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Today's faculty features:

Harold J. Ashner, Partner, **Keightley & Ashner**, Washington, D.C.

Constance A. Donovan, Participant and Plan Sponsor Advocate, **Pension Benefit Guaranty Corporation**, Washington, D.C.

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PBGC Expands Scope of Early Warning Program

BY HAROLD J. ASHNER AND DEBORAH WEST

On December 21, 2016, the Pension Benefit Guaranty Corporation announced that, in an effort to increase transparency about PBGC's Early Warning Program, it had ''enhanced and reorganized the information available on its website.'' While much of the newly-posted guidance regarding its Early Warning Program reflects longstanding PBGC guidance and practices, PBGC added a new basis for possible action—''*trends* that may pose an increased risk to plans and the pension insurance system'' (emphasis added)—that appears to signal a significant expansion of the scope of the Program. *See* www.pbgc.gov/prac/whatsnew.html and www.pbgc.gov/prac/risk-mitigation.html.

By way of background, since the inception of the Early Warning Program in 1993, PBGC has monitored certain employers and identified planned corporate transactions that it believes may result in a significant increase in PBGC's losses in the event of a future plan termination. If PBGC is concerned about a transaction, it may intervene to seek protection for a pension plan or for itself.

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Historically, Early Warning Program cases have been opened because of a specific transaction of concern to PBGC. (The term ''transaction'' is used broadly in this article to encompass all significant business events, whether or not they involve an unrelated person.) Under the new basis for possible action, an employer facing financial challenges may be surprised to find itself the target of an Early Warning Program investigation—and possibly an Early Warning Program demand—even in the absence of a specific transaction.

In announcing the new guidance, PBGC said that, with the goal of posting a new set of Early Warning Program FAQs on www.pbgc.gov in early 2017, it was inviting dialogue on the Early Warning Program, and encouraged practitioners to send questions to webmaster@pbgc.gov.

PBGC's Screening Criteria

Under ERISA, a contributing sponsor of a pension plan and each of the members of its ''controlled group'' (who together with the contributing sponsor constitute a single ''employer'' for purposes of Title IV of ERISA) are responsible, on a ''joint and several'' basis, for certain plan-related liabilities. PBGC's monitoring efforts focus on controlled groups maintaining plans that, in the aggregate, have: (1) underfunding of $50 million or more; or (2) 5,000 or more participants. Although the new guidance refers to ''plans'' crossing the two thresholds, informal guidance from PBGC staff makes clear that PBGC aggregates all plans in the controlled group when applying the thresholds. *See, e.g.*, www.pbgc.gov/Documents/2013bluebook.pdf, Q&A 22(a).

In a July 2000 Technical Update regarding the Early Warning Program, PBGC stated that it would contact a company about a transaction *only if* PBGC's then-existing screening criteria were met. PBGC Technical

Update 00-3: PBGC's Early Warning Program (available at web.archive.org/web/20150328012414/http://www.pbgc.gov/prac/other-guidance/tu/tu00-3.html) at Section II, Paragraph 2. The new guidance does not expressly address the issue, but in informal guidance given long after the 2000 Technical Update, PBGC staff has indicated that PBGC may open an Early Warning Program case with respect to a controlled group that does not meet either the $50 million screening criterion or the 5,000-participant screening criterion for other reasons as appropriate. *See*, *e.g.*, www.americanbar.org/content/dam/aba/events/employee_benefits/PBGCQA2016_final.authcheckdam.pdf, Q&A 20.

PBGC's Identification and Processing of Cases

PBGC stated in the new guidance that it ''learns of a transaction or other event from its own monitoring efforts, reports in the financial press, and notices provided by companies as reportable events under section 4043 of ERISA . . . .'' Once PBGC has identified a case of concern, it is likely to issue follow-up information requests to the employer. PBGC provided, as part of its new guidance, a sample information request letter (available at www.pbgc.gov/documents/Company-Contact-Initial-Inquiry-FINAL.pdf).

