

**Rules and Procedures for Enforcement
of Employers' Reporting and Payment Obligations
32BJ Connecticut Pension Fund**

Effective: January 1, 2016

I. Introduction

The Board of Trustees has a fiduciary obligation to collect all money that is due and owing to the 32BJ Connecticut Pension Fund (the "Fund.") That obligation requires that they establish a system for monitoring employers' compliance with their obligations to make contributions to the Fund and under which the Fund's 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's 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 a fund's 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. A fund's 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 Fund's Board of Trustees has adopted the following rules and procedures regarding the enforcement of employers' reporting and remittance obligations to the Fund:

II. Delinquent Contributions

1. Contribution Due Date. Contributing Employers shall remit all contributions on or before the 20th day of each month for payroll periods payable in the preceding month (the "Due Date"). Contributions must be submitted electronically.

2. When a Contribution is "Received" by the Fund. A contribution is received by the Fund only if the money is transmitted electronically before 7:00 p.m. on the date of transmission. If the Due Date is on a weekend or holiday, the contribution is deemed received as of the Due Date only if the money is transmitted electronically before 7:00 p.m. on the last business day before the Due Date.

3. Definition of a delinquency.

When the term "delinquency" is used in this Delinquency Collection Policy, it includes all of the following:

- a. Late payment (*i.e.*, after the Contribution Due Date) or failure to remit contributions that are owed to the Fund;
- b. Payment of only a portion of the contributions that are owed to the Fund (including those situations where there is a discrepancy as to the amount of contributions owed to the Fund);
- d. A dishonored check or rejected ACH or other funds transfer request;
- e. Failure to provide complete remittance reports to identify the employees for whom contributions are remitted.

4. Consequences of delinquency.

Interest shall accrue at the rate , of 9% per annum from the Contribution Due Date The interest rate of 9% per year shall be subject to periodic review and adjustment by the Board of Trustees.

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 from the Contribution Due Date, and an additional month's interest will accrue for each month, or any part thereof, that contributions remain due and owing.

Interest shall accrue solely on contributions due to the Fund; no interest shall accrue on interest or on any liquidated damages which may become due and owing.

5. Liquidated Damages. The rate of liquidated damages is 20% of the amount of contributions owed to the Fund. Liquidated damages are calculated only on the amount of

delinquent contributions and shall become due and owing only in the event a matter is referred to Fund Counsel for collection and Counsel is required to submit the matter to arbitration and/or litigate the delinquency.

6. Other costs of collection. An employer that fails to pay required contributions on a timely basis 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, but not limited to, arbitration costs, court costs, and attorney's fees, in addition to the interest and liquidated damages described above.

III. Compliance Audit Program

1. Types of audits. The Fund's compliance audit program will include two components:

a. "regular" audits which are performed on all employers on a periodic basis to confirm that the employers are making accurate reports and remitting all amounts required by their respective collective bargaining agreements, and

b. "for cause" audits which are performed on employers in aid of enforcement proceedings or to investigate assertions that employees have not been properly reported on contribution remittance reports.

2. Employers' duty to cooperate with auditor. Employers are required, pursuant to the Trust Agreement and their collective bargaining agreement, to cooperate with the Fund's auditor by promptly providing all records that are requested by the auditor to permit it to make a determination regarding the accuracy, completeness and timeliness of the employer's reports and remittances to the Fund.

3. 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.

4. Interest. Interest shall accrue on any delinquency discovered as a result of the audit from the date payment was initially due.

5. Audit Cost. The cost of a payroll audit shall be borne by the Fund, provided, however, that the cost shall be borne by an employer if the amount of contributions found to be due and owing equals or exceeds 10% of the contributions remitted to the Fund by the employer during the period of the audit.

IV. General Collection Provisions

1. Contribution Monitoring. The Fund shall maintain a system to monitor employer contributions and identify delinquencies as soon as administratively practicable.

