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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.

Updated November 17, 2025

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.

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.

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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 United States Tax Court in 1935, our decades of focus on the intricacies of the Internal Revenue Code and Department of Labor regulations have led numerous Fortune 500 companies, as well as smaller companies, tax-exempt organizations, and high net worth individuals to rely on us for answers to their most complicated and sophisticated tax planning problems as well as for complex tax litigation.

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