The guidance notes that PBGC will generally request the following information:

- *Event*—To help [PBGC] understand the potential impact on the sponsor (and its controlled group members and its pension plans), [PBGC] need[s] information to help [PBGC] assess how the event will affect the companies responsible for the plan and the cash flow available to support the plan.
- *Controlled Group*—To help [PBGC] understand the financial support the plan has available to it (both before *and* after a transaction), [PBGC] need[s] information about the ownership structure of the sponsor and each controlled group member.
- *Credit Quality*—To help [PBGC] understand whether the financial health of the sponsor and its controlled group may deteriorate as a result of an event or a downward business trend, [PBGC] need[s] current and projected financial information about the sponsor and any members of its controlled group.
- *Pension Plan(s)* —To help [PBGC] assess the health of the plans, [PBGC] review[s] recent actuarial information about the plans, including the most recent actuarial valuation report, latest market value of each plan's assets, contribution history, and information about any events that have had a material effect on the plans since the last actuarial valuation.

In its guidance, PBGC stated that it ''internally identifies about 300 transactions, events, or trends each year that are potentially of concern and engages the plan sponsors to obtain additional information.'' PBGC said it then assesses the impact of these situations ''based on each employer's financial and operational ability to support its pension promises.'' PBGC also said that it averages about 100 Early Warning Program cases each year, and that, in recent years, it has entered into an average of about 5 settlements each year. It remains to be seen whether this level of activity will increase and, if so, how significantly, under the expanded scope of the Early Warning Program.

PBGC's Leverage

PBGC's leverage to extract settlements in Early Warning Program cases is a consequence of its authority under ERISA Section 4042(a)(4) to initiate termination proceedings whenever PBGC determines that ''the possible long-run loss of the [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.''

Although PBGC has no authority to approve or disapprove a corporate transaction, and no authority to terminate a pension plan unilaterally, if PBGC concludes that an Early Warning Program case increases PBGC's risk of long-run loss, PBGC can threaten to initiate an involuntary termination of a plan unless it is provided with the protection it seeks. PBGC's initiation of an involuntary termination could, in many cases, result in a cascade of potentially catastrophic consequences, including the triggering of various defaults, the increase and acceleration of pension liability, the creation of a new liability for termination premiums, the need to file for bankruptcy protection, and job losses.

Because of the potential consequences of plan termination, even the threat that PBGC might initiate an involuntary termination could significantly destabilize the business. If a transaction is planned, such a threat could scare away lenders and/or other parties to the transaction and thus have the effect of blocking the transaction. However, in threatening—implicitly or explicitly—to initiate an involuntary termination action in an Early Warning Program case, generally PBGC's goal is not to terminate the pension plan, but rather to obtain a settlement that PBGC views as strengthening the plan's financial condition and reducing PBGC's risk.

Early Warning Program Settlements

The new PBGC guidance gives the following examples of negotiated protections provided in Early Warning Program cases:

- *Cash Contributions*. The employer agrees to make cash contributions to its plan in excess of minimum funding requirements.
- *Letters of Credit*. The employer provides PBGC a letter of credit to secure its agreement to make future pension contributions or to secure a plan's unfunded liabilities.
- *Security Interests*. The employer grants PBGC a security interest in specific company assets to secure a plan's unfunded liabilities.
- *Guarantees*. A related entity agrees to assume the pension plan or guarantee payment of termination liability if the financially weaker sponsor/controlled group cannot support the plan following a transaction.

In Early Warning Program settlements, as consideration for the negotiated protection provided by the employer, PBGC typically will agree to forbear from initiating an involuntary termination based on the transaction at issue. It is unclear what consideration PBGC will provide to an employer in a settlement that does not involve a specific transaction.

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PBGC's Guidance Expanding Basis For Possible Action

From its inception, the Early Warning Program has focused on certain types of corporate *transactions* that PBGC believes may pose an increased risk to plans and the pension insurance system. *See* PBGC Technical Update 00-3, Sections I.1, I.2. I.3, II.1, and III. However, as noted above, PBGC's new guidance regarding the Early Warning Program states that PBGC reviews ''corporate transactions, events, *or trends* that may pose an increased risk to plans and the pension insurance system . . . .'' (Emphasis added.) Typically, there is no question as to whether a transaction has occurred (or is proposed to occur). By contrast, it may often be difficult to predict when PBGC may reach out to an employer to investigate—and potentially make a demand—based on a ''trend.''

