



Pension Benefit Guaranty Corporation
Office of Inspector General
Audit Report

**Evaluation of PBGC Appropriation
Expenditures for Food, Entertainment
and Mementos**

September 30, 1998

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Food, Entertainment and Mementos
Audit Report 98-5/23115***

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ABBREVIATIONS

CCRD	Contracts and Controls Review Department
CFC	Combined Federal Campaign
CFO	Chief Financial Officer
CFR	Code of Federal Regulations
CMO	Chief Management Officer
CN	Chief Negotiator
COO	Chief Operating Officer
DED	Deputy Executive Director
DOJ	Department of Justice
ERISA	Employee Retirement Income Security Act of 1974
FASD	Facilities and Services Department
FBA	Field Benefit Administrator
FOD	Financial Operations Department
GAO	United States General Accounting Office
GEIAA	Government Employees Incentive Awards Act
HRD	Human Resources Department
IOD	Insurance Operations Department
IRMD	Information Resources Management Department
IRS	Internal Revenue Service
OIG	Office of Inspector General
OGC	Office of the General Counsel
OPM	Office of Personnel Management
PAS	Premium Accounting System
PBGC	Pension Benefit Guaranty Corporation
RPA	Retirement Protection Act
Redbook	<i>Principles of Federal Appropriation Law, Volumes I and II</i> , United States General Accounting Office, Office of the General Counsel (GAO/OGC-91-5)
U.S.C.	United States Code

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EXECUTIVE SUMMARY

INTRODUCTION

This report presents an evaluation of certain expenditures of the Pension Benefit Guaranty Corporation (PBGC or the Corporation) for food, entertainment and mementos in conjunction with various PBGC meetings and functions. The objective of our audit was to identify the population of and circumstances surrounding expenditures made by PBGC for food, entertainment and mementos occurring from October 1, 1994 through June 30, 1996. Once identified, the expenditures were evaluated in relation to applicable laws and regulations to determine if they were proper uses of appropriated funds. Harper, Rains, Stokes & Knight, P.A. was engaged by the PBGC's Office of Inspector General (OIG) to perform the audit.

FINDINGS AND RECOMMENDATIONS

PBGC reported expenditures, totaling \$30,825, for food, entertainment and mementos in conjunction with 37 meetings and functions that PBGC employees and others attended during the period of our audit. We evaluated the propriety of these expenditures in relation to relevant criteria (see pages 2 through 7) and identified \$17,121 (56 percent of the total dollar amount audited) as questionable under applicable laws and regulations. We found questionable expenditures in 27 out of 37 PBGC meetings or functions during the audit period (see pages 7 to 9).

1. PBGC improperly expended \$16,138 for food, entertainment, and mementos.

Expenditures for food, refreshments and mementos are generally not allowed but may be made under certain well defined circumstances. One such circumstance is the statutory authority provided by the Government Employees Incentive Awards Act (5 U.S.C. §§ 4501-4507), which allows agencies to expend appropriations on mementos to be awarded to employees for job related achievements. Agencies may also provide refreshments at ceremonies to present these awards to employees. During our evaluation we identified certain expenditures made by PBGC which are questionable.

Awards and Ceremonies

If an awards program does not conform to OPM regulations and PBGC policies, it is not authorized under 5 U.S.C. §§ 4501-4507 and therefore no statutory authority exists for providing mementos to employees or refreshments at related ceremonies. We are questioning \$9,333 expended for awards and entertainment because the departments making the awards did not have non-monetary awards plans or they made awards which were not contained in their approved plans (see pages 9 to 11).

Meetings and Conferences

The "free food" rule generally precludes the use of appropriated funds to provide food or refreshments to attendees at purely internal business meetings or conferences sponsored by government agencies regardless of their location. We are questioning \$6,764 of expenditures made in conjunction with meetings and conferences held at and away from PBGC headquarters at which PBGC employees and others were dealing with PBGC operational matters (see page 12).

Training

PBGC provided refreshments at seven customer service training courses. Refreshment expenditures in conjunction with six of these courses were found to be improper in Comptroller General Decision B-270199. We identified \$41 of identical expenditures for a seventh course which was not covered in Decision B-270199 and are improper on the same basis as the first six courses (see page 13).

Recommendation

We recommend the following corrective action:

The appropriate certifying officials should reimburse \$16,138 to the Corporation. (OED-28)

- 2. PBGC expended, without sufficient authority, \$983 on food and refreshments for government-sanctioned campaign events and for private sector practitioner meetings.**

Government-sanctioned campaigns

PBGC expended \$899 for food and refreshments provided to employees at Combined Federal Campaign (CFC) and savings bond campaign ceremonies held at PBGC headquarters. These campaigns are government-sanctioned events in which federal agencies participate. Agencies are allowed to spend a reasonable amount of their appropriations to support the campaigns such as permitting solicitation during working hours, preparing campaign instructions, and providing and distributing promotional materials. The official guidance that we reviewed did not explicitly provide authority for refreshment expenditures in support of these campaigns. Given the general prohibition of providing free food to government employees at headquarters, we find that these expenditures are questionable under applicable laws and regulations (see pages 14 and 15).

Private Sector Practitioner Meetings

In order to comply with an Executive Order mandating improved customer service, PBGC conducted meetings, at which refreshments costing \$84 were provided, with private sector pension practitioners to obtain their views on PBGC's customer service. The general prohibition of providing food applies to non-government, as well as government personnel and we did not locate definitive guidance as to the allowability of the refreshments provided by PBGC at these meetings. However, we found reference to a Comptroller General Decision which indicated that the cost of a luncheon paid by a quasi-public corporation to induce participation in a government program by private sector persons was an appropriate expense. The facts surrounding PBGC's expenditures may conform to this exception approved by the Comptroller General (see page 15).

Recommendation

We recommend the following corrective action:

PBGC should seek authoritative guidance from the Comptroller General on the propriety of appropriation expenditures for refreshments provided at government-sanctioned campaign events and meeting with pension practitioners. If the Comptroller General disallows the expenditures, the appropriate certifying officials should reimburse the Corporation. (OED-29)

3. PBGC's obligations approval process for food and mementos should be strengthened.

Internal control standards issued by GAO state, in part, that *internal control systems are to reasonably ensure that ... obligations and costs comply with applicable law*. We found that more than half of the expenditures made by PBGC for food and mementos during the audit period were not proper uses of PBGC's appropriated funds. Given the general prohibitions of such expenditures in applicable laws and regulations and taking into account the visibility and sensitivity of these type of expenditures, PBGC's internal controls over these expenditures should be strengthened (see page 16).

