

**Rules and Procedures for Enforcement
of Employers' Reporting and Payment Obligations
Effective for Delinquencies Arising With Respect to Contribution Periods
Beginning on or After January 1, 2015**

Introduction

The Board of Trustees of each of the Building Service 32BJ Benefit Funds (each a "Fund" and collectively, the "Funds") has a fiduciary obligation to collect all money that is due and owing to the Fund. That obligation requires that they establish a system for monitoring employers' compliance with their obligations to make contributions to the Funds and under which the Funds' administrators and legal counsel will take all legally appropriate and cost-effective steps to collect delinquent contributions, so that they may be applied for the benefit of the Funds' participants.

In addition, ERISA defines as a "prohibited transaction" any extension of credit from an employee benefit plan to a contributing employer. A failure to collect contributions when they are due may be treated as such an extension of credit from the plan to the employer. In 1976 the Department of Labor (DOL) issued guidance, in the form of a class exemption from the prohibited transaction rules that permits reasonable business decisions to be made on unpaid contributions. That guidance is Prohibited Transaction Class Exemption 76-1 ("PTCE 76-1").

The fundamental principles of PTCE 76-1 are the following:

- Any compromise of a claim for unpaid contributions, or any arrangement permitting payment later than the normal due date, must be made for the "exclusive purpose of facilitating the collection of such contribution" (and not, for example, to ease the employer's cash-flow problems).
- Any such compromise or arrangement and any decision to write off a claim for unpaid contributions as uncollectible must be "reasonable under the circumstances based on the likelihood of collecting such contribution or the approximate expenses that would be incurred" if the plan persisted in trying to collect the contribution by other means.
- All such compromises, arrangements, or write-offs must be preceded by "such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contribution or any part thereof."

On December 30, 2003, the DOL issued a prohibited transaction class exemption that applies to settlements of claims against contributing employers for failure to forward participants' deferred wages to 401(k) plans within the required time periods. PTCE 2003-39 (Dec. 30, 2003). This PTCE requires that any release or reduction of such a claim for contributions, or any extension of credit permitting payment of such delinquent contributions in installments:

- Must be based on the plan attorney's determination that there is a genuine controversy involving the plan;
- Must be authorized on behalf of the plan by a "fiduciary who has no relationship to,

- or interest in, any of the parties involved in the litigation, other than the plan, that might affect the exercise of such person’s best judgment as a fiduciary”;
- Must be described in a written agreement or consent decree;
- Must not be part of an arrangement that is designed to benefit a party in interest (i.e., either a contributing employer or the union);
- Must be reasonable in light of the plan’s likelihood of full recovery, the costs and risks of litigation, and the value of the claims forgone;
- If it provides for any installment payments or delayed payment, the credit terms must be reasonable in light of the creditworthiness of the employer and the time value of money, and the fiduciary should consider requiring security; and
- The plan must participate in the settlement on terms that are at least as favorable to the plan as the terms that affect any other parties that are not plans.

The primary policy consideration of the Funds’ collection program, other than those that are mandatory under the DOL’s guidance, is that the Funds should design their delinquency policies to avoid being the lender of first resort for an employer that has cash-flow problems. It is extremely easy for an employer to write itself a loan from the Funds by simply postponing a contribution remittance. The Funds’ delinquency policy should make that decision costly, so that if the employer has to decide which of its creditors it will pay first, it will have a strong reason to pay the Funds first and postpone payment to its other creditors.

In compliance with the applicable principles governing collection, the Board of Trustees of each of the Funds has adopted the following rules and procedures regarding the enforcement of employers’ reporting and remittance obligations to the Funds:

I. When Contributions are due.

- A. Deferred wages payable as 401(k) contributions to the SRSP.** Department of Labor regulations require that the deferred wages payable to the SRSP as 401(k) contributions are due from all employers **as of the earliest date on which such contributions can reasonably be segregated from the employer’s general assets.** Employers must remit such contributions electronically not later than the 7th calendar day after each payroll payment date on which amounts deferred would otherwise have been payable to the participant as the participant’s wages. It should be understood that the 7th calendar day outside limit is not a safe harbor that employers may rely on when remitting amounts deducted from participants’ wages.
- B. Other Contributions.** Must be remitted electronically on or before the 20th calendar day of each month for payroll periods ending in the preceding month.
- C. When a Contribution is “Received” by the Funds.** A contribution is received by the Funds only if the money is transmitted electronically on or before 7:00 p.m. on the specified date. If the specified date falls on a weekend or holiday, the contribution is received only if the money is transmitted electronically on or before 7:00 p.m. on the last business day before the specified date.

