section 417(a)(2) *[26 USCS § 417*(a)(2)]?
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> A-31: (a) Specific beneficiary. Both the participant's waivers of

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[3] Pub. L. 98-397, 98 Stat. 1426. The requirements of REA in this regard are generally effective for annuity starting dates on and after January 1, 1985.

[4] 520 U.S. 833 (1997)

a QPSA and QJSA and the spouse's consents thereto must state the specific nonspouse beneficiary (including any class of beneficiaries or any contingent beneficiaries) who will receive the benefit. Thus, for example, if spouse B consents to participant A's election to waive a QPSA, and to have any benefits payable upon A's death before the annuity starting date paid to A's children, A may not subsequently change beneficiaries without the consent of B (except if the change is back to a QPSA). If the designated beneficiary is a trust, A's spouse need only consent to the designation of the trust and need not consent to the designation of trust beneficiaries or any changes of trust beneficiaries.

(b) Optional form of benefit -- (1) QJSA. **Both the participant's waiver of a QJSA (and any required spouse's consent thereto) must specify the particular optional form of benefit.** The participant who has waived a QJSA with the spouse's consent in favor of another form of benefit may not subsequently change the optional form of benefit without obtaining the spouse's consent (except back to a QJSA). Of course, the participant may change the form of benefit if the plan so provides after the spouse's death or a divorce (other than as provided in a QDRO). A participant's waiver of a QJSA (and any required spouse's consent thereto) made prior to the first plan year beginning after December 31, 1986, is not required to specify the optional form of benefit.

(2) QPSA. A participant's waiver of a QPSA and the spouse's consent thereto are not required to specify the optional form of any preretirement benefit. Thus, a participant who waives the QPSA with spousal consent may subsequently change the form of the preretirement benefit, but not the nonspouse beneficiary, without obtaining the spouse's consent.

(3) Change in form. After the participant's death, a beneficiary may change the optional form of survivor benefit as permitted by the plan.

(c) General consent. In lieu of satisfying paragraphs (a) and (b) of this Q&A 31, a plan may permit a spouse to execute a general consent that satisfies the requirements of this paragraph (c). A general consent permits the participant to waive a QPSA or QJSA, and change the designated beneficiary or the optional form of benefit payment without any requirement of further consent by such spouse. No general consent is valid unless the general consent acknowledges that the spouse has the right to limit consent to a specific beneficiary and a specific optional form of benefit, where applicable, and that the spouse voluntarily elects to relinquish both of such rights. Notwithstanding the previous sentence, a spouse may execute a general consent that is limited to certain beneficiaries or forms of benefit payment. In such case, paragraphs (a) and (b) of this Q&A 31 shall apply to the extent that the limited general consent is not applicable and this paragraph (c) shall apply to the extent that the limited general consent is applicable. A general consent, including a limited general consent, is not effective unless it is made during the applicable election period. A general consent executed prior to October 22, 1986 does not have to

satisfy the specificity requirements of this Q&A 31.
[Underlined boldfacing added for emphasis.]

Q&A 31 make it clear that a spouse's consent to a participant's election of a benefit other than a plan's automatic QJSA is specific to the form of benefit elected by the participant. Based on our review of your election form and your spouse's consent, it is unclear whether your spouse was aware that you might not receive your lump-sum benefit in a single payment. The Appeals Board has concluded that PBGC should treat your spouse's consent as consent only to payment of your benefit in a single sum and, therefore, not pay your remaining benefit as a TCA. Accordingly, PBGC will pay your PBGC-payable benefit in the form of a Joint & 100% Survivor Annuity, with your spouse as the contingent annuitant, as you requested in your appeal letter.

Decision

Having applied the law and PBGC's regulations to the facts of this case, the Appeals Board granted your appeal by finding that PBGC will pay you the portion of your cash-balance benefit that was not paid to you before the Plan terminated in the form of a Joint & 100% Survivor Annuity with your spouse as the contingent annuitant, reduced in accordance with the legal limitations on PBGC benefits.

If you have other questions regarding your PBGC benefit, you may call PBGC's Customer Contact Center and ask to speak to the authorized representative assigned to the [redacted] Plan (Case [redacted]).

Sincerely,

Michel Louis
Appeals Board Member