Recommendations

We recommend the following corrective actions:

PBGC should develop and distribute written guidance that specifically addresses the circumstances when PBGC funds can be expended on food and mementos. (OGC-34)

PBGC should designate an appropriate high-level official to review and approve planned expenditures for food and mementos prior to obligation. (OGC-35)

PBGC should seek guidance from the Comptroller General in situations in which clear guidance cannot be obtained from laws and regulations, prior to obligating appropriated funds for food and mementos. (OGC-36)

PBGC should ensure that employees with responsibility for obligation and disbursement of PBGC's funds are properly trained regarding appropriations law. (FOD-273)

AGENCY COMMENTS and OIG EVALUATION

A draft report was given to the Corporation for comment. PBGC provided an overall response to the draft report which included two attachments: (1) a memorandum waiving indebtedness to PBGC and (2) a memorandum concerning PBGC's authority to waive erroneous payments. The full text of the response is attached to the report (Tab 1).

The agency generally agrees with the findings and recommendations in the report. The memorandum waiving indebtedness to PBGC states that a debt is owed to PBGC in the amount of \$17,121 (Findings 1 and 2) for the reasons stated in the referenced audit report; while the overall response states agreement with the four recommendations of Finding 3.

An analysis of PBGC's response is included after each finding and recommendation.

***Evaluation of PBGC Appropriation Expenditures For
Food, Entertainment and Mementos
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INTRODUCTION

The Pension Benefit Guaranty Corporation (PBGC or the Corporation) was established under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) as amended. PBGC is a government corporation that protects the pensions of more than 42 million Americans in approximately 48,000 private single-employer and 2,000 multiemployer defined benefit plans. PBGC states that its mission is to operate as a service-oriented, professionally managed agency that protects participants' benefits and supports a healthy retirement plan system by:

- encouraging the continuation and maintenance of private pension plans,
- protecting pension benefits in ongoing plans,
- providing timely payments of benefits in the case of terminated pension plans, and
- making the maximum use of resources and maintaining premiums and operating costs at the lowest levels consistent with statutory responsibilities.

At September 30, 1996, PBGC was trustee or in the process of becoming trustee of 2,348 terminated pension plans. PBGC's programs are financed by revenues obtained from premiums paid by sponsors of covered pension plans, assets from terminated plans that PBGC trustees, recoveries from sponsors formerly responsible for the trustee plans, and investment income.

OBJECTIVE

The objective of our audit was to identify the population of and circumstances surrounding expenditures made by PBGC for food, entertainment and mementos occurring from October 1, 1994 through June 30, 1996. Once identified, the expenditures were evaluated in relation to applicable laws and regulations to determine if they were proper uses of appropriated funds.

SCOPE AND METHODOLOGY

The Office of Inspector General (OIG) engaged Harper, Rains, Stokes & Knight, P.A. to conduct the audit in accordance with *Government Auditing Standards*, issued by the Comptroller General of the United States. To meet our objective, we asked PBGC to provide specific information about PBGC expenditures for food, entertainment and mementos in conjunction with corporate meetings and functions that took place during the period being audited. The information request included meeting dates, times, locations, purposes, and attendees, as well as, expenditure data including amounts, descriptions, and funding sources. Additionally, we asked PBGC for legal opinions, and laws and regulations on which they relied in determining that these expenditures of PBGC funds were proper.

Expenditures reported by PBGC excluded, for the most part, amounts paid for items presented to employees as awards under PBGC's non-monetary awards program authorized under Title 5 Code of Federal Regulations (CFR), Part 451, and implemented in PBGC Directive PM 20-2. PBGC management has represented to the OIG that they are responsible for the fair presentation of the reported expenditures of PBGC funds for food, entertainment and mementos from October 1, 1994 through June 30, 1996. They also represented that to the best of their knowledge, all pertinent information regarding these expenditures has been made available and that they have no reason to doubt the accuracy or completeness of the expenditure information submitted.

We performed certain procedures to test the completeness of the expenditures reported by PBGC. These procedures included reviewing selected financial records, interviewing personnel, reviewing documents and reports on meetings and functions held by PBGC. These procedures were not sufficient in scope to assure that all expenditures made by PBGC for food, entertainment and mementos in conjunction with employee meetings that occurred during the period October 1, 1994 through June 30, 1996 were identified. However, we did not locate any significant amount of such expenditures which had not been reported to us.

EVALUATION CRITERIA

Laws and Regulations

We identified laws and regulations that, in our opinion, contained relevant criteria for determining whether the expenditures were proper uses of PBGC appropriated funds. These laws and regulations were identified through discussions with PBGC personnel, review of the CFR and publications of the United States General Accounting Office (GAO) and other appropriate documents as required.

Laws and regulations governing use of appropriated funds for food, entertainment and mementos come from several sources and are listed below.

- PBGC's authorizing legislation (ERISA) and yearly appropriation;
- Appropriations laws which are summarized in *Principles of Federal Appropriation Law, Volumes I and II*, United States General Accounting Office, Office of General Counsel (GAO/OGC-91-5 and GAO/OGC-92-13);
- Comptroller General Decisions concerning availability of appropriated funds for specific purposes;
- Government Employees Incentive Award Act (5 U.S.C. §§ 4501-4507) and Office of Personnel Management (OPM) implementing regulations (5 CFR Part 451);
- Government Employees Training Act (5 U.S.C. §§ 4109-4110) and OPM implementing regulations (5 CFR Part 410);
- OPM implementing regulations for the Combined Federal Campaign (5 CFR Part 950);
- Certain travel regulations in 41 CFR Part 301-7, Per Diem Allowances; and
- Executive Order 12862, Setting Customer Service Standards.

PBGC Directives

PBGC maintains a directives system which formally communicates required actions and provides information essential to effective administration and operation of PBGC's programs. Directives that may affect availability of PBGC appropriations for specific purposes include:

- PBGC Systems for the Requisition of, Acquisition of and Payment for Goods and Services (Directive FM 15-1, effective 6/1995);
- Obligating Procedures for PBGC Procurements (Directive FM 15-2, effective 8/1993);
- Revolving Fund Reimbursement by the Trust Fund (Directive FM 05-3, effective 12/1988)
- Delegation Authority to Approve Certain Financial Transactions (Directive GA 05-4, effective 9/1995);
- The PBGC Imprest Fund (Directive FM 05-6, effective 4/1990);
- PBGC Travel Policies and Procedures (Directive GA 10-5, effective 8/1996);
- Incentive Awards Directive (Directive PM 20-2, effective 12/1995 replaced PM 40-1, effective 10/1986), and
- Training Policy and Procedures (Directive PM 25-2, effective 10/1993).