II. Definition of a delinquency.

When the term “delinquency” is used in this Delinquency Collection Program, it includes all of the following:

- A.** Failure to remit deferred wages or contributions that are owed to any Fund;

- B.** Late payment of deferred wages or contributions, i.e., remittance after the due dates defined in **I**;
- C.** Payment of only a portion of the amount that is owed to any Fund (which includes a “discrepancy” as described in **V.A.2**);
- D.** A rejected ACH or other Funds transfer request;
- E.** Failure to provide complete remittance reports to identify the employees for whom deferred wages or contributions are remitted, on or before the due dates defined in **I**.
- F.** Failure to report status changes with respect to employees who have been terminated, suspended or otherwise have had their status changed to one in which the employer is not obligated to contribute. In the event that an employer does not provide the Funds with the requisite notice within 20 days of such status change, the Funds will charge the employer Health, Legal and Training contributions from the time of status change until such notice is provided. This is a confirmation of existing policy. For employers that contribute at an hourly rate, the Funds will charge the hourly rate times the minimum number of hours set forth in their collective bargaining or participation agreements necessary to qualify for the benefit in question

III. Consequences of delinquency.

Interest will accrue on any deferred wages that are not received by the SRSP Fund by the due date defined in **I.A** and on any other contribution that is not paid by the due date defined in **I.B**.

A. Interest.

- 1.** The interest rate is 9% per year, subject to review and adjustment by the Executive Committee at any time that the Executive Committee determines that the rate is no longer appropriate in light of prevailing interest rates, or other relevant factors.
- 2.** Interest will be calculated as follows:
 - a.** for deferred wages payable as 401(k) contributions to the SRSP, beginning on the 8th day after the payroll payment date on which amounts deferred would otherwise have been payable to the participant, and
 - b.** for all other contributions, beginning on the 21st day of the month for payroll periods ending in the preceding month.
- 3.** One month’s interest will be charged for each month or part of a month that the delinquency continues, i.e., a full month’s interest will be charged on the beginning date specified in **A.2** (whichever is applicable) and an additional month’s interest will be charged for each following month or part of a month thereafter on any part of the delinquency that remains outstanding.
- 4.** Interest is calculated only on the principal amount due, and no interest shall accrue on interest.
- 5.** Partial payments of deferred wages due the SRSP as 401(k) contributions shall be credited to the participants’ accounts pro rata based on the full amounts due. Interest due on such deferred wages owed to the SRSP when collected shall be credited to the participants’ accounts pro rata based on the full amounts due. Liquidated damages owed to the SRSP

when collected shall be credited to the SRSP Fund.

6. If an employer remits only a portion of its outstanding balance due for contributions other than deferred wages due to the SRSP as 401(k) contributions, the partial payment will be applied as follows:
 - a. first to the amount due to SRSP for other than such deferred wages; these amounts will be credited to the participants' accounts,
 - b. then to accrued interest on such amount due to SRSP; this interest will be credited to the participants' accounts,
 - c. the balance, if any, then allocated pro rata (based on the full amounts due) among the other Funds, crediting the amounts to principal first, then to interest.
- B. Liquidated Damages.** The rate of liquidated damages is 20% of total principal due, unless the delinquency is resolved without the need for arbitration or litigation. For SRSP fund the rate of liquidated damages is 21%.
- C. Other costs of collection.** As provided by the collective bargaining agreements, an employer that fails to pay required contributions on time or fails to make proper and timely remittance reports may be required to pay all of the Funds' expenses of collection or enforcement, including arbitration costs, court costs, and attorney's fees, in addition to the interest and liquidated damages provided in **A** and **B**.
- D. Providing a cash bond or other security.** As provided by the collective bargaining agreements, an employer that is "regularly or consistently delinquent" may be required to provide security, including the posting of a cash bond, for the payment of future contributions. The Executive Committee will decide whether to require such security from an employer.

IV. Compliance Audit Program

- A. Types of audits.** The Funds' compliance audit program will include two components: regular audits performed of selected employers to confirm that the employers are making accurate reports and remitting all amounts required by their collective bargaining agreements; and audits performed for cause (e.g., in aid of enforcement proceedings or to investigate assertions that employees' work or wage deferrals have not been reported or remitted properly to the Funds).
- B. Employers' duty to cooperate with auditor.** Employers are required, pursuant to the Trust Agreements and their collective bargaining agreements, to cooperate with the Funds' auditor by promptly providing all records that are requested to permit the auditors to make a determination regarding the accuracy, completeness and timeliness of the employer's reports and remittances to the Funds.
- C. Audit Corrections.** The Funds shall establish a uniform, non-discriminatory procedure for reviewing employers' challenges to audit findings and for reducing the amounts claimed in audit findings on grounds of error.
- D. Interest.** In all cases, interest will be charged beginning as of the original due date of each delinquency found on audit as specified in **III.A**.

- V. Demands for Payment.** The Funds shall maintain a system to monitor employer contributions and identify delinquencies as soon as administratively practicable. The following steps will be taken when any delinquency has been identified.