The new PBGC guidance does not provide a complete list of all the types of ''transactions, events, or trends'' that may be of concern. However, the guidance does provide seven examples, the first five of which are consistent with earlier PBGC guidance, and the last two of which are new:

- A change in the controlled group that is legally responsible for supporting a pension plan;
- A major divestiture by an employer that retains significantly underfunded pension liabilities;
- A leveraged buyout involving the purchase of a company using a large amount of secured debt;
- A substitution of secured debt for a significant amount of unsecured debt;
- The payment of a very large dividend to shareholders;
- Significant credit deterioration involving the downgrading of a plan sponsor's credit ratings, which PBGC views as a possible signal that the sponsor is, or is becoming, unable to support its plan(s); and
- A downward trend in cash flow or other financial factors, which PBGC views as a possible signal that the sponsor is becoming unable to support its plan(s).

Clearly, PBGC has always taken into account an employer's financial soundness (including credit ratings and other financial factors) in evaluating Early Warning Program cases. *See, e.g.*, www.pbgc.gov/Documents/2012bluebook.pdf, Q&A 23; PBGC Technical Update 00-3, Section II, Paragraph 2(1). However, this is the first time that PBGC has issued guidance stating that credit ratings and other financial factors—standing alone—could trigger an Early Warning Program investigation or demand.

Prior to PBGC's issuance of the new guidance, there were anecdotal reports that PBGC appeared to be expanding the scope of the Early Warning Program by pursuing Early Warning Program investigations and demands in the absence of any transaction.

- For example, the PBGC Participant and Plan Sponsor Advocate (the ''Advocate'') noted in her 2015 Annual Report that she had ''become aware of PBGC using the Early Warning Program outside of the context of business transactions to intervene in how a company runs its business'' and that ''[t]his is not consistent with the guidance issued by the PBGC on the Early Warning Program.'' *See* www.pbgc.gov/Documents/pbgc_advocate_report_2015.pdf at p. 25.
- Another example appears in the Intersector Group's ''Notes from Intersector Meeting with PBGC, April 16, 2015,'' which state that ''a number of clients are getting letters from PBGC asking for all kinds of information . . . in the absence of any transaction.'' The Intersector Group is composed of delegates from a number of actuarial organizations. Twice a year, the Intersector Group meets with PBGC representatives to dialogue with them on regulatory and other issues affecting pension practice. *See* https://www.ccactuaries.org/Portals/0/pdf/Intersector/Intersector-PBGC-2015-04-16.pdf) at pp. 1 and 3.

PBGC's new guidance on the Early Warning Program thus may be viewed as an effort to ensure that its published guidance corresponds with its recent practice.

The Advocate discussed the new guidance in her just-released 2016 Annual Report, noting that the guidance ''significantly expands on the types of situations that might trigger an Early Warning Program case, as PBGC has now added 'significant credit deterioration' and 'a downward trend in cash flow or other financial factors' to the standard list of considerations.''

- With respect to the first factor, the Advocate recalled that PBGC's request, in the context of the 2006 Pension Protection Act, that statutory contribution requirements be increased for companies with bad credit ratings had been rejected by Congress, and stated that PBGC now appeared to be pursuing the same goal in the Early Warning Program context.
- With respect to the second factor, the Advocate expressed concern that the vague language could give rise to very burdensome PBGC demands on many companies.

See www.pbgc.gov/Documents/PBGC-Participant-and-Plan-Sponsor-Advocate-2016-Annual-Report-FINAL.pdf at p. 9.

Implications of Expanded Basis For Possible Action

PBGC's addition of the ''trends'' basis for possible action, and of the two new examples based solely on credit ratings and other financial factors, is troubling because it represents a potentially significant expansion of the scope of the Early Warning Program, and indeed may be a harbinger of an unwelcome increase in PBGC's attempts to involve itself in an employer's business challenges and decisions.

Clearly, PBGC's Early Warning Program has undergone significant changes over the years. In the past, PBGC would open an Early Warning Program case only if the screening criteria were met *and* if there was a transaction of potential concern. Today, PBGC may decide to open an Early Warning Program case regardless of whether the screening criteria are met, and regardless of whether any transaction is occurring or expected to occur. As a result, for many employers for whom there previously was certainty that the employer would not be the subject of an Early Warning Program investigation or demand, that certainty has now disappeared.