PBGC's Role as Guarantor and Trustee

Our identification took into account PBGC's dissimilar duties as guarantor and trustee and the effect that these dissimilar duties might have on the laws and regulations governing the expenditures. The Comptroller General in *Matter of: Pension Benefit Guaranty Corporation's Use of Contingent Fee Arrangement With Outside Counsel*, B-223146 (1986) describes these fundamentally different duties.

On the one hand, PBGC serves in its corporate capacity as an insurer of the plans covered under the laws it administers. 20 U.S.C. § 1305. When acting in this capacity, its costs are financed through revolving funds. 29 U.S.C. § 1305(b)(2)(D). When performing non-trust-related functions funded out of the revolving fund, PBGC is subject to provisions of law applicable to wholly-owned Government corporations....

On the other hand, the law vests in PBGC the power to serve as trustee for terminated plans. 29 U.S.C. § 1342. When serving as trustee for a terminated plan, PBGC is serving primarily the interest of the pension participants and beneficiaries of the plan in the same manner and to the same degree as a nongovernmental party appointed to the same position. 29 U.S.C. § 1342 (d)(1)(A)(i)....

When serving in its trustee capacity, PBGC is treated as if it were a private fiduciary acting on behalf of the third party beneficiaries and possesses the same authority and duty to act as would a nongovernmental party if it were appointed to that position. Thus, the laws applicable to expenditure of appropriated funds ... do not apply to PBGC when it is acting in its trustee capacity and is funded out of trust funds transferred to it in order to perform the duties of a trustee under ERISA....

Finally, when PBGC serves as trustee for plans its reasonable expenses in administering, preserving or otherwise managing the plan for the benefit of the participants ... are properly chargeable to trust assets....

To facilitate the payment of trust expenses, PBGC Directive FM 05-3, Revolving Fund Reimbursement by the Trust Fund, states at page 1 that "all payments for expenses emanating from PBGC are to be made from the Revolving Fund." " ... the Trust Fund will reimburse the Revolving Fund for expenses applicable to the Trust Fund."

Principles of Federal Appropriations Law

Appropriation Availability and the Necessary Expense Doctrine

Principles of Federal Appropriations Law, Volume 1, United States General Accounting Office, Office of the General Counsel (GAO/OGC-91-5) (the Redbook) introduces the concept of appropriation "availability" which refers to whether a given appropriation is legally available for a specified use. Legal availability of an appropriation depends on the following three items (Redbook at 4-2):

1. The purpose of the obligation or expenditure must be authorized;
2. The obligation must occur within the time limits applicable to the appropriation; and
3. The obligation and expenditure must be within the amounts Congress has established.

All three of these elements must be observed for a given expenditure or obligation to be legal (Redbook at 4-2). However, Item 1, availability as to purpose, is of primary importance relative to the expenditures evaluated in this audit.

The Redbook at 4-2 cites 31 U.S.C. 1301(a) as a fundamental statute governing the use of appropriated funds. This statute states:

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

The basic concept of this statute is that the wording of the appropriation act, and the program legislation it funds, governs the purposes to which the appropriation can be applied. The statute does not require that every item of expenditure be specified in the appropriation act and allows the spending agency reasonable discretion in determining how to carry out the objective of the appropriation. This concept of reasonable discretion is known as the "necessary expense doctrine" (Redbook at 4-15). Justification under the necessary expense doctrine requires that an expenditure meet the following three tests (Redbook at 4-16). The expenditure must:

1. Bear a logical relationship to the appropriation sought to be charged;
2. Not be prohibited by law; and,
3. Not be funded through another appropriation or statutory funding method.

The Redbook at 4-16 states that the necessary expense doctrine does not require that an expenditure be so critical that the object of the appropriation could not possibly be achieved without it. The doctrine does, however, require an expenditure to be more than desirable or even important. For example, an expenditure cannot be justified merely because an agency official thinks it is a good idea. The true measure of an expenditure is not its individual significance, value to the government or some social purpose, but the degree to which it helps achieve the purpose of the funding appropriation. (See generally, Redbook at 4-16.) Without statutory authority or an adequate justification under the necessary expense doctrine, an expenditure is illegal (Redbook at 4-20).

Entertainment and Gifts

Expenditures evaluated in this audit were primarily for food and mementos provided to PBGC employees and non-government personnel in conjunction with various corporate events. Improper expenditures of this nature are considered to be entertainment or personal gifts. The Redbook at 4-84 defines entertainment as an “umbrella” term encompassing food and drink either as formal meals or as snacks and refreshments; receptions, banquets and the like; music, live or recorded; live artistic performances; and recreational facilities.

The Redbook explains the rule that appropriated funds may not be used for entertainment except under specific statutory authority and with approval by proper administrative officers. Entertainment is considered to be essentially a personal expense that is not normally necessary to carry out the purposes of an appropriation. In *Matter of: United States Trade Representative - Use of Reception and Representation Funds*, B-223678 (1989), Redbook at 4-82, explains the basis for this rule.

The theory is not that these items can never be business related because sometimes they clearly are. Rather, what the decisions are really saying is that, because public confidence ... is essential, certain items which may appear frivolous or wasteful - however legitimate they may in fact be in a specific context - should, if they are to be charged to public funds, be authorized specifically by the Congress.

The Redbook at 4-128 also states that absent statutory authority, appropriated funds cannot be used for personal gifts or mementos. Most Comptroller General decisions have used the necessary expense doctrine to evaluate these expenditures and have found that items in the nature of gifts can rarely be justified. The rule prohibiting the use of appropriated funds for personal gifts reflects the clear potential for abuse and the impossibility of drawing a rational line.

“Free Food” Rule

The Redbook at 4-84 states that as a general rule paying subsistence or providing free food to government employees at their official duty stations is not a proper use of appropriated funds. This “free food” rule applies to snacks as well as meals and refreshments. The Redbook at 4-100 further explains that this rule also makes the entertainment of non-government personnel impermissible:

The basic rule is the same regardless of who is being fed or entertained: Appropriated funds are not available for entertainment, including free food, except under specific statutory authority.

The Redbook discusses certain well-defined exceptions to the rules prohibiting food and gifts to government employees. These exceptions include statutory authority to:

- pay for the expenses, including meals, of civilian personnel traveling on official business (5 U.S.C. § 5702);
- pay for employee meals at meetings where attendance is authorized under 5 U.S.C. § 4110;
- pay or reimburse employees for meals in conjunction with training courses if the agency determines that providing meals is necessary to achieve the objectives of the training program (5 U.S.C. § 4109); and

- provide monetary and non-monetary awards to employees who display exemplary performance in execution of duties related to their official employment. This Act also permits agencies to use appropriations to provide entertainment at awards ceremonies. (Government Employees Incentive Awards Act at 5 U.S.C. §§ 4501-4507)

In discussing the authority for provision of meals to employees at authorized meetings and conferences, the Redbook at 4-89 makes it clear that this is a strict authority, applying only in certain circumstances, and states the following three part test should be used to determine whether a separate charge for meals may be paid for with an appropriation:

1. The meals are incidental to the meeting,
2. Attendance of the employee at the meals is necessary to full participation in the business of the meeting, and,
3. The employee is not free to take the meals elsewhere without being absent from essential formal discussions, lectures or speeches concerning the subject of the conference.