2. Failure to Properly Remit Contributions. If the Fund fails to receive contributions and an accompanying remittance report by the Contribution Due Date, or, if the employer submits a remittance report, but less than the amount of contributions required thereunder, the Fund shall send a written or electronic notice of delinquency and demand for payment to the employer. The

notice and demand shall advise the employer that interest is accruing on the delinquency, and, to the extent possible, shall provide the amount of interest which has accrued on the delinquency through the date of the letter. The letter shall further advise the employer that the delinquency will be referred to Fund Counsel for collection if neither the contributions nor other satisfactory response is received within 30 days of the date of the notice.

3. Late Remittances. If the Fund receives the full amount that an employer owes to the Fund but the remittance is received after the Contribution Due Date, the Fund shall assess monthly interest on the amount that was paid late, calculated from the Contribution Due Date through the date of receipt of payment. The Fund shall send a written or electronic notice of demand for interest to the employer, which notice shall advise that the matter will be referred to Fund Counsel for collection if the full amount of interest owed is not received within 30 days of the date of the notice.

4. Late Reports. If the Fund receives the full amount of contributions due on or before the Contribution Due Date, but does not receive the accompanying remittance report on or before such Date, the employer shall be liable for an administrative fee of \$300 per account, said sum representing the reasonable estimate of the costs incurred by the Fund in processing contributions without the report. The Fund shall send a written or electronic notice of demand for the administrative fee to the employer, which notice shall advise that the matter will be referred to Fund Counsel for collection if payment of the fee is not received within 30 days of the date of the notice.

5. Incomplete Reports. If the Fund receives 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 from the date of the letter. The Fund will also advise the employer that an administrative fee of \$300 per account will be assessed if the employer submits three incomplete reports within any period of 12 consecutive months. The amount of \$300 per account is a reasonable estimate of the costs incurred by the Fund in processing incomplete reports.

6. Dishonored Checks. 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 shall not redeposit the check, but shall send a written or electronic notice to the employer demanding payment of the amount of the dishonored check or rejected transfer, any bank fees charged to the Fund and interest accrued on the amount of the check or transfer from the Contribution Due Date within 10 days from the date of the letter. The notice will advise the employer that the delinquency will be referred to Fund Counsel for collection if the unpaid amount is not received within 5 days after the date of the notice.

V. Referral for Collection

1. Amounts below \$1,000. If any amount due and owing to the Funds under Section IV above is not paid within the period specified therein, a demand for payment shall be sent to the employer by Fund Counsel.

If an employer which is not repeatedly or chronically delinquent in remitting its obligations to the Fund does not pay the amounts owed in full after demand is made therefore by Fund Counsel, no further action should be taken if the amount owed is less than \$1,000. Notwithstanding the foregoing, the amount(s) owed shall be maintained as a delinquent amount in the Fund's records for the maximum period permitted by the applicable statute of limitations, with interest continuing to accrue on any contributions due and owing. At any later time that the cumulative amount owed to the Fund equals or exceeds \$1,000, or if the employer becomes repeatedly or chronically delinquent, the cumulative delinquency will be referred to Fund counsel for collection as provided below.

2. Amounts of \$1,000 or more, and chronic or repeated delinquencies. If the cumulative amount that the employer owes to the Fund for delinquent contributions, interest, administrative fees and/or costs of collection is equal to or exceeds \$1,000, or if the employer is determined by the Trustees to be repeatedly or chronically delinquent, the matter shall be referred to Fund Counsel for collection.

The Fund will provide Fund Counsel with all necessary documentation and evidence that is required for collection of the employer's cumulative delinquencies, and will promptly report to Fund Counsel any payments received by the Fund toward the delinquency, additional accruals of interest and/or fees and any additional delinquencies incurred by the employer.

Fund Counsel may, in its discretion, send the employer a follow-up demand before initiating a proceeding for collection, but shall not be required to do so. Fund 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 (*i.e.*, arbitration hearing, state court litigation, federal court litigation) for collection that will be most likely to allow for collection of the employer's obligations to the Fund in the most cost-effective and timely manner.

3. Bankrupt or insolvent employers. If the Fund learns 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 Fund 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.

4. Acceleration or omission of collection procedures. In any case in which the Fund or Fund 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 Fund 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.

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.

