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Frequently Asked Questions Regarding IPB's PBGC Guarantees White Paper

In a new white paper, nationally recognized Ivins, Phillips & Barker ERISA attorneys Kevin O'Brien and Spencer Walters argue that the PBGC's disavowal of federal protection for retirees after pension risk transfers was never authorized by Congress and conflicts with both the statute and the PBGC's own 1981 position. The authors trace the legal history, legislative intent, and policy implications demonstrating that the law already requires PBGC guarantees to continue even after pension benefits are annuitized. Their analysis calls on regulators and courts to restore this "forgotten promise" to strengthen the integrity of the U.S. pension system.

The white paper is available at www.ipbtax.com/PRT-PBGC-Guarantees.

Q1. Why do you believe that PBGC guarantees do not actually stop when a pension plan transfers its obligations to an insurance company?

A1. The statute does not say the guarantees stop. Section 4022 of ERISA guarantees "all nonforfeitable benefits under a single-employer plan." Nothing in that language limits protection to benefits still being paid by the plan. When a plan buys an annuity for a retiree, those payments are still "under the plan" because they arise from and are defined by the plan's terms. Congress could have written a cut-off, but it didn't. The legislative history, and even PBGC's own early cases, provide support for continued guarantees.

Q2: Why does the PBGC say it does not guarantee plan benefits after insurance company failures?

A2. The PBGC actually used to say the exact opposite. In 1981 regulations, the PBGC first required annuity purchases to be in standard terminations, and the PBGC regulations provided that insurance contracts continued to be guaranteed by the PBGC. The PBGC even explicitly assured everyone that if an insurer failed "the PBGC would provide the necessary benefits." That was in black and white in the *Federal Register*. A decade later, after failing to get the law changed in this regard, and amidst PBGC budget stress, the agency reversed itself. The PBGC changed its position not because the statute changed,

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but because it was worried about financial exposure from the Executive Life Insurance failure. The PBGC conducted no study of the issue. *See* *56 Fed. Reg. 28,642 28,645* (June 21, 1991) ("However, the PBGC presently lacks information concerning the extent to which there is a risk that some insurance companies will become insolvent and will be unable to meet their obligations under irrevocable annuity contracts, and that such obligations will not be fully provided for by the insurance industry and/or state guaranty funds."). It also ignored that its original position was reflected in a prior regulation. That's not how law or policy is supposed to work.

Q3: If PBGC guarantees continue after a PRT so that annuitants may be able to recover benefits from the PBGC after an insurance failure, would continuation of PBGC premiums for the annuitized participants be required?

A3: No, continuing PBGC guarantees to PRT annuitants does not mean that PBGC premium payments automatically must be made on behalf of those annuitants. The statutory prerequisites are different – the guarantee is based on what constitutes a benefit "under the plan" and the premium is based on who is a "participant." Under long-standing PBGC and ERISA regulations, an individual who receives a distribution of an irrevocable insurance amount ceases to be a "participant."

The PBGC could try to modify its regulations to include PRT annuitants as "participants," but such a change would be inconsistent with PBGC's statutory mission to "keep premiums at a minimum" and would face legal obstacles. The term "participant" is used in a number of ERISA Title IV provisions and continuing to treat annuitants as "participants" would render a number of those provisions nonsensical (e.g., ERISA section 4044). The PBGC could try to promulgate a different definition of "participant" for premium purposes than for other purposes. But that approach would run counter to a well-established principle of statutory construction that the same term is presumed to have the same meaning in all parts of the same statute. This is the so-called presumption of consistent usage. *See Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); *see also Patterson v. Shumate*, 504 U.S. 753 (1992) (Scalia, concurring). The PBGC could try to avoid legal challenge by seeking a legislative change, which would not be an easy task.

In any case, an expansion of the premiums would be unwarranted from an economic and policy basis. The PBGC's own explanation in 1981 notes that it could reasonably provide guarantees without additional premiums given that insurer failures are expected to be infrequent and guarantees are "unlikely" to arise in practice. Now, with more than 50 years of history since ERISA was passed, it appears the PBGC was correct:

a) History suggests there is an extremely low likelihood of insurance company failure. According to a recent 2025 National Organization of Life & Health Insurance Guaranty Associations (NOLHGA) Report on Pension Risk Transfers, there has only been one failure of a PRT insurer and that was Executive Life in 1991.

b) Even in the instance of an insurance company failure, PBGC guarantees are secondary to state rehabilitation efforts and application of any available state guarantees. Remaining PBGC liabilities are likely to be extremely low after application of these state programs. Even in the Executive Life failure, the NOLHGA Report cites an 86% return to Executive Life policyholders, but that includes all policy holders and not just PRT annuitants. The data cited in our White Paper suggest that annuitant recoveries were higher. In California, over 92% of the annuity policyholders received a 100% recovery, and the small group subject to California state limits still received an almost 90% recovery.

c) Even assuming there would be "new" liability from restoring the PBGC's position on post-PRT guarantees, any such increased liability would be dwarfed by the current $54.1B surplus in the PBGC's single employer program. Furthermore, it is not as if plans have avoided paying annual premiums with respect to individuals whose benefits are annuitized. Most plans have paid premiums for years while the individuals accrued a benefit and prior to a PRT transaction.