If these criteria are not met, the government is not authorized to pay for the meal. These criteria were used by the Comptroller General in *Matter of: Pension Benefit Guaranty Corporation - Provision of Food to Employees* B-270199 (August 6, 1996) in deciding that appropriated funds were not available to purchase food for PBGC employees at PBGC training sessions. These rules apply whether the meeting takes place at the employee's official duty station area or someplace else. When these rules apply to an employee on travel or temporary duty status, the employee's per diem must be reduced by the value of the meals provided (41 CFR § 301-7.12(a)(2)). It is noted that this exception generally does not apply to agency sponsored meetings which are normally subject to the prohibition of furnishing free food to employees at their official duty stations.

Government-Sanctioned Campaigns

The Redbook at 4-26 also discusses appropriation expenditures in conjunction with government-sanctioned campaigns such as the Combined Federal Campaign (CFC) and the United States savings bond campaign. An agency may expend a reasonable portion of its appropriation in support of the CFC including such things as permitting solicitation during working hours, preparing campaign instructions and distributing campaign materials. The Office of Personnel Management (OPM) prescribes implementing regulations for agency participation in the CFC which are found at 5 CFR Part 950. The Redbook at 4-26 also states that an agency may use its general operating appropriation to fund limited amounts of promotional material in support of the United States savings bond campaign.

Accountability

An accountable officer is defined in the Redbook at 9-8 as "any government officer or employee who by reason of his or her employment is responsible for or has custody of government funds" and states that "the legal liability of an accountable officer arises automatically by virtue of the loss and is not affected by lack of fault or negligence on the officer's part "

Accountability for public funds in civilian agencies rests primarily with the certifying officer, a government officer or employee whose job is or includes certifying vouchers (including voucher schedules or invoices used as vouchers) for payment.... In brief, certifying officers are responsible for the legality of proposed payments, and are liable for the amount of illegal or improper payments resulting from their certifications (Redbook at 9-8).

The Redbook further defines and discusses the accountability for public funds.

Accountability for public funds in civilian agencies rests primarily with the certifying officer ... whose job is or includes certifying vouchers ... for payment (Redbook at 9-8).

For purposes of accountability, "public funds" consists of three categories: appropriated funds, funds received by government from nongovernment sources, and funds held in trust (Redbook at 9-14).

When the government holds private funds in a trust capacity, it is obligated, by virtue of its fiduciary duty, to pay over those funds to the rightful owners at the proper time. Thus, although the funds are not appropriated funds, they are nevertheless accountable funds (Redbook at 9-20).

AUDIT RESULTS

We evaluated the propriety of the identified expenditures provided by PBGC and analyzed the nature and extend of each expenditure in relation to the criteria obtained from laws and regulations. The majority of our analysis involved the application of the "necessary expense" doctrine as discussed in the Redbook at 4-16 that states that a precise formula for determining the application of the necessary expense rule has never been established due to the vast differences among agencies. Any such determination must essentially be made on a case-by-case basis and frequently involves subjective evaluation of the relationship of a specific expenditure to the purposes of the appropriation sought to be charged. In addition, authority for determining whether a given expenditure is appropriately chargeable to an appropriation rests with the Comptroller General of the United States.

For the expenditure types that the Comptroller General has issued similar decisions, we are recommending that the appropriate certifying officials reimburse the Corporation for the questioned funds as required by law. Where the Comptroller General has not issued a decision regarding the particular expenditure type (e.g., expenditures for food served at meetings with private sector participants and at CFC or savings bond functions), we have applied relevant Comptroller General decisions and the Redbook analysis and are recommending that PBGC seek an authoritative determination from the Comptroller General. We have concluded that, while reasonable expenditures from the Trust Funds are exempted from certain laws and regulations, the expenditures evaluated in this audit are subject to the federal appropriations laws. We have also concluded that the appropriate certifying officers are liable for reimbursement of the funds because they are accountable for all public funds.

EXHIBIT 1
APPROPRIATION EXPENDITURES FOR FOOD,
ENTERTAINMENT AND MEMENTOS
For the Period October 1, 1994
through June 30, 1996

Expenditure Category	Number Of Functions and Meetings Audited	Total Expenditures Audited	Number Of Functions With Questioned Expenditures	Questioned Expenditures
Awards and ceremonies	20	\$22,922	12	\$ 9,333
Meetings ¹ and Conferences	6	6,764	6	6,764
Training ²	1	47	1	41
Government-sanctioned campaigns	8	1,008	6	899
Practitioner Meetings	<u>2</u>	<u>84</u>	<u>2</u>	<u>84</u>
Total	<u>37</u>	<u>\$30,825</u>	<u>27</u>	<u>\$17,121</u>

As shown in the exhibit, PBGC management reported expenditures, totaling \$30,825, for refreshments and mementos in conjunction with 37 meetings and functions that PBGC employees and others attended during the period of our audit. Based on PBGC provided information, we summarized the reported expenditures into the following Expenditure Categories: (1) Awards and Ceremonies, (2) Meetings and Conferences, (3) Training, (4) Government-sanctioned Campaigns or (5) Private Sector Practitioner Meetings.

¹ PBGC management reported expenditures related to 14 meetings and functions. The meetings category has been reduced for expenditures associated with six of the functions totaling \$232 of improper expenditures that the OIG previously reported to management.

² PBGC management reported expenditures related to 12 training functions. The training category has been reduced for expenditures associated with 11 of the events totaling \$853 which were determined to be improper by the Comptroller General in *Matter of Pension Benefit Guaranty Corporation - Provision of Food to Employees*, B-270199 (August 6, 1996).

We evaluated the propriety of these expenditures in relation to relevant criteria (see pages 2 through 7) and identified \$17,121 (56 percent of the total dollar amount audited) as questionable under applicable laws and regulations. In 27 out of 37 PBGC meetings and functions during the period audited we found questionable expenditures. These questioned expenditures are primarily for meals, refreshments and mementos purchased in conjunction with PBGC-sponsored events which do not meet the criteria for exemption from the general prohibitions of providing entertainment and personal gifts as defined in applicable laws and regulations and the necessary expense doctrine.