Conclusion

It remains to be seen how broadly PBGC will seek to apply the new guidance. It is clear, however, that an employer facing PBGC investigations under the Early Warning Program should have a thorough understanding of the nature of PBGC's concerns and effective alternatives for addressing those concerns, as well as of the scope and limits of PBGC's authority.

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2016 Annual Report of the Participant and Plan Sponsor Advocate

Pension Benefit Guaranty Corporation

December 30, 2016

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This statutorily required 2016 Annual Report discusses the activities of the Office of the PBGC Participant and Plan Sponsor Advocate, and is submitted to the Health, Education, Labor, and Pensions Committee of the Senate, the Committee on Finance of the Senate, the Committee on Education and the Workforce of the House of Representatives, and the Committee on Ways and Means of the House of Representatives. A copy of this Report is concurrently submitted to the Secretary of Labor, the Director of the Corporation, and other appropriate officials.

The Office of the Advocate continues to receive and respond to requests for assistance from participants in defined benefit pension plans regarding resolution of benefit entitlement issues and plan sponsors concerning their disputes with PBGC. However, whenever speaking to a group or organization, I always preface my remarks with the observation that no one is calling the Advocate because things are going well with their interactions with PBGC. Participants and sponsors who contact me are not representative of the large volume of transactions PBGC staff handles exceptionally well on a routine basis. Nonetheless, these issues come to my attention and are important as they share common themes and represent repeat and often systemic problems that sponsors and participants experience with PBGC. Perhaps more importantly, we must also consider the participants and sponsors that simply "give up" on their claims to benefit entitlements and dispute resolution with PBGC because of the persistent problems that remain unresolved and make it difficult to do business with the agency.

The Office of the Advocate is grateful for the collegial working relationships with the PBGC staff who help us resolve difficult and challenging participant and sponsor issues that often require change in PBGC practice, custom, and historical ways of doing business. Change in practice is perhaps one of the most difficult measures for an organization to achieve, and the participant advocacy groups, sponsors and their trade groups, and the Office of the Advocate welcome the continuation of the good work with PBGC staff and the PBGC Director in the New Year.

As you read about the activities of the Office of the Advocate in this Report that include various case studies and attendant recommendations, you will observe notable themes emerge in the challenges participants and plan sponsors encounter with PBGC such as:

- Interactions with PBGC are adversarial and defensive, rather than collaborative and businesslike, in working toward a mutually agreeable resolution;
- There is a lack of transparency in working with PBGC to understand the corporation's assumptions, resulting in costly and time-consuming interactions with the agency which can go on for months and even years;

- PBGC is unwilling to exercise judgment and discretion with participant claims and sponsor penalties, relying almost exclusively on automatic and mechanical-like approaches; and
- PBGC demands documentation, costly analysis, and historical records that businesses, governmental entities, or participants rarely, if ever, retain.

The issues faced by participants and plan sponsors who come to the Advocate for help raise the need for changes in administrative practices adopted by PBGC that may have served the corporation well in its early years, but now need a fresh look. Given the dwindling number of viable defined benefit plan sponsors and the growing number of participants in trusteed plans, adjustments to PBGC's historical practices may actually facilitate the continuation and maintenance of the voluntary defined benefit system.

The Advocate's 2016 Report also notes improvements, particularly on the participant front, that demonstrate a more reasonable, practical, and cost-effective approach in addressing issues regarding benefit claims. However, I have observed a substantive disconnect between two different departments within PBGC that confer benefits, and in how the departments exercise judgment and discretion regarding benefit entitlement claims, which is of concern to the participant advocacy community and the Office of the Advocate.

PBGC received extremely positive comments from both the participant and plan sponsor communities regarding the release of its proposed Missing Participants Regulation which will facilitate reuniting missing participants with their benefits in pension and defined contribution plans. One smaller, but no less important initiative, is a project between the Employee Benefits Security Administration (EBSA) Chicago Regional Office and PBGC, where the benefits analysts in the Chicago Regional Office actively work with the PBGC missing participants database to help reunite participants with their missing benefits.

PBGC also updated its premium penalty rule, providing extraordinary relief for premium payers by reducing penalty rates for all plans and waiving most of the penalty for plans that meet a standard for good compliance. This rule is an effort by PBGC to reduce the regulatory costs and make it easier for plan sponsors to maintain traditional defined benefit plans.