Q4. Some would say that if PBGC protection continued after an annuity purchase, the agency would be insuring insurers. Isn't that a big leap?

A4. Not really. The PBGC is not insuring insurance companies—it is insuring retirees. The guarantee kicks in only if both the insurer and the state guaranty system fail to make retirees whole and only up to the limits of the PBGC guarantees. Those are layered protections. In 40 years, state guaranty funds have covered nearly all annuity failures.

So the incremental PBGC risk is tiny, but the security it restores to retirees is still meaningful.

Q5. The Supreme Court's *Beck v. PACE* decision is often cited as confirming the PBGC's current view. Why do you think that case doesn't settle it?

A5. Because the line noting that PBGC liability ends when annuities are purchased was not part of the actual issue before the Court. It was *dicta*, an aside lifted from a government brief that itself just repeated the PBGC's 1991 position. The Court never analyzed Section 4022 or the legislative record. *Dicta* doesn't change the law.

Q6. What is at stake for plan sponsors if your reading of the law prevails?

A6. Clarity. Right now, sponsors face unnecessary litigation risk because plaintiffs claim they have lost PBGC protection after a PRT. If courts confirm that PBGC guarantees still apply, that alleged loss disappears. It would make legitimate PRTs less of a legal minefield and allow companies to de-risk without fear that retirees are left exposed or that they'll be sued for supposed "loss of federal protection."

Q7. How does the recent *Loper Bright* decision factor into this debate?

A7. *Loper Bright* ended so-called *Chevron* deference, meaning courts won't automatically bow to agency interpretations when the statute's clear. Instead, under Skidmore, an agency only gets deference if its reasoning is sound and consistent. The PBGC's position here fails both tests. Its reasoning ignores the text, and it flipped 180 degrees from its original stance. That inconsistency alone makes its current interpretation vulnerable in court. The President issued Executive Order 14219 in February 2025 calling for the rescission of regulations not supported by the best reading of the law. The current PBGC regulation would be a prime candidate for reconsideration under this Executive Order.

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Q8. So what's your message to policymakers and regulators coming out of this research?

Q8. They don't rewrite history—all they need to do is restore it. The law already provides for continued PBGC coverage after a pension is annuitized. Recognizing that would strengthen participant confidence, reduce litigation, and reaffirm PBGC's mission: ensuring the "timely and uninterrupted payment of pension benefits." This isn't about creating a new program. It's about keeping the one Congress intended.

Q9. [Added December 2, 2025] The White Paper cites the PBGC's 1981 regulation, pointing out that the regulation reflected the PBGC's promise to guarantee distributed annuities against insurer failure. Why is it important that the PBGC interpretation was reflected in the regulation itself rather than just the preamble?

Q9. First, it is important the interpretation is in a regulation as a matter of administrative law and the potential deference a court might provide to the PBGC's interpretation. Second, it is important because the PBGC's 1991 position change overlooked that its prior interpretation was in the regulation –calling into question whether that 1991 position change was at all valid. (See also Q&A-12 below.)

The recent Supreme Court decision in *Loper Bright Enterprises* signals that courts will be less deferential to agency regulatory interpretations. Still, an agency's regulations may be owed some deference – and typically greater deference than may be given to pronouncements of agency interpretation in other contexts. Courts may also find that earlier interpretations – like in this 1981 regulation issued – are entitled to greater deference than later re-interpretations.

Q10. [Added December 2, 2025] The White Paper notes that the PBGC interpretation in the 1981 regulation is expressed by "negative inference." Does the fact that the PBGC's legal interpretation was expressed in this manner weaken the argument regarding the 1981 regulation?

A10. No, it does not weaken the argument at all. The fact that the PBGC's interpretation is implicit rather than stated explicitly in the regulation does not make the regulation any less clear.

First, consider what the regulation requires. The regulation required plans to notify lump sum recipients – who had no reason to think that they received anything but a full benefit distribution – that the PBGC guarantees do not apply to them, but did not require plans to notify the insurance annuitants that they did not have PBGC guarantees on those benefits even though they would continue to be paid over time. It would be an absurd reading of the regulation to conclude that the PBGC guarantee did not cover the insurance company annuitants; otherwise, the PBGC would have required such a similar notice to annuitants.