FINDINGS AND RECOMMENDATIONS

1. PBGC improperly expended \$16,138 for food, entertainment, and mementos.

An expenditure is proper when it is made under specific statutory authority or a relationship is established that makes the expenditure “necessary” to achieve the purposes of a given appropriation. Absent such specific authority or the “necessary” relationship, a given expenditure is an improper use of an appropriation.

In the case of expenditures for employee awards and related ceremonies, the Government Employees Incentive Award Act (5 U.S.C. §§ 4501-4507) authorizes agencies to pay a cash award to, and incur necessary expense for, the honorary recognition of employees. The Act also provides that an award may take a form other than cash. Under this statutory authority, GAO has held that refreshments at an agency awards program can qualify as a “necessary” expense. Finally, the Act authorizes OPM to prescribe regulations (5 CFR Part 451) and instructions to agencies. 5 CFR § 451.104(a) states:

An agency may grant a cash, honorary, or informal recognition award ... to an employee as an individual or member of a group, on the basis of (1) a suggestion, invention, superior accomplishment ... or other personal effort that contributes to the efficiency, economy, or other improvement of Government operations ...; and (2) a special act or service in the public interest in connection with or related to official employment.

5 CFR § 451.102 defines an awards program as the specific procedures and requirements established by an agency or a component of an agency for granting awards under 5 U.S.C. §§ 4501-4507. PBGC’s awards program is implemented primarily through its directives.

Awards and Ceremonies

A. No Authorized Awards Plan

The expenditures listed below were made in conjunction with six functions, and are questioned because the PBGC departments which paid for the items had not prepared and filed non-monetary awards plans with the PBGC's Human Resources Department (HRD) as required by PBGC's directives and procedures. PBGC departments are encouraged to develop non-monetary awards programs which should include a description of the planned recognition type and awards and the nomination criteria for recognition.

Function	Date	Department	Item	Amount
Clean audit opinion	04/10/95	DED/CFO	Refreshments	\$ 775
PAS completion	02/21/96	DED/CFO	Refreshments	323
PAS completion	02/21/96	DED/CFO	35 Shoulder bags	1,267
New Valley settlement	11/22/94	DED/COO	72 T-shirts	331
New Valley settlement	11/22/94	DED/COO	Refreshments	491
RPA passage	12/08/94	FASD	Refreshments	782
RPA passage	12/08/94	FASD	Coffee mugs & framed documents	1,042
Record cleanout campaign	06/22/95	FASD	Refreshments	88
Hammer award receipt	10/26/94	IOD	Refreshments	74
Total				<u>\$ 5,173</u>

We note that the Financial Operations Department (FOD), who reports to the Chief Financial Officer (CFO), submitted non-monetary awards plans containing descriptions of planned recognitions which were similar to the clean audit opinion and PAS completion. However, the number of employees to be recognized and the amounts to be expended were much less than the amounts spent by the CFO. In addition, the budgetary source of funds was the CFO and not FOD. 5 CFR § 451.103 states that "Agency award programs must provide for obligating funds consistent with applicable agency financial management controls and delegations of authority."

We further note that documentation submitted by PBGC for the "New Valley settlement" indicates that the "New Valley Team" to be recognized consisted of 23 employees; however, 71 adult size and one infant size T-shirts were purchased.

B. No Authorized Awards Criteria

In addition, the following expenditures are questioned because these awards, and the criteria for the awards, were not contained in the awards plans submitted by the departments to HRD for approval.

Function	Date	Department	Item	Amount
Records cleanout campaign	06/10/96	FASD	Refreshments	\$ 50
Reorganization anniversary	10/31/95	IOD	355 T-shirts	1,822
Extra recognition	12/08/95	IOD	68 athletic event tickets	1,948
Job Enrichment Forum	06/05/95	HRD	Continental breakfast	285
Facilitator training	03/29/95	HRD	Refreshments	25
Facilitator training	08/01/95	HRD	Refreshments	30
Total				<u>\$ 4,160</u>

PBGC's policies and procedures encourage each department to develop a non-monetary awards program. This program should include a description of the planned recognition and awards and the nomination criteria for recognition. The items listed above are questioned because they were not included as planned recognition and awards in the departments' awards programs.

Moreover, IOD's costs for recognition of its reorganization anniversary are further questioned because this does not meet the criteria for an award to employees as defined at 5 CFR § 451.101. The IOD recognition is celebrating an event, rather than rewarding specific employees for an achievement related to official employment.

In addition, the IOD documentation explaining the purchase of 68 athletic event tickets indicates that the tickets were "special act" awards given to several employees deserving of recognition that were not provided for in IOD's non-monetary awards program. While we do not dispute that the employees deserved recognition, we find that this is an improper appropriation expenditure. The purchase of additional awards not only violated IOD's non-monetary awards program, therefore not in compliance with statutory and agency requirements, but IOD also augmented its non-monetary awards program with funds that had been granted for another budgetary purpose.

Meetings and Conferences

The expenditures listed below were made in conjunction with six functions, and are questioned because "free food" was provided at internal business meetings or conferences.

Function	Date	Department	Item	Amount
FBA conference - Washington, DC	09/06/95	IOD	Continental Breakfasts	\$ 2,138
FBA conference - Atlanta, GA	03/06/96	IOD	Continental Breakfasts	4,177
Executive planning conference	12/06/95	IOD	Refreshments	195
Area representative meeting	03/23/95	IRMD	Lunch	123
Steering committee meeting	04/10/95	IRMD	Refreshments	47
Project meeting	04/19/95	IRMD	Lunch	84
Total				<u>\$ 6,764</u>

The Redbook states that the "free food" rule generally precludes the use of appropriated funds to provide food or refreshments to attendees at purely internal business meetings or conferences sponsored by government agencies, regardless of their location.

The Redbook also indicates that merely conducting a meeting or conference away from headquarters does not change the agency's ability to provide food or refreshments to participants. When employees and contractors are traveling on official business, agencies pay for the travel expenses including meals because there is specific statutory authority to do so at 5 U.S.C. 5702. Thus, when an employee's or contractor's official business is attendance at a conference or meeting, meals are paid for as part of the travel expenses. The government pays for food at a conference if it is a "necessary expense," e.g., when the meal occurs during a continuation of the conference, such as a guest speaker. This exception is not applicable here. See In Matter of: Pension Benefit Guaranty Corporation - Provision of Food to Employees, B-270199 (August 6, 1996). In cases where meals are provided at government expense to employees and contractors in travel status, the per diem paid must be reduced by the value of the meals provided (41 CFR § 301-7/12(a)(2)).

