

**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, 2013**

Introduction

The Board of Trustees has a fiduciary obligation to collect all money that is due and owing to the 32BJ/Broadway League Pension Fund (the "Fund"). That obligation requires that it establish a system for monitoring employers' compliance with their obligations to make contributions to the Fund and under which the Fund 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 Fund 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"

The primary policy consideration of the Fund collection program, other than those that are mandatory under the DOL's guidance, is that the Fund should design its delinquency policy 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 Fund by simply postponing a contribution remittance. The Fund 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 Fund first and postpone payment to its other creditors.

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

The Fund is party to an administrative services agreement (“ASA”) with the Building Service 32BJ Pension Fund (“32BJ Pension Fund”). Pursuant to Section 1(h) of said ASA, the 32BJ Pension Fund is responsible for the collection of employer contributions. On October 26, 2012, the Board of Trustees of the Fund resolved that the 32BJ Pension Fund collect employer contributions, including delinquent contributions in accordance with the procedure set forth below.

**I. When Contributions are Due.**

**A.** The due date for contributions owed by all Employers is the 20th day of each month for payroll periods ending in the preceding month. If the 20<sup>th</sup> day of the month is a weekend or holiday, the due date is the last business day before that date.

**B. When a Contribution is "Received" by the Fund.** A contribution is received by the Fund only if the money is transmitted electronically or received in the bank lockbox on or before 3:00 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 or received in the bank lockbox on or before 3:00 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.** Payment of only a portion of the amount that is owed to the Fund (which includes a "discrepancy" as described in **V.A.2**);

**B.** A dishonored check or rejected ACH or other Fund transfer request;

**C.** Failure to provide complete remittance reports to identify the employees for whom contributions are remitted, on or before the due dates defined in **I**.

**III. Consequences of delinquency.**

Interest will accrue on any contribution that is not paid by an Employer by the 20<sup>th</sup> calendar day of each month for payroll periods ending in the prior month.

**A. Interest.**

- 1.** The interest rate is 9% per year subject to review and adjustment by the Board of Trustees of the Fund should it determine that the rate is no longer appropriate in light of prevailing interest rates, or other relevant factors.
- 2.** Interest will be calculated for contributions not paid by the due date defined in **I.A**, beginning on the 21<sup>st</sup> day of the month for payroll periods ending in the prior 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** 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.

**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.

**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 Fund's 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.

#### **IV. Compliance Audit Program**

**A. Types of audits.** The Fund will participate in the Building Service 32BJ Health Fund ("Health Fund") compliance audit program, which includes two components; regular audits performed on 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 periods have not been reported or remitted properly to the Fund).

**B. Employers' duty to cooperate with auditor.** Employers are required, pursuant to the Trust Agreement and their collective bargaining agreements, to cooperate with the Fund's 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 Fund.

**C. Audit Corrections.** The Fund 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 Fund 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, except as provided in **VII**.

**A. Failure to provide timely or full remittances.**

**1.** If the Fund fails to receive a remittance by the dates provided in **I**, the Fund 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 Fund has 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 within specified date..

**2.** If the Funds receive a report but the employer's remittance is less than the

required amount, the Fund 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 within specified date.

**B. Late Remittances.** If the Fund receives the full amount that an employer owes to the Fund but the remittance is received after the applicable date identified in **III**, the Fund 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 Fund has 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 within specified date.

**C. Late Reports.** If an employer makes a timely remittance of the full amount that it owes to the Fund but the Fund receives the remittance report after the applicable due date identified in **I**, the Fund shall assess an administrative fee of \$300, which is a reasonable estimate of the costs incurred by the Fund in processing a remittance without the appropriate report. A written or electronic notice will be sent to the employer after the Fund has determined that the report was late, demanding payment of the administrative fee within specified date.

**D. Incomplete Reports.** If an employer provides a remittance report to the Fund that omits necessary information, the Fund shall send a written or electronic notice to the employer demanding that the employer supply the missing information within 10 days. The Fund 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 Fund in processing incomplete reports.

**E. 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 Fund 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 Fund, 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. Referral for Collection**

### **A. Amounts below \$1,000**

1. If any delinquency, or any interest, liquidated damages, administrative fees, or costs of collection that were assessed for late remittance or late or incomplete reporting, is not fully paid within the period provided in **V**, a follow-up demand for payment will be sent to the employer.
2. In the case of an employer that is not repeatedly or chronically delinquent in satisfying its obligations to the Fund, if the employer does not pay the amounts owed in full after the follow-up demand described in **VI.A.1**, but the amounts owed (including all prior unpaid amounts to the Fund and the Health Fund) are less than \$1,000, the delinquency will not be referred to counsel for

collection. Each such delinquency will be maintained as a delinquent amount in the Fund's records for the maximum period permitted by the applicable statute of limitations, and interest will continue to accrue pursuant to **III.A.**

3. At any later time that the cumulative amount the employer owes to the Funds for delinquencies, interest, liquidated damages, administrative fees, and costs of collection, equals or exceeds \$1,000, or if the employer becomes repeatedly or chronically delinquent, the cumulative delinquency will be referred to counsel for collection.