- A. Failure to provide timely or full remittances.**
- 1.** If the Funds fail to receive a remittance by the dates provided in **I**, the Funds will send a written or electronic notice of delinquency and demand to the employer. This demand will advise the employer that interest is accruing as provided in **III**, will advise the employer of the amount of interest if the Funds have sufficient information to calculate or estimate the amount, and will also advise the employer that the delinquency will be referred for collection (along with collection of liquidated damages) if the remittance or other satisfactory response is not received by a specified date.
 - 2.** If the Funds receive a report but the employer's remittance is less than the required amount (either with respect to amounts due the SRSP or contributions or both), the Funds will send a written or electronic bill for the discrepancy to the employer, demanding that the employer remit the amount that remains unpaid and all accrued interest. The Funds will advise the employer that the discrepancy will be referred for collection (along with collection of liquidated damages) if the unpaid amount is not received by a specified date.
- B. Late Remittances.** If the Funds receive the full amount that an employer owes to the Funds but the remittance is received after the applicable date identified in **IIIA**, the Funds shall assess interest on the amount that was paid late, calculated beginning with the applicable date specified in **III.A**. A written or electronic notice will be sent to the employer after the Funds have determined that the payment was late. The notice will demand payment of interest and will advise the employer that the delinquency will be referred for collection if the full amount owed for interest is not received by a specified date.
- C. Late Reports.** If an employer makes a timely remittance of the full amount that it owes to the Funds but the Funds receive the remittance report after the applicable due date identified in **I**, the Funds shall assess an administrative fee of \$300, which is a reasonable estimate of the costs incurred by the Funds in processing a remittance without the appropriate report. A written or electronic notice will be sent to the employer after the Funds have determined that the report was late, demanding payment of the administrative fee by a specified date.
- D. Incomplete Reports.** If an employer provides a remittance report to the Funds that omits necessary information, the Funds shall send a written or electronic notice to the employer demanding that the employer supply the missing information within 10 days. The Funds will also advise the employer that an administrative fee of \$300 will be assessed if the employer submits three incomplete reports within any period of 12 consecutive months. The amount of \$300 is a reasonable estimate of the costs incurred by the Funds in processing incomplete reports.
- E. Rejected ACH or Dishonored Checks, etc.** If a check provided by an employer in payment of required amounts is dishonored by the employer's bank, or an ACH or other money transfer demand is not paid, the Funds will not redeposit the check but will notify the employer and demand payment. That notice will advise the employer of the amount of the dishonored check or rejected transfer, will demand

payment of the amount of the check or rejected transfer, any bank fee charged to the Funds, and interest, calculated on the amount of the check or transfer beginning on the applicable date specified in **III**. The notice will advise the employer that the delinquency will be referred for collection if the unpaid amount is not received within 5 days after the date of the notice.

VI. Overpayments

- A. General principle.** As a matter of general policy, the Board of Trustees will not credit or refund overpayments to an employer if the overpayments were associated with a reporting error that has caused one or more Funds to provide benefits to a person who was not eligible to receive them, if the reporting error is likely to cause benefits to be paid to such an ineligible person in spite of reasonable administrative efforts to correct the error, or if a credit or refund otherwise would cause actuarial harm to one or more Funds. The determination of whether any of these conditions are present will be made by the Board of Trustees pursuant to Article XI, Section 8, of the applicable trust agreement.
- B. Procedure for Credit or Refund.**
- 1. Employer request.** An employer may request a refund of amounts that it has overpaid by identifying the amount and date of the overpayment in writing to the Funds and by providing any additional information that the Funds request to verify that the amount was an overpayment.
 - 2. Time for making request.** Such a request must be made within two years after the date on which the overpayment was remitted to the Funds. This time limit shall not prevent the Funds from voluntarily correcting an overpayment that has been discovered and verified through means other than employer's request (including, for example, upon audit)
 - 3. Employers that have an outstanding delinquency.** If an employer that has an outstanding delinquency (including any accumulated interest, liquidated damages and costs of collection) requests or is found to be due a refund of overpaid contributions, the Funds will apply any such refund to the outstanding delinquency. If any amount remains after the full amount of the delinquency is satisfied, that amount will be credited or paid as provided in **4** and **5**.
 - 4. Small overpayments.** Except as provided in **VI.A** or **B.3**, if a verified overpayment is not more than 10% of the employer's regular remittance amount (whether monthly or quarterly) and not more than \$5,000, the Funds will credit the amount of the overpayment against a future remittance and will notify the employer of this credit.
 - 5. Large overpayments.** Except as provided in **VI, A** or **B.3**, if a verified overpayment is more than either \$5,000 or 10% of the employer's regular remittance amount, the Funds will notify the employer of the overpayment and offer the employer a cash refund or credit against a future remittance, at the employer's option. If the employer does not make a timely election, the Funds will credit the overpayment against the employer's future remittance obligations and will notify the employer of this credit.

VI. Acceleration or omission of collection procedures

No employer shall be entitled to defend an enforcement action on the ground that any step in the Fund's collection process has been accelerated or omitted.