We conclude that the refreshments provided at meetings conducted at PBGC headquarters are inappropriate. Likewise, we conclude that the continental breakfasts and refreshments provided at meetings and conferences away from PBGC headquarters are inappropriate. In addition, PBGC has indicated that it is assumed that meeting participants in travel status did not reduce their daily per diem for the value of the meals provided. In this case, the Corporation has paid twice for these meals: first, through payment of the direct charge and second, through payment of the participants' per diem.

Training

During 1995, PBGC provided refreshments at seven customer service training courses. Refreshment expenditures in conjunction with six of these courses were found to be improper by the Comptroller General, *In Matter of: Pension Benefit Guaranty Corporation - Provision of Good to Employees*, B-270199. The \$41 presented below represents identical expenditures for the seventh course which was not covered in the Comptroller General's decision.

Function	Date	Department	Item	Amount
Basic customer service training	07/11/95	HRD	Refreshments	<u>\$ 41</u>

These expenditures are improper on the same basis as the first six training courses. In the PBGC decision, the Comptroller General concluded that appropriated funds were not available for the purchase of food for government employees at PBGC training sessions.

Recommendation

We recommend the following corrective action:

The appropriate certifying officials should reimburse \$16,138 to the Corporation. (OED-28)

AGENCY COMMENTS and OIG EVALUATION

The agency agrees that a debt of \$17,121 (\$16,138 in this finding and \$983 in Finding 2) is owed to PBGC. However, instead of seeking reimbursement from the certifying officials, PBGC has elected to waive the indebtedness. PBGC states that it is relying on its "sue or be sued" waiver authority under ERISA § 4002(b)(1). PBGC used the criteria of 5 U.S.C. § 5584 to waive the indebtedness to PBGC.

OIG confirms that the indebtedness of \$16,138 has been waived.

2. PBGC expended, without sufficient authority, \$983 on food and refreshments for government-sanctioned campaign events and for private sector practitioner meetings.

Government-sanctioned campaigns

The following expenditures made in conjunction with six functions are questioned because we found no specific authority for an agency to provide food to its employees in support of these campaigns.

Function	Date	Department	Item	Amount
CFC Wrap-up (1994)	12/03/94	IRMD	Refreshments	\$ 84
CFC Wrap-up (1995)	12/18/95	CN	Lunch	178
Savings bond kick-off (1995)	05/08/95	FASD	Refreshments	250
Savings bond wrap-up (1995)	07/25/95	FASD	Refreshments	139
Savings bond kick-off (1996)	03/26/96	CCRD	Refreshments	162
Savings bond wrap-up (1996)	05/14/96	CCRD	Refreshments	86
Total				<u>\$ 899</u>

The CFC and savings bond campaigns are government-sanctioned events in which federal agencies participate. In discussing the availability of appropriations to support these campaigns, the Redbook at 4-26 states:

Agencies may spend their appropriations, within reason, to cooperate with government-sanctioned charitable fund-raising campaigns, including such things as permitting solicitation during working hours, preparing campaign instructions and distributing campaign materials.

The Redbook at 4-26 further provides that: "An agency may use its general operating appropriations to fund limited amounts of promotional material" in support of the United States savings bond campaign.

The Redbook does not specifically discuss the allowability of providing food and refreshments at these events. We therefore researched the Comptroller General decisions, and the regulations at 5 CFR Part 950 which govern agency participation in the CFC.

Section 950.602 of 5 CFR states that agencies are encouraged to have kick-off and wrap-up ceremonies to promote employee participation in the CFC; however, provision for food and refreshments is not explicitly mentioned as an authorized expenditure. There are several Comptroller General decisions addressing the propriety of expenditures for CFC, two of which are discussed below.

In *Matter of: IRS Purchase of T-Shirts for Employees Contributing Certain Amounts to the Combined Federal Campaign*, 70 Comp. Gen. 248 (1991), the IRS purchased T-shirts with appropriated funds to give to employees who contributed to the CFC. Analyzing the expenditure under both the Incentive Awards Program and the necessary expense doctrine, the Comptroller General concluded that the expenditure was improper, stating "we are not convinced that purchasing personal items for individual employees is an integral and necessary part of supporting the CFC" (70 Comp. Gen. at 248). Food, as established above, has been held by the Comptroller General to be a personal expense. The Comptroller General did not foreclose all CFC expenditures, however, and stated "reasonable expenditures of

appropriated funds are permissible," as there are "legitimate elements of agency support for the CFC, e.g., fostering an atmosphere conducive to convenient giving" (70 Comp. Gen. at 248).

In a later decision, *Matter of: Expenditures by the Department of Veterans Affairs Medical Center, Oklahoma City, Oklahoma*, B-247563 (Dec. 11, 1996), the Comptroller General was asked whether the agency could spend appropriated funds for forks, cups and napkins for a "ceremony to recognize associates and key workers for a successful effort in the annual CFC." In addressing this particular expenditure, the Comptroller General stated, "[s]ince the Medical Center's reception was an inclusive, "victory" event, we do not object to its use of a limited amount of appropriated funds to purchase necessary items."

The Comptroller General's "free food" rule and the necessary expense doctrine would appear to preclude expenditures for food, however, without addressing the specific issue, the *Veterans Affairs* decision could be read to approve such expenditures. To resolve this issue, therefore, it would be prudent for PBGC to seek an advisory opinion from the Comptroller General regarding spending appropriated funds for food served at government-sanctioned fundraising campaigns.

Private Sector Practitioner Meetings

We were unable to locate definitive guidance as to the allowability of refreshments provided at the following meetings PBGC employees held with private sector pension practitioners.

Function	Date	Department	Item	Amount
Practitioners group- Washington, DC	06/26/95	CMO	Refreshments	\$ 49
Practitioners group- Newport, RI	06/05/95	CMO	Refreshments	<u>35</u>
Total				<u>\$ 84</u>

Documentation for these expenditures indicates that these meetings were held with private sector pension practitioners in order to comply with an Executive Order mandating improved customer service. During the meetings, PBGC employees requested information from the attendees regarding their dealings with PBGC as a means for identifying ways to improve customer service.

The general prohibition of providing food applies to non-government, as well as government personnel. However, we also found a reference in Comptroller General Decision B-45702 to another Comptroller General Decision B-35602 which indicated that the cost of a luncheon paid for by a quasi-public corporation to induce participation in a government program by private sector persons was an appropriate expense. In that decision, GAO states:

...if it be administratively determined by the Board of Directors that the expenditures referred to in your submission are essential to carry out effectively the authorized functions of the Corporation this office will interpose no objection to the use for that purpose of funds available to the Corporation for its administrative expenses.

It is evident that the meetings ... were to be participated in principally by members of the public, having no official connection with the Federal service, for the purpose of obtaining their assistance and cooperation in the prosecution of a program of the government.