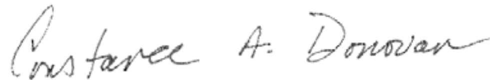
There are a number of repeat issues and recommendations discussed in this Report that also appear in previous reports by the Advocate, dating back to the Advocate's Inaugural Report in 2014. Positive change will require much more active engagement by management, including asking challenging questions and probing for alternative ways to resolve the enduring disputes sponsors and participants have with the agency. This is where I hope PBGC can grow. If PBGC can listen more and act in partnership with plan sponsors and participants, then many of the substantive issues raised here would be resolved in a way that promotes a healthy private pension system and a financially sound PBGC.

Year-end always presents a time to reflect on the activities of the past year as we all anticipate the promise that comes with the New Year, and to thank those who have been so supportive in helping us assist participants with their benefit entitlement claims and plan sponsors to fulfill their obligations to their defined benefit plans.

To that end, the small Advocate staff of two moved to a new suite on the second floor at PBGC, and we now really do have an "Office of the Advocate." The development of the Office of the Advocate would not have been possible without the support of the congressional committees of jurisdiction and their hardworking, dedicated staff, the PBGC Board, the Board agencies and their staff, particularly the dedication of Assistant Secretary Borzi and her staff, and that of the PBGC Director.

Respectfully, I submit for your consideration the 2016 PBGC Participant and Plan Sponsor Advocate Annual Report in accordance with my reporting duties under ERISA section 4004.

Sincerely,



Constance A. Donovan
PBGC Participant and Plan Sponsor Advocate
December 30, 2016

cc: Camille M. Castro, Esq.
Associate PBGC Participant and Plan Sponsor Advocate

Statutory Authorization[1]

DUTIES

The Participant and Plan Sponsor Advocate shall—

(1) Act as a liaison between the corporation, sponsors of defined benefit pension plans insured by the corporation, and participants in pension plans trusteed by the corporation;
(2) Advocate for the full attainment of the rights of participants in plans trusteed by the corporation;
(3) Assist pension plan sponsors and participants in resolving disputes with the corporation;
(4) Identify areas in which participants and plan sponsors have persistent problems in dealings with the corporation;
(5) To the extent possible, propose changes in the administrative practices of the corporation to mitigate problems;
(6) Identify potential legislative changes which may be appropriate to mitigate problems; and
(7) Refer instances of fraud, waste, and abuse, and violations of law to the Office of the Inspector General of the corporation.

ANNUAL REPORT

(1) In general—Not later than December 31 of each calendar year, the Participant and Plan Sponsor Advocate shall report to the Health, Education, Labor, and Pensions Committee of the Senate, the Committee on Finance of the Senate, the Committee on Education and the Workforce of the House of Representatives, and the Committee on Ways and Means of the House of Representatives on the activities of the Office of the Participant and Plan Sponsor Advocate during the fiscal year ending during such calendar year.

(2) Content—Each report submitted under paragraph (1) shall--
(a) Summarize the assistance requests received from participants and plan sponsors and describe the activities, and evaluate the effectiveness, of the Participant and Plan Sponsor Advocate during the preceding year;
(b) Identify significant problems the Participant and Plan Sponsor Advocate has identified;
(c) Include specific legislative and regulatory changes to address the problems; and
(d) Identify any actions taken to correct problems identified in any previous report.

[1] *See* ERISA § 4004 (29 U.S.C. § 1304).

PLAN SPONSOR ISSUES

Plan sponsors and their advisors contact the Office of the Advocate seeking assistance on a wide variety of issues involving disputes with the corporation. Many sponsors request assistance from the Office of the Advocate on a pending matter at PBGC when negotiations have stalled. Overall, these requests for assistance generally involve a sponsor struggling for some period of time to reach resolution with PBGC.

Sponsor cases brought to my attention suffer from the same issues reported in prior Advocate Annual Reports. Notably, the Office of the Advocate hears about adversarial dealings with PBGC resulting from the way the corporation conducts business with the sponsor community. Sponsors observe that there is a lack of transparency in dealing with the corporation that relates to an apparent unwillingness by PBGC to share its assumptions or concerns about a transaction the sponsor is about to undertake, and how that transaction might affect the pension plan. The Office of the Advocate often finds considerable misunderstanding exists between the sponsor and PBGC, and that without a mutual exchange back and forth on the issues about the transaction and its potential threat to the pension plan, the sponsor's expenses associated with legal and other consultant fees becomes cost-prohibitive.

