

Dated: May 12, 1998.

**Stephen F. Sundlof,**

Director, Center for Veterinary Medicine.

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## PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4022, 4041, 4050

RIN: 1212-AA87

### PBGC Recoupment and Reimbursement of Benefit Overpayments and Underpayments

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

**SUMMARY:** The Pension Benefit Guaranty Corporation is amending its regulation governing recoupment of benefit overpayments in trustee plans to stop the reduction of monthly benefits under its actuarial recoupment method once the amount of the benefit overpayment is repaid. The amendment also makes other related changes.

**EFFECTIVE DATE:** May 29, 1998.

**FOR FURTHER INFORMATION CONTACT:** Harold J. Ashner, Assistant General Counsel, or James L. Beller, Attorney, Office of the General Counsel, PBGC, 1200 K Street, NW., Washington, DC 20005-4026, 202-326-4024. (For TTY/TTD users, call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

**SUPPLEMENTARY INFORMATION:** On December 18, 1997, the PBGC published a proposed rule in the **Federal Register** (62 FR 66319) amending its benefit payments regulation to provide that recoupment will cease when the amount of the overpayment is repaid. The amendment also gives the PBGC flexibility to waive recoupment of *de minimis* amounts and to accept repayment ahead of the recoupment schedule, and modifies the rules governing calculation of net overpayments and underpayments.

The PBGC received comments on the proposed rule from two commenters: the American Association of Retired Persons ("AARP") and the Association of Former Pan Am Employees, Inc. ("AFPAAE"). AARP supported the proposed regulation and commended the PBGC for its action. AFPAAE, which also commended the PBGC for proposing changes, recommended a number of revisions.

The final regulation follows the proposed regulation with the following modifications:

- As requested by AFPAAE, the final rule clarifies that in determining whether the net overpayment has been fully repaid, interest on the net overpayment is disregarded.

- In response to an inquiry in a pending case in which participants received both underpayments and overpayments, the final regulation provides that the PBGC will always pay interest on underpayments to the extent they exceed overpayments. In addition, for months beginning after May 29, 1998, the PBGC will pay interest at the applicable federal mid-term rate. For earlier months, the PBGC will continue to pay interest using the immediate annuity rate established for lump sum valuations.

- Consistent with an AFPAAE suggestion, the final regulation provides that the PBGC generally will not seek recovery from the estate of a participant who dies post-termination. (The existing regulation precludes recovery from the estate only for a participant who dies after the PBGC initiates recoupment.)

- For administrative convenience, the final regulation provides that the PBGC will not collect any final partial monthly installment.

- AFPAAE expressed concerns about the provision allowing repayment ahead of the recoupment schedule, arguing that, because the PBGC charges no interest under the recoupment schedule, early repayment will never be advantageous to the participant. The PBGC will discontinue its current practice of routinely offering a lump sum repayment option as part of its recoupment notice. However, the PBGC will retain the early repayment option for those participants who, for whatever reason, want to eliminate debt. As suggested by AFPAAE, the PBGC intends to explain to those participants who ask about the early repayment option that there may be financial disadvantages to early repayment.

The PBGC has carefully considered AFPAAE's other comments and has decided not to adopt them.

- AFPAAE suggested that the PBGC not seek recoupment from a surviving beneficiary unless recoupment has been initiated before the participant's death. AFPAAE offered no reason why the PBGC's recoupment rules should distinguish in this manner between a survivorship benefit and the underlying benefit from which the survivorship benefit derives. The regulation minimizes hardship in the case of recoupment from a survivorship benefit because the monthly recoupment amount is reduced in proportion to any other applicable reduction in the deceased participant's benefit (e.g., a

50% reduction under a joint and survivor annuity) and is generally capped at 10% of the survivorship payment.

- AFPAAE suggested that the PBGC eliminate its discretion to recover overpayments by methods other than recoupment. The regulation provides that the PBGC will normally exercise its discretion only where net benefits paid exceed plan entitlements (e.g., where a participant entitled to \$1,200 per month as the full plan benefit and \$1,000 per month under Title IV has received clearly erroneous payments of \$5,000 per month). Any further limitation on the PBGC's discretion could result in unacceptably large losses in particular cases.