5. Audit and Delinquency Committee. The Trustees shall establish an Audit and Delinquency Committee, including at least one management trustee and at least one union trustee. The Audit and Delinquency Committee will meet as needed to, *inter alia*, review and advise on the Fund's program for identifying and collecting delinquent amounts, to receive reports from the Fund, and to coordinate collection efforts with Fund Counsel. Such meetings need not be held in person (*i.e.*, the Committee may meet by teleconference.) The Audit and Delinquency Committee will report to the Board of Trustees.

6. 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 hereby 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. The Trustees delegate to the Audit and Delinquency Committee the authority to deviate from these procedures when the Committee determines that doing so will enhance the Fund's ability to collect amounts due from employers.

b. General rules. In compliance with PTCE 76-1:

- Any compromise of a claim for unpaid contributions, interest and/or fees, or any arrangement permitting payment later than the Contribution Due Date, must be made for the "exclusive purpose of facilitating the collection of such contribution."
- 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 Fund 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.

- 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.”

In addition to the foregoing:

- Any compromise or arrangement may not be part of an agreement, arrangement, or understanding designed to benefit a party in interest.
- If any party other than the Fund participates in a settlement with an employer, the Fund must participate in the settlement on terms at least as favorable as the terms on which any other party participates.
- Any agreement for such a compromise or arrangement must be evidenced in writing signed on behalf of the employer and the Fund or a consent decree signed by a judge presiding over an enforcement action.

7. Compromises. The Audit and Delinquency Committee shall have authority to approve compromises of claims on such terms as they deem appropriate in the light of the principles stated above. Any such compromises of claims shall be reported to the Board of Trustees at their next regularly scheduled meeting.

8. Payment over time. Fund Counsel shall have authority to approve a settlement on terms providing for payment of 100% of the principal amount determined to be due, plus all interest and collection expenses, by monthly or quarterly installments over a period of no more than 12 months, with interest accrued on the unpaid balance at the rate provided in Section II.4 above. Any such settlement shall promptly be reported to the Board of Trustees.

The Audit and Delinquency Committee shall have authority to approve other installment payment arrangements on such terms as they deem appropriate in light of the principles stated above, based upon recommendation from Fund Counsel.

9. Uncollectible Amounts. After the Fund has made diligent, documented attempts to collect the amount owed by an employer, the amount owed may be deemed uncollectible by the Audit and Delinquency Committee if Fund 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 of the Committee must be documented in writing.

10. Reports. In order to be certain that the collection process and any settlements or the deeming of any amounts as uncollectible are consistent with this policy, Fund staff, auditors, and Fund Counsel shall provide regular reports to the Board of Trustees, describing the cases that are being pursued, the results of the collection efforts and any waivers, compromises or terms for payment authorized in accordance with the terms set forth above.

11. 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 Fund Counsel 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.

VI. Overpayments of Contributions

1. General principle. As a matter of general policy, the Board of Trustees will not credit or refund overpayments to an employer if (i) the overpayments were associated with a reporting error that has caused the Fund to provide benefits to a person who was not eligible to receive them, (ii) 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 (iii) a credit or refund 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.

2. Procedure for Credit or Refund.

a. 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 request to verify that the amount was an overpayment.

b. 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)

c. Employers that have an outstanding delinquency. If an employer that has an outstanding delinquency (including, but not limited to, contributions, accumulated interest, fees or costs of collection) requests, or is found to be due, a refund of overpaid contributions, the Fund shall first 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 against future obligations or paid to the employer, as provided for below.

d. Small overpayments. If the amount of a verified overpayment is less than 10% of the employer's average periodic remittance amount (whether monthly or quarterly; said average amount determined based on contributions received during the preceding 12 consecutive months), the Fund shall credit the amount of the overpayment against a future remittance and shall notify the employer of this credit.

e. Large overpayments. If the amount of a verified overpayment is more than 10% of the employer's average periodic remittance amount (determined as provided above), the Fund will notify the employer of the overpayment and offer the employer the choice of repayment or credit against a future remittance. In the absence of an employer election within 30 days of the letter advising of the option, the overpayment will be credited against the employer's future remittance obligations and the Fund shall notify the employer of the credit.