The facts surrounding PBGC's expenditures may conform to this exception approved by the Comptroller General.

Recommendation

We recommend the following corrective action:

PBGC should seek authoritative guidance from the Comptroller General on the propriety of appropriation expenditures for refreshments provided at government-sanctioned campaign events and meetings with pension practitioners. If the Comptroller General disallows the expenditures, the appropriate certifying officials should reimburse the Corporation.
(OED-29)

AGENCY COMMENTS and OIG EVALUATION

The agency agrees that a debt of \$17,121 (\$983 in this finding and \$16,138 in Finding 1) is owed to PBGC. However, instead of seeking authoritative guidance from the Comptroller General and seeking reimbursement from the certifying officials if the Comptroller General disallowed the expenditures, PBGC has elected to waive the indebtedness. PBGC states that it is relying on its "sue or be sued" waiver authority under ERISA § 4002(b)(1). PBGC used the criteria of 5 U.S.C. § 5584 to waive the indebtedness to PBGC.

OIG confirms that the indebtedness of \$983 has been waived.

3. PBGC's obligations approval process for food and mementos should be strengthened.

Standards for Internal Controls in the Federal Government issued by GAO states, in part, that "Internal control systems are to reasonably ensure that ... obligations and costs comply with applicable law." The third general internal control standard states, in part, that "Managers and employees ... are to maintain a level of competence that allows them to accomplish their assigned duties...."

We found that more than half of the expenditures made by PBGC for food and mementos during the audit period were not proper uses of PBGC's appropriated funds. We note that the total dollar value of the expenditures for food and mementos would be considered insignificant when compared to PBGC's total expenditures for this period. However, given the general prohibitions of such expenditures in applicable laws and regulations and taking into account the visibility and sensitivity of these type of expenditures, PBGC's processing controls over these expenditure types should be strengthened.

Recommendations

We recommend the following corrective actions:

PBGC should develop and distribute written guidance that specifically addresses the circumstances when PBGC funds can be expended on food and mementos. (OGC-34)

PBGC should designate an appropriate high-level official to review and approve planned expenditures for food and mementos prior to obligation. (OGC-35)

PBGC should seek guidance from the Comptroller General in situations in which clear guidance cannot be obtained from laws and regulations, prior to obligating appropriated funds for food and mementos. (OGC-36)

PBGC should ensure that employees with responsibility for obligation and disbursement of PBGC's funds are properly trained regarding appropriations law. (FOD-273)

AGENCY COMMENTS and OIG EVALUATION

The response states agency agreement with the recommendations.





SEP 28 1998

14-00000

3 PBGC should seek guidance from the Comptroller General in situations in which clear guidance cannot be obtained from laws and regulations, prior to obligating appropriated funds for food and mementos

We agree. We note, however, that (1) “clear guidance” is itself subject to reasonable but differing views among persons acting in good faith, and (2) laws and regulations (including their authoritative interpretations by the courts and administrative bodies charged with such interpretations) often vest discretion in management without specifying precisely how that discretion shall be exercised in all potential circumstances. Accordingly, our agreement to seek GAO guidance in appropriate situations is without prejudice to any rights or discretion vested in management, including any proper and reasonable interpretations thereof by PBGC’s legal advisors. We would not, for example, feel constrained to seek an opinion from GAO where reasonably clear guidance exists under GAO case law, even if that case law does not necessarily match “foursquare” with the circumstances then at issue.

4 PBGC should ensure that employees with responsibility for obligation and disbursement of PBGC's funds are properly trained regarding appropriations law

We agree Our efforts will include (1) reviewing certifying officers' training histories and scheduling whatever training may be appropriate to update their knowledge of appropriations law, (2) issuing the above-referenced guidance to all employees, (3) raising the issue at senior staff meetings, and (4) identifying other training needs in connection with the review procedures being implemented with respect to food, mementos, and other appropriations-related matters PBGC remains committed to training its employees on an on-going basis as needs arise and, accordingly, the efforts noted here are not exclusive of any others

Attachment

cc Dale Williams, CCRD



Pension Benefit Guaranty Corporation

200 K Street, N W , Washington, D C 20005-4026

MEMORANDUM

SEP 28 1998

TO: Wayne McKinnon
Controller

FROM: John Seal *John Seal*
Chief Management Officer

SUBJECT: Waiver of Indebtedness to PBGC

In Audit Report 98-5/23115, Wayne Robert Poll, Inspector General, concluded that various Corporate expenditures for food, entertainment and mementos totaling \$17,121 could not be properly justified¹ Mr Poll therefore recommended that PBGC seek reimbursement from the certifying officials who approved the challenged expenditures

In an opinion dated September 25, 1998 (attached), PBGC's Office of the General Counsel described (a) PBGC's authority to waive indebtedness to the Corporation, (b) the specific propriety of exercising that authority in the facts and circumstances presented, and (c) the legal effect of a waiver with respect to the liability of the certifying officers who approved the challenged expenditures That opinion also recommended for purposes of evaluating the merits of waiving all or any part of the claims, that PBGC adopt and apply the waiver criteria of 5 U S C § 5584

Having considered that opinion, I adopt the recommended waiver criteria and find that

- 1 a debt is owed to PBGC in the amount of \$17,121 for the reasons stated in the referenced Audit Report,
- 2 collection of the debt would be against equity and good conscience and not in the best interests of the United States,

¹ Of the \$17,121, Mr Poll concluded PBGC should seek repayment of \$16,138 from the certifying official(s) With regard to the remaining \$983, he suggested PBGC seek an opinion from the Comptroller General regarding the propriety of those payments He added that if the Comptroller General found them improper, PBGC should also seek reimbursement of the \$983 Waiving the full amount of \$17,121 eliminates any need to seek an opinion from the Comptroller General

3 there is no reasonable basis for concluding that there exists, in connection with the claim,
an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the
person liable for the claim or any other person having an interest in obtaining a waiver
of the claim,

4 PBGC should not attempt to collect such debt by salary offset or any other form of
repayment, and

5 PBGC should waive collection of the entire debt

Accordingly, the \$17,121 debt described above is waived in full

Attachment

cc N Anthony Calhoun
Chief Financial Officer

Robert Wayne Poll
Inspector General

Sharon Barbee Fletcher
Director, Human Resources Department

Dale C Williams
Director, Contract Controls & Review Department



Pension Benefit Guaranty Corporation

1200 K Street, N W , Washington, D C 20005-4026

MEMORANDUM

SEP 25 1998

TO: John Seal
Chief Management Officer

FROM: Philip R. Hertz *PH*
Deputy General Counsel

SUBJECT: Authority to Waive Erroneous Payments

I respond to your request for an evaluation of (1) the authority to waive various overpayments and/or erroneous payments ("payments") from PBGC funds if certain conditions are met, and (2) the effect of any such waiver on the liability of the certifying officer(s)¹ who approved the payments. As explained below, PBGC has authority to waive debts owed the Corporation, and any such waivers have the effect of releasing certifying officers from any liability they may otherwise have incurred.