- AFPAAE suggested that recoupment be permitted only if (1) the participant is notified of the possibility of recoupment no later than 30 days after the PBGC makes a final decision to seek an involuntary termination, and (2) recoupment begins no more than one year after the termination date. This suggestion is impracticable. The PBGC often encounters significant delays in obtaining the participant information needed to provide notice and the benefit and asset information needed to complete the complex and time-consuming process of determining final benefit entitlements. The PBGC will continue to provide notice to participants, and to initiate recoupments, as soon as possible.

- In response to the provision in the proposed rule giving the PBGC discretion to waive *de minimis* amounts, AFPAAE suggested that the regulation specify a dollar threshold under which recoupment is automatically waived. The PBGC has decided to retain the discretion provided in the proposed rule in order to allow maximum flexibility. After gaining experience under the *de minimis* waiver provision, the PBGC may decide to specify a fixed dollar threshold in the regulation.

- AFPAAE suggested broadening the scope of the recoupment and reimbursement regulation to cover underpayments made before the plan termination date. The Title IV single-employer insurance program does not cover pre-termination underpayments. These underpayments represent a claim on plan assets that are satisfied before those assets are used to satisfy Title IV benefits under the allocation rules of ERISA section 4044 and 29 CFR Part 4044. Thus, to the extent assets are available, pre-termination underpayments are fully reimbursed.

AFPAAE made several other comments suggesting revisions to the benefit

determination and appeals process. These comments are beyond the scope of this rulemaking proceeding.

### Applicability of New Rules

The new rules will apply to all initial determinations that become effective on or after May 29, 1998. For earlier initial determinations, if a participant (or beneficiary) is subject to recoupment under the actuarial reduction method, the new rules will apply except that the PBGC will not redetermine the amount of the net overpayment or the amount of the monthly reduction. Thus, for these cases, the PBGC will stop recoupment once the amount of the net overpayment (as previously determined) is repaid. If the amount of that net overpayment has been fully repaid prior to May 29, 1998, the PBGC will stop recoupment effective as of May 29, 1998.

*Example 1.* Ms. X is entitled to a monthly benefit of \$500 under Title IV. For the last 11 years the PBGC has been recouping \$25 each month to repay a series of overpayments totaling \$3,000. Recoupment will cease as of May 29, 1998 because as of that date Ms. X will have repaid the overpayments. No amounts recouped prior to May 29, 1998 will be refunded.

*Example 2.* Same facts as example 1, except recoupment began nine years ago. Recoupment will cease in one year, i.e., when the full \$3,000 is repaid.

### Rulemaking Requirements

The PBGC has determined that good cause exists to make this final rule effective immediately because the changes impose requirements only on the PBGC. See 5 U.S.C. § 553(d)(3).

### E.O. 12866 and the Regulatory Flexibility Act

The Office of Management and Budget has determined that this final rule is a "significant regulatory action" under the criteria set forth in Executive Order 12866 and has completed its review of the final rule under that order.

This rule affects only individuals. Therefore, the PBGC certifies that, if adopted, the amendment will not have a significant economic effect on a substantial number of small entities. Accordingly, as provided in section 605(b) of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

### List of Subjects

29 CFR Part 4022, 4041

Pension insurance, Pensions, Reporting and recordkeeping requirements.

### 29 CFR Part 4050

Pensions, Reporting and recordkeeping requirements.

For the reasons set forth above, the PBGC amends parts 4022, 4041, and 4050 of 29 CFR chapter XL as follows:

### PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE EMPLOYER PLANS

1. The authority citation for part 4022 continues to read as follows:

**Authority:** 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D) and 1344.

2. Section 4022.81 is revised to read as follows:

#### § 4022.81 General rules.

(a) *Recoupment of benefit overpayments.* If at any time the PBGC determines that net benefits paid with respect to any participant in a PBGC-trusted plan exceed the total amount to which the participant (and any beneficiary) is entitled up to that time under title IV of ERISA, and the participant (or beneficiary) is, as of the termination date, entitled to receive future benefit payments, the PBGC will recoup the net overpayment in accordance with paragraph (c) of this section and § 4022.82. Notwithstanding the previous sentence, the PBGC may, in its discretion, recover overpayments by methods other than recouping in accordance with the rules in this subpart. The PBGC will not normally do so unless net benefits paid after the termination date exceed those to which a participant (and any beneficiary) is entitled under the terms of the plan before any reductions under subpart D.