More importantly, this lack of PBGC transparency contributes to significant delays in resolving the sponsor's issues before the agency and constrains the sponsor from proceeding with a transaction which may actually strengthen the company and secure jobs and the future of the pension plan. This remains an enduring difficulty for the sponsor community regarding their encounters with PBGC that they characterize as un-businesslike and costly, and may even be detrimental to participants and beneficiaries in plans insured by the corporation, since the constant haggling with plan sponsors and their advisors comes at a tremendous cost to business.

Before providing case studies illustrating the above observations, I want to mention two optimistic points. First, as set forth at the end of this section, there have been positive steps taken by PBGC to address plan sponsor concerns, including premium penalty relief. These are excellent improvements in the right direction, both substantively and in terms of the message sent by PBGC to plan sponsors.

Second, I have always had great respect for the abilities and dedication of the PBGC team. They are smart and hardworking people who care deeply about their jobs and the work they do for the agency. In this context, it is even more puzzling to me that they do not show their potential for collaboration to plan sponsors who actually come to them to ensure that the structure of a transaction properly takes into account any PBGC concerns.

To that end, sponsor advisors have observed to me that if PBGC does not change its approach by acting in a collaborative and transparent manner with the plan sponsor to work toward an efficient and timely resolution, then, depending on the facts of the case, the advisor may recommend the employer bypass PBGC and proceed to bankruptcy. Without a dialogue between the sponsor and PBGC, bankruptcy becomes attractive as the most cost-effective way to ensure its business as a going-concern and avoid devoting a large portion of its resources to running a pension plan.

Therefore, I would like to explore means of bringing together plan sponsors with the senior leadership at PBGC to highlight the problems I hear about on a constant basis. One idea could be an annual or quarterly roundtable forum, with participation by such plan sponsors (or their advisors), the Board Agency Representatives, and senior officials at PBGC. I will be discussing this possibility with the Board and the PBGC Director, along with other ideas to bring the corporation closer to its premium paying customers, the plan sponsors. Since there is often movement toward resolution once PBGC leadership is engaged in a particular sponsor dispute, I am optimistic that such a roundtable forum can further strengthen working relations between sponsors and PBGC to resolve disputes in a more timely and effective manner.

CASE STUDY: Adversarial Approach and Long Delays by PBGC Result in No Money into the Plan and Call into Question the Use of the Early Warning Program

A sponsor targeted by PBGC for almost five years reached out to the Advocate for assistance in resolving a dispute with the agency related to a 4062(e) issue[2] that had been open for those five years and concerns about PBGC's actions triggered by the Early Warning Program due to planned business activities.[3]

The company had a defined benefit plan that met the funding requirements, and the sponsor was willing to resolve the open 4062(e) issues (which the company believed the recent legislative changes had already eliminated). The company also wanted to settle any concerns PBGC might have about the planned business activities and resolve what PBGC considered a potential future 4062(e) event. However, according to the company, PBGC refused to engage, made financially unreasonable demands, and allowed calls by the CEO of the company to PBGC to remain unanswered.

While PBGC did meet with the sponsor for what the sponsor understood to be a settlement meeting of the issues, PBGC declared at the outset of the meeting that it was only "in listening mode." PBGC did not ask substantive questions to broaden its knowledge about the transaction, and after numerous additional meetings and calls with

[2] Until late 2014, ERISA section 4062(e) required the employer to provide security to PBGC when it ceased "operations" at a facility, and as a result of ceasing operations, more than 20 percent of the total number of employees who were participants in the defined benefit plan were separated from their employment. A company could satisfy a 4062(e) liability by placing the liability amount owed in escrow, or PBGC could require a bond for up to 150 percent of the liability. If the plan did not terminate within five years of the cessation of operations event, then the money held in escrow was returned to the company without interest or the bond was cancelled. However, PBGC's practice was not to take security in the form of a bond or escrow, but rather to negotiate with employers to accelerate funding of the pension plan by the large and disproportional amounts of money that would otherwise be required for security. Many of these plans were frozen defined benefit plans whose employers had made all the required employer contributions or even exceeded the funding requirements, yet were faced with significant accelerated funding required by PBGC—funding that could otherwise be used for business investments, including the creation of American jobs. Once the employer experienced this interaction with 4062(e), it was not unusual that it pursued de-risking options so as to partially or completely exit the defined benefit system. However, in December of 2014, Congress passed legislation that changed the statutory provisions of 4062(e) in a number of ways that rendered downsizing liability more predictable and reasonable. The law was enacted on December 16, 2014.