Background

In Audit Report 98-5, No. 23115, Wayne Robert Poll, PBGC's Inspector General, evaluated various Corporate expenditures for food, entertainment and mementos that benefitted PBGC employees and other persons doing business with the Corporation. The Inspector General concluded that a total of \$17,121 could not be properly justified and, accordingly, he recommended that PBGC seek reimbursement of that amount from the certifying officials who approved the challenged expenditures.²

¹ "In brief, certifying officers are responsible for the legality of proposed payments, and are liable for the amount of illegal or improper payments resulting from their certifications." 9 GAO RedBook pt. B, §2, 2, p. 798 ("Who is an Accountable Officer?")

² Of the \$17,121, the Inspector General concluded PBGC should (1) recoup \$16,138 from the certifying official, (2) seek a Comptroller General opinion as to the propriety of the remaining \$983, and (3) per that opinion, recoup any amounts found improper.

Legal Authority

Under 5 U.S.C. § 5584, **Claims for overpayment of pay and allowances, and of travel, transportation and relocation expenses and allowances**, an agency head may waive "an erroneous payment" to an employee when "the claim is in an amount aggregating not more than \$1,500" in circumstances discussed below. A claim above \$1,500 may be waived, but not at the agency head level.

As a Government corporation, however, PBGC has waiver authority different from and broader than that accorded Federal agencies under 5 U.S.C. § 5584. Under ERISA § 4002(b)(1), PBGC's corporate powers include the authority to "sue and be sued." The Comptroller General has found that this authority "includes the power to compromise a claim without a lawsuit" and to otherwise act without regard to 5 U.S.C. § 5584. Matter of: Pension Benefit Guaranty Corp - Waiver Authority, B-190806 (unpub. Apr. 13, 1978) at 2.

[W]e have traditionally held that claims involving [wholly owned Government] corporations are for settlement by them, [and] not within the jurisdiction of the General Accounting Office ³

Id

This decision further notes and relies upon an exception in 5 U.S.C. § 5584(f) "This section does not affect any authority under any other statute to litigate, settle, compromise, or waive any claim of the United States." The Comptroller General determined that PBGC's "sue and be sued" power was an authority within section 5584(f)'s exception, and concluded that PBGC "has authority independent from that of 5 U.S.C. § 5584 to waive a claim which it has against an employee for an overpayment" Id

The claims arising from the challenged payments involve certifying officers,⁴ other

³ In 1996, Congress amended 5 U.S.C. § 5584 to give OMB the waiver authority formerly vested in the Comptroller General. Pub. L. 104-316, § 103(d)(1) (1996).

⁴ As stated by the General Accounting Office,

A certifying officer is liable the moment an improper payment is made as the result of an erroneous or misleading certification. This is true whether the certification involves a matter of fact, a question of law, or a mixed question of law and fact. As a general proposition, the government looks first to the certifying officer for reimbursement even though some other agency employee may be liable to the certifying officer under administrative regulations. Also, the certifying officer's liability does not depend on the government's ability or lack of ability

PBGC employees, and other individuals. Section 5584, however, authorizes waivers only with respect to "an employee of an agency," and certifying officers seeking relief from liability must proceed under 31 U.S.C. § 3528 (authorizing waivers by the Comptroller General).

In these circumstances, we believe PBGC may rely on its "sue and be sued" waiver authority. Under the Comptroller General's above-quoted analysis, claims of a government corporation may be settled by that corporation. Accordingly, the payments at issue in the OIG report may be settled, or waived, by PBGC

Waiver Procedure

As previously discussed, 5 U.S.C. § 5584 "does not affect" PBGC's authority under ERISA "to settle, compromise, or waive any claim of the United States." Nonetheless, the waiver criteria described at 5584 have long served as an appropriate standard and we recommend that, for purposes of the claims at issue, PBGC adopt and apply them. Under those criteria, PBGC should waive all or part of any claim only when

- collection "would be against equity and good conscience and not in the best interests of the United States" (5 U.S.C. § 5584(a)), and
- the waiving official is of the opinion that there does not exist "in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the [person liable for the claim] or any other person having an interest in obtaining a waiver of the claim" (5 U.S.C. 5584(b)(1)).

We also note that the various payments at issue involve numerous employees (including those who are not certifying officers) and non-employees, none of whom is identified by name in the OIG report. Given these particular circumstances, together with PBGC's broad authority to compromise its claims, PBGC could effect a general waiver of these claims at, e.g., the Deputy Executive Director level, in the interests of administrative efficiency.

to recoup from the recipient of the improper payment. What this means is that the government is not obligated to seek first to recoup from the recipient, although it frequently does so, and of course any recovery from the recipient will reduce the certifying officer's liability, at least in most cases.

Principles of Federal Appropriations Law, United States General Accounting Office, Office of the General Counsel, 2d ed ("GAO Redbook") at 865

Effect of Waiver on Certifying Officials

With respect to the liability of the certifying officer(s) who approved the challenged payments, it is settled law that a waiver of an improper payment releases the certifying officer(s) from any further liability. See, e.g., 5 U.S.C. § 5584(e) (“An erroneous payment, the collection of which is waived under this section, is deemed a valid payment for all purposes.”); see also 31 U.S.C. § 3711, “Collection and compromise,” at paragraph (c) (“An accountable official is not liable for an amount paid or for the value of property lost or damaged if the amount or value is not recovered because of a compromise under this section.”).

Therefore, if an appropriate PBGC official (1) exercised PBGC's authority under its "sue and be sued" powers, (2) determined that the circumstances of the various payments met the adopted criteria, and (3) waived the erroneous payment, then the certifying officers would not be liable.

Merits of Waiving

With respect to the merits of a waiver, neither the IG Report nor any other known source suggest that waiving the debt at issue would be inconsistent with the criteria described at 5 U S C § 5584, quoted above. To the contrary, as stated in an April 3, 1998 memorandum to the Inspector General, the questioned expenditures:

were used to recognize deserving employees for their accomplishments, improve employee morale, instill organizational pride, and advance productivity by highlighting teamwork, employee development, customer service and better communication. The well-intentioned purposes behind the expenditures identified in the draft report are worthy of our whole-hearted support.

Conclusion

Based on the foregoing, we have prepared a waiver for your signature. Please let me know if we can be of further assistance

Attachment