Interpretation of statements and regulations by inference is a standard legal exercise *See Reading Law: The Interpretation of Legal Text*, p. 107, Scalia and Garner (2012) Canon 10-Negative-Implication Canon. Within ERISA, the pension plan cash out rules provide the perfect example of this interpretive principle. Code Section 411(a)(11) provides that a participant must consent to distribute a benefit that has a value of $5,000 or more (recently increased to $7,000), but the statute says nothing about benefits that are under that threshold value. The IRS and the courts have employed the negative inference interpretive canon to conclude that a participant consent is not needed for a less than $5,000 cashout. Treas. Reg. § 1.411(a)-11(c)(3)(i); *Cooper v. Willis Towers Watson Pension Plan*, 562 F. Supp. 3d 890 (C.D. Cal. 2022).

Q11. **[Added December 2, 2025] As the White Paper describes, PBGC guarantees apply when there is a plan termination. Many of the current PRT lawsuits, however, involve retiree annuity "lift outs" that do not involve a plan termination. Does that mean that a return to the PBGC's 1981 position on guaranteed coverage would not affect the "lift out" annuitants?**

A11. Plan "lift out" annuitizations and plan termination annuitizations often are conflated by commentators (and the courts) because the end result is the same in both cases – the pension plan participant's benefit is transferred to an insurance company under a group annuity contract and the individual is no longer considered to be a plan "participant" for ERISA purposes. But as the question suggests, there is a difference between "lift outs" and plan terminations in terms of possible PBGC guarantees.

If an individual receives an annuity distribution in a "lift out" and the insurance company then fails, there would be no argument for immediate PBGC guarantee coverage because there had been no plan termination. In that case, the annuitant would be protected only by the state guaranty funds and state rehabilitation efforts.

The recipient of a "lift out" annuity still has a benefit "under the plan" even though the individual is no longer a plan "participant." That conclusion is supported by the PBGC's winning argument in the *Lami* case cited in the White Paper. That means that the PBGC protections would apply if the pension plan from which the "lift out" annuity was distributed later terminates. The key is that the annuitized benefits were still considered to be "under the plan" when the plan terminates no matter how many years after the annuity distribution the plan terminates occurs.

Q12. [Added December 2, 2025] The White Paper suggests that the PBGC's process supporting the 1991 reinterpretation of the PBGC annuity guarantee question was flawed. How so?

A12. The PBGC's 1991 effort was deeply flawed for a couple of reasons. First, the PBGC admitted that it reversed course in 1991 because of concerns about the impeding Executive Life failure, but without any information concerning the overall risk level posed by insurance company failures (see Q&A-2, above).

Second, and more alarming, is that the PBGC acted as if they were totally unaware of the wording of its own 1981 regulation when it flip-flopped positions in 1991. In the 1991 regulation preamble, the PBGC tried to downplay what it had said earlier by claiming that the 1981 position was reflected only in a preamble that it was made "without legal analysis." This was not the first time that the PBGC trotted out this argument. In April 1990 testimony before the Senate Finance Committee on the scope of PBGC guarantees, the PBGC Executive Director stated that the PBGC's 1981 position only was expressed in a preamble, that it was "made in error," and that a preamble statement "does not have legal standing." While the characterization of preambles as having no legal standing is itself highly debatable, the status of a regulation as a legal authority is clear cut, and the failure to acknowledge the 1981 regulation is mind-

boggling. One can only wonder – was it really possible that the PBGC staff was unaware of the words in its own regulation?

About the Authors

Kevin O'Brien has concentrated his practice in employee benefits and compensation for over 30 years. He is widely known as a leader in a wide variety of subjects, including innovative defined benefit plan design, flexible benefits, ERISA fiduciary matters and executive compensation. Before joining the firm, Kevin worked in the Pension and Welfare Benefits Administration at the Labor Department soon after ERISA was enacted. Kevin represents corporate clients before the Treasury Department, the Internal Revenue Service, the Labor Department, the Pension Benefit Guaranty Corporation, the Equal Employment Opportunity Commission, and Congress on a variety of employee benefits issues. He was one of the founders of the Employers Council on Flexible Compensation (ECFC) and served as an officer of ECFC for many years. Kevin has been individually recognized by Chambers & Partners for Employee Benefits & Executive Compensation multiple times, most recently in 2025.

Spencer Walters practices all aspects of employee benefits and executive compensation law, including the development and maintenance of qualified and nonqualified plans; plan compliance with the Code, ERISA, and Affordable Care Act; the treatment of employee benefits plans in connection with corporate mergers and acquisitions; and executive employment agreements and compensation arrangements, including Code section 409A. Spencer enjoys working with in-house counsel, tax and payroll personnel, and human resources professionals to attend to day-to-day administrative challenges and respond to new challenges. Spencer also actively engages in the federal rulemaking process, offering key comments to proposed regulations including under Section 162(m) and Section 7508A. Spencer has been individually recognized by Chambers & Partners for Employee Benefits & Executive Compensation.

About Ivins, Phillips & Barker, Chtd.

Ivins, Phillips & Barker (IPB) is exclusively engaged in the practice of federal tax, benefits and compensation, and estate and gift tax law. Founded by two of the original judges on the

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