[3] PBGC monitors corporate transactions, events, or trends that could affect a plan sponsor's ability to continue to support its pension plan as part of the Early Warning Program. The Early Warning Program is discussed in greater detail within this Report.

> PBGC and its advisors, ultimately allowed the negotiations to stall without resolution, walking away from the company's multimillion dollar settlement offer to contribute to its pension plan, where no contribution to the plan was required.
>
> To receive this multimillion dollar final settlement contribution to the plan, PBGC was asked to agree to three conditions: waive the open 4062(e) claim that the company believed failed to meet the new statutory requirements; agree if there was a potential 4062(e) event under the new legislation, it would consider this settlement as fully satisfying any remaining liability; and agree to not interfere with the company's debt buyback and exchange programs that all parties agreed would be advantageous to the company. Ultimately, PBGC refused to settle and no extra contributions have been made to the plan.

To further complicate interactions between sponsors and PBGC, sponsors, like the one discussed above, and their advisors, describe meetings with PBGC where it is clear PBGC staff is not familiar with the issue, or has not prepared for the meeting, forcing the sponsor and their advisors to spend a substantial portion of their meeting time just getting PBGC staff back up to speed on the issues. It is not clear whether this lack of preparation is because so much time has elapsed that PBGC has forgotten, or if the agency is just unprepared or unwilling to have substantive, meaningful discourse with the sponsor.

Recommendation:

The above case study is but one example of what must change in PBGC's procedures and approach when addressing disputes between the plan sponsor community and the corporation. These issues are further complicated by a lack of substantive discussion when the plan sponsor actually meets with PBGC. Plan sponsors go to great expense to fly in consultants, advisors, and top leaders of the corporation, such as the CEO, CFO, or General Counsel, with the expectation that they will be received at PBGC by like decision-makers, yet discover they are greeted only by junior level staff apparently not even authorized or knowledgeable enough to ask questions, let alone make decisions.

So, again I say as discussed in my 2014 Inaugural Report, lessons can be learned from 4062(e), with the main takeaway that PBGC needs to listen and adjust more based on what it hears from the plan sponsor community.

A positive step toward active listening and acting in partnership with the plan sponsor community in 2017 could involve working with sponsors and their advisors to issue regulations on the 2014 legislative changes to 4062(e). While PBGC did update its website to include a simplified version of the revised law and its changes, there are still ambiguities in the legislative language that require further clarification. Practitioners tell me that their clients are raising interpretative issues concerning the 2014 legislative changes to 4062(e), and PBGC has promised future guidance on questions of interpretation and implementation of 4062(e). It would be beneficial to all parties if PBGC prioritizes regulatory guidance on 4062(e) to bring certainty to these interpretative questions.

The Need for Program and Regulatory Guidance

Early Warning Program

PBGC recently released guidance on the Early Warning Program,[4] and while that guidance is a positive step in being more transparent as to how PBGC administers the program, it seems to confirm a troubling development highlighted in the 2015 Advocate Annual Report: PBGC's use of the Early Warning Program as an end run around 4062(e) restrictions enacted by Congress in 2014.

The Early Warning Program is not a statutory provision in Title IV of ERISA, but rather a "program" created by PBGC staff to monitor certain companies with underfunded defined benefit pension plans in order to identify corporate transactions that could jeopardize pensions and arrange suitable protections for those pensions and the pension insurance program.[5] This program allows PBGC to prevent losses before they occur, rather than waiting to pick up the pieces when a company goes bankrupt and its financial resources are limited. However, the implementation of what sounds like a very reasonable program falls short when it comes to the actual encounters plan sponsors have with PBGC, who subsequently contact the Office of the Advocate for assistance.

