

**Rules and Procedures for Enforcement
of Employers' Reporting and Payment Obligations
Effective for Delinquencies Arising With Respect to Contribution Periods
Beginning on or After June 1, 2016**

Introduction

The Board of Trustees (“Trustees”) of the 32BJ School Workers Pension Fund (the “Fund”) has a fiduciary obligation to collect all money that is due and owing to the Fund. That obligation requires that the Trustees 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 the Fund’s collection program, other than those that are mandatory under the DOL’s guidance, is that the Fund should design its delinquency policies 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’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 Trustees of the

Fund have adopted the following rules and procedures regarding the enforcement of employers' reporting and remittance obligations to the Fund:

I. When Contributions are due.

- A. Contributions.** Must be remitted electronically on or before the 20th calendar day of each month for payroll periods ending in the preceding month.
- B. When a Contribution is "Received" by the Fund.** A contribution is received by the Fund only if the money is transmitted electronically on or before 7:00 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 on or before 7:00 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.** Failure to remit contributions that are owed to the Fund;
- B.** Late payment of contributions, i.e., remittance after the due date defined in **I.A.**;
- C.** Payment of only a portion of the amount that is owed to the Fund (which includes a "discrepancy" as described in **V.A.2**);
- D.** A rejected ACH or other money transfer request;
- E.** Failure to provide complete remittance reports to identify the employees for whom contributions are remitted, on or before the due date defined in **I.A.**

III. Consequences of delinquency.

Interest will accrue on any contribution that is not paid by the due date defined in **I.A.**

A. Interest.

- 1.** The interest rate is 9% per year, subject to review and adjustment by the Trustees at any time that they determine that the rate is no longer appropriate in light of prevailing interest rates, or other relevant factors.
- 2.** Interest will be calculated beginning on the 21st day of the month for payroll periods ending in the preceding 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 **III.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.
- 5.** If an employer remits only a portion of its outstanding balance due for contributions, the partial payment will be applied to principal first, then to interest.

B. Liquidated Damages. The rate of liquidated damages is 20% of the total principal due, unless the delinquency is resolved without the need for arbitration or litigation.

C. Other costs of collection. 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 but not limited to arbitration costs, court costs, audit costs and attorney's fees, in addition to the interest and liquidated damages provided in **III.A** and **III.B**.

- D. Providing a cash bond or other security.** 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. The Trustees will decide whether to require such security from an employer.

IV. Compliance Audit Program

- A. Types of audits.** The Fund's compliance audit program will include two components: regular audits 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 or wage deferrals 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.

- A. Failure to provide timely or full remittances.**
 - 1.** If the Fund fails to receive a remittance by the date provided in **I.A**, 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.A**, 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 by a specified date.
 - 2.** If the Fund receives 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 Fund 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 by a 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 **I.A**, 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 by a 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.A**, 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 by a 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. Rejected ACH or 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 and 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.A**. 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.

VII. Acceleration or omission of collection procedures.

- A.** 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.