**B. Amounts of \$1,000 or more, and chronic or repeated delinquencies**

1. If the cumulative amount that the employer owes to the Funds for delinquencies, interest, liquidated damages, administrative fees, and costs of collection, is equal to or more than \$1,000, or if the employer is repeatedly or chronically delinquent, as determined by the Fund, all delinquent amounts shall be referred to counsel for collection.
2. The Fund will provide counsel all necessary documentation and evidence that is required for collection of the employer's cumulative delinquencies, and will report to counsel promptly any payments that the Funds receive, additional accruals of interest, liquidated damages, and any additional delinquencies incurred by the same employer.
3. Counsel may, but is not required to send the employer a follow-up demand before initiating a proceeding for collection. Counsel will exercise litigation judgment, based on amounts owed, the disputed factual or legal issues (if any), information available about the employer's ability to satisfy a judgment for the delinquencies, and the employer's history of prior delinquencies, if any, to determine the forum for collection that will be most likely to enforce the employer's obligations to the Fund in the most cost-effective and timely manner. The potential forums include arbitration under the employer's collective bargaining agreement, a legal action in state court, or a legal action in federal court.
4. Collection counsel may seek to recover actual damages caused by an employer's delinquency in any case in which actual damages exceed the applicable liquidated damages.

**C. Bankrupt or insolvent employers.** If the Funds learn that an employer that owes any amounts to the Fund is the subject of a bankruptcy proceeding in federal court, a proceeding for insolvency in state court, or an assignment for the benefit of creditors, the Fund will file a claim in that proceeding for the amount or estimated amount of the employer's delinquency. If the employer contests a claim for \$1,000 or more, or in other circumstances, where it is more cost-effective to take an active role in the proceeding or file a petition for involuntary bankruptcy, the Fund may refer the claim to legal counsel. Upon receiving notice that an employer is the subject of a bankruptcy proceeding, all efforts to collect from that employer, other than by asserting the claim in bankruptcy, must cease in accordance with federal law.

**VII. Acceleration or omission of collection procedures.**

A. In any case in which the Fund or its counsel obtains information from which it appears that the Fund's ability to collect amounts owed by an employer may be diminished by following the schedule or steps prescribed for the normal collection procedure, any or all of the steps set forth in this procedure may be accelerated or omitted, in order to initiate formal collection action as quickly as possible, including (if

appropriate in the judgment of counsel) an application for preliminary relief pending final resolution of a collection proceeding. Impending events that may justify such acceleration or omission include (but are not limited to) dissolution or distribution of the employer's assets, sale of any substantial portion of the employer's assets, assignments for the benefit of creditors, liquidation, insolvency, bankruptcy, or any event that may remove the employer's assets from judicial attachment.

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

## **IX. Procedure for Settlement and Write-offs**

**A. General statement of objective.** The Trustees recognize that there are circumstances in which it is appropriate to reach agreements with employers to compromise claims for delinquent amounts or to provide for payments of amounts due over time, and that on occasion prudent administration requires that amounts due from an employer should be deemed uncollectible. The Trustees adopt the following procedures regarding the negotiation and approval of such compromises, payment terms, and determinations that the amounts should be deemed uncollectible, at all times in compliance with applicable guidance from the Department of Labor.

**B. General rules.** In compliance with PTCE 76-1:

1. 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."
2. 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 contributions or approximate expenses that would be incurred" if the plan persisted in trying to collect the contribution by other means. The compromise or arrangement, and any write-off decision must also be in the best interests of the participants and beneficiaries of the Fund.
3. 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."

**C. Payment over time.**

1. Collections counsel shall have authority in cases involving principal amounts of \$100,000 or less, to approve a settlement on terms providing for payment of 100% of the principal amount determined to be due, plus all interest, liquidated damages and collection expenses, by monthly or quarterly installments over a period of no more than 12 months, with interest on the unpaid balance from time to time at the rate provided in **III.A.1**. All such terms for payment will be reported to the Executive Committee in the monthly reports required by **X**.
2. The Trustees shall have authority to approve other installment payment arrangements on such terms as they deem appropriate in light of the principles stated in **IX.A** and **B**, based upon a written recommendation from collection counsel.

**D. Write-offs.** After the Fund has made diligent, documented attempts to collect the amount owed by the employer, the amount owed may be deemed uncollectible if counsel advises in writing that the

likelihood of collecting any further amount would be exceeded by the likely cost of additional collection efforts. Such determinations may be made by the Trustees and evidenced in writing.

**X. Reports.** In order to be certain that the collection process and any settlements or write-offs are consistent with this policy, Fund administrator, auditors, and legal counsel will provide regular reports to the Trustees describing the cases that are being pursued and the results of the collection efforts, plus any waivers, compromises or terms for payment that are described by **IX.B.1** or **IX.C.1**.

**XI. Records.** The Fund will maintain records for at least 6 years of each settlement or compromise. Those records will comply with any applicable DOL requirements. Any written determinations or recommendations made by counsel to the Fund shall be maintained as confidential attorney-client communications, but records of the fact that such determinations or recommendations were made, and the dates on which they were made, shall be kept in summary form to be made available as may be required to verify compliance with the applicable requirements.

## **XII. 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 Fund 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 the Fund. The determination of whether any of these conditions are present will be made by the Board of Trustees pursuant to Article X, Section 7, of the 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 Fund and by providing any additional information that the Fund requests 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 Fund. This time limit shall not prevent the Fund from voluntarily correcting an overpayment that has been discovered and verified through means other than the 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, costs of collection, and all amounts described in **V**) requests or is found to be due a refund of overpaid contributions, the Fund 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 **XII.A** or **B.3**, if a verified overpayment is not more than 10% of the employer's regular remittance amount

and not more than \$5,000, the Fund 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 **XII. A** or **B.3**, if a verified overpayment is more than either \$5,000 or 10% of the employer's regular remittance amount, the Fund 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 Fund will credit the overpayment against the employer's future remittance obligations and will notify the employer of this credit.