(b) *Reimbursement of benefit underpayments.* If at any time the PBGC determines that net benefits paid with respect to a participant in a PBGC-trusted plan are less than the amount to which the participant (and any beneficiary) is entitled up to that time under title IV of ERISA, the PBGC will reimburse the participant or beneficiary for the net underpayment in accordance with paragraph (c) of this section and § 4022.83.

(c) *Amount to be recouped or reimbursed.* In order to determine the amount to be recouped from, or reimbursed to, a participant (or beneficiary), the PBGC will calculate a monthly account balance for each month ending after the termination date. The PBGC will start with a balance of zero as of the end of the calendar month ending immediately prior to the termination date and determine the account balance as of the end of each month thereafter as follows:

(1) *Debit for overpayments.* The PBGC will subtract from the account balance the amount of overpayments made in that month. Only overpayments made on or after the latest of the proposed termination date, the termination date, or, if no notice of intent to terminate was issued, the date on which proceedings to terminate the plan are instituted pursuant to section 4042 of ERISA will be included.

(2) *Credit for underpayments.* The PBGC will add to the account balance the amount of underpayments made in that month. Only underpayments made on or after the termination date will be included.

(3) *Credit for interest on net underpayments.* If at the end of a month there is a positive account balance (a net underpayment), the PBGC will add to the account balance interest thereon for that month using—

(i) For months after May 1998, the applicable federal mid-term rate (as determined by the Secretary of the Treasury pursuant to section 1274(d)(1)(C)(ii) of the Code) for that month (or, where the rate for a month is not available at the time the PBGC calculates the amount to be recouped or reimbursed, the most recent month for which the rate is available) based on monthly compounding; and

(ii) For May 1998 and earlier months, the immediate annuity rate established for lump sum valuations as set forth in Table II of Appendix B of part 4044 of this chapter.

(4) *No interest on net overpayments.* If at the end of a month, there is a negative account balance (a net overpayment), there will be no interest adjustment for that month.

3. Section 4022.82 is revised to read as follows:

#### § 4022.82 Method of recoupment.

(a) *Future benefit reduction.* The PBGC will recoup net overpayments of benefits by reducing the amount of each future benefit payment to which the participant or any beneficiary is entitled by the fraction determined under paragraphs (a)(1) and (a)(2) of this section, except that benefit reduction will cease when the amount (without interest) of the net overpayment is recouped. Notwithstanding the preceding sentence, the PBGC may accept repayment ahead of the recoupment schedule.

(1) *Computation.* The PBGC will determine the fractional multiplier by dividing the amount of the net overpayment by the present value of the benefit payable with respect to the participant under title IV of ERISA. The PBGC will determine the present value

of the benefit to which a participant or beneficiary is entitled under title IV of ERISA as of the termination date, using the PBGC interest rates and factors in effect on that date. The PBGC may, however, utilize a different date of determination if warranted by the facts and circumstances of a particular case.

(2) *Limitation on benefit reduction.* Except as provided in paragraph (a)(1) of this section, the PBGC will reduce benefits with respect to a participant or beneficiary by no more than the greater of—

(i) Ten percent per month; or  
(ii) The amount of benefit per month in excess of the maximum guaranteeable benefit payable under section 4022(b)(3)(B) of ERISA, determined without adjustment for age and benefit form.

(3) *PBGC notice to participant or beneficiary.* Before effecting a benefit reduction pursuant to this paragraph, the PBGC will notify the participant or beneficiary in writing of the amount of the net overpayment and of the amount of the reduced benefit computed under this section.

(4) *Waiver of de minimis amounts.* The PBGC may, in its discretion, decide not to recoup net overpayments that it determines to be de minimis.

(5) *Final installment.* The PBGC will cease recoupment one month early if the amount remaining to be recouped in the final month is less than the amount of the monthly reduction.

(b) *Full repayment through recoupment.* Recoupment under this section constitutes full repayment of the net overpayment.

#### § 4022.83. [Amended]

4. Section 4022.83 is amended by removing the reference to § 4022.81(d) and adding, in its place, a reference to § 4022.81(c).

#### PART 4041—TERMINATION OF SINGLE-EMPLOYER PLANS

5. The authority citation for part 4041 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1341, 1344, 1350.

#### § 4041.42 [Amended]

6. Section 4041.42(d)(2) is amended by removing the reference to § 4022.81(d) and adding, in its place, a reference to § 4022.81(c)(3).

#### PART 4050—MISSING PARTICIPANTS

7. The authority citation for part 4050 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1350.

#### § 4050.2 [Amended]

8. The definition of “Designated benefit interest rate” in Section 4050.2,

is amended by removing the reference to § 4022.81(d) and adding, in its place, a reference to § 4022.81(c).

Issued in Washington, DC, this 27th day of May, 1998.

**Alexis M. Herman**

*Chairman, Board of Directors Pension Benefit Guaranty Corporation.*

Issued on the date set forth above pursuant to a resolution of the Board of Directors authorizing its Chairman to issue this final rule.

**James J. Keightley**

*Secretary, Board of Directors Pension Benefit Guaranty Corporation.*

[FR Doc. 98-14448 Filed 5-28-98; 8:45 am]

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#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

##### 50 CFR Part 660

[Docket No. 980415098-5098-8098-01; I.D. 031998A]

##### Fisheries Off West Coast States and in the Western Pacific; Western Pacific Crustacean Fisheries; Vessel Monitoring System; Harvest Guideline; Closed Season; Correction

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule; correction.

**SUMMARY:** This document corrects a rule published in the **Federal Register** on April 27, 1998. The regulations implemented three management measures governing the crustacean fisheries in the exclusive economic zone around Hawaii.

**DATES:** Effective May 27, 1998.

**FOR FURTHER INFORMATION CONTACT:** Alvin Katekaru, NMFS, 808-973-2985.

**SUPPLEMENTARY INFORMATION:** In the classification section of the final rule published on April 27, 1998 (63 FR 20539),

NMFS inadvertently omitted a word at the end of the third paragraph. Also, when NMFS revised the definition for Crustacean Permit Area I VMS Subarea in § 660.12, NMFS inadvertently put a comma at the end of the definition.

##### Correction of Publication

The publication on April 27, 1998 (63 FR 20539) [I.D. 031998A], FR Doc. 98-11017, is corrected as follows:

On page 20540 in the second column, in the third paragraph under **Classification**, the word “not” should be inserted before the word “applicable”.

#### § 660.12 [Corrected]

On page 20540, in § 660.12, in the definition of “Crustaceans Permit Area I VMS Subarea”, in the third column, on the last line, the comma at the end of the definition should be removed and replaced with a period.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: May 22, 1998.

**David L. Evans,**

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

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#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

##### 50 CFR Part 678

[I.D. 051998A]

##### Atlantic Shark Fisheries; Quota Adjustment

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Quota adjustment.

**SUMMARY:** NMFS announces that the landings of large coastal sharks in the Atlantic Ocean, Gulf of Mexico, and Caribbean Sea totaled 684.8 metric tons (mt) during the first semiannual 1998 season. Because this constitutes an overharvest of 42 mt, the second semiannual 1998 quota is reduced accordingly.

**DATES:** Effective May 29, 1998.

**FOR FURTHER INFORMATION CONTACT:** Margo Schulze or Karyl Brewster-Geisz at 301-713-2347; or Buck Sutter at 813-570-5324.

**SUPPLEMENTARY INFORMATION:** The Atlantic Ocean, Gulf of Mexico, and Caribbean Sea shark fisheries are managed by NMFS according to the Fishery Management Plan (FMP) for Atlantic Sharks prepared by NMFS under authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR part 678.

Section 678.24(b) of the regulations provides for two semi-annual quotas of 642 mt of large coastal sharks to be harvested from the Atlantic Ocean, Gulf of Mexico, and Caribbean Sea waters by