Early reaction by the sponsor community to the new guidance is that it seems to suggest that PBGC can and will intervene in routine business transactions which is hardly helpful in encouraging the maintenance of pension plans and calls into question whether Congress ever intended PBGC have this kind of authority. This guidance also significantly expands on the types of situations that might trigger an Early Warning Program case, as PBGC has now added "significant credit deterioration"[6] and "a downward trend in cash flow or other financial factors"[7] to the standard list of considerations.

Although PBGC has historically taken into account a company's "creditworthiness" or other financial factors relating to the company under the Early Warning Program, it did so in the context of a particular transaction. Now it appears that such factors may be the basis for an Early Warning Program demand absent a particular transaction. For plan sponsors, that is a troubling expansion of the reach of the Early Warning Program. As a result, PBGC may be contacting employers to request that the employer make an excess contribution to the plan or provide some other form of protection to PBGC and/or the plan, in the absence of any transaction, and threaten involuntary termination of the plan if the employer refuses, making it almost impossible for the employer to overcome financial difficulties.

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[4] *See* http://www.pbgc.gov/prac/risk-mitigation.html.
[5] PBGC also interprets ERISA section 4042(a)(4) as providing authority for the Early Warning Program.
[6] In the context of the 2006 Pension Protection Act, PBGC asked Congress to increase contribution requirements on companies with bad credit ratings. Congress rejected the request, and now PBGC is doing something similar with respect to the Early Warning Program guidance.
[7] This factor is vague as it could authorize the Early Warning Program with respect to almost every company with a defined benefit pension plan, potentially giving PBGC discretion to make very burdensome demands on these companies.

Payment of Interest on Premium Overpayments

Another outstanding issue that needs regulatory guidance involves the PBGC payment of interest on premium overpayments. This issue was originally raised in the Advocate's 2014 Annual Report. Provisions of the Pension Protection Act of 2006, enacted over ten years ago, allow the payment of interest on premium overpayments (even on a retroactive basis). PBGC has expressed the view that it must adopt regulations implementing its authority to pay interest on overpayments. PBGC has committed on a number of occasions to issuing these regulations, which would go a long way in balancing the scales when PBGC exacts interest on late premiums, and may have the positive effect of causing PBGC to work more expeditiously in resolving premium overpayments.

CASE STUDY: Closing Audit Complications that Span Years and a Costly Most Unusual Administrative Review Process

In the "eyes" of the plan sponsor and actuarial communities, another example of PBGC's adversarial approach, which includes a lack of transparency and apparent unwillingness to engage in substantive dialogue and discussion, concerns a matter arising from a closing audit after the plan sponsor, a prominent university from a small state, completed a standard termination of its plan in late 2012.

In its 2014 audit finding of the standard termination, PBGC interpreted a plan document provision contrary to the plan administrator's interpretation over the past thirty years. The language in the plan was not unique, and it had been interpreted in the same manner by other plan administrators. PBGC's interpretation conflicted with well-settled case law providing deference to a plan administrator's interpretation of the terms of a plan document, and resulted in an actuarially inequivalent benefit to participants that was never promised or expected.

From the outset, the plan sponsor repeatedly requested a meeting with PBGC so the parties could discuss the complex actuarial issues. PBGC initially refused to meet, but ultimately agreed the parties could convene to discuss the issues as soon as the plan sponsor filed a request for reconsideration, which is essentially the final step in a plan sponsor's appeal of a PBGC determination. After this happened, PBGC informed the plan sponsor that the meeting would take the form of an "oral argument," which finally occurred this past June. The "oral argument" ended up being largely one-sided, providing the plan sponsor with very limited feedback about PBGC's concerns.

Just to put the timeframe in perspective, since the plan was terminated in 2012, until now in 2016, an entire class has entered and graduated from this university plan sponsor. PBGC finally issued a decision in late December, stating that it would not take any further action against the plan sponsor. While this outcome is good, it would have been better if the agency did not take so long to come to its final decision, prolonging the administrative review process at the expense of the plan sponsor.

Recommendation:

Although PBGC has the ability to engage in Alternate Dispute Resolution (ADR) with plan sponsors, it instead prefers to go through its adversarial review process, using ADR primarily for internal labor and employment relations matters.[8] PBGC's 1999 ADR policy recognized the benefits of ADR as a way to resolve "appropriate disputes in a timely and cost-efficient manner." Although there is no entitlement to ADR, per PBGC's policy, it can "provide faster, less expensive, and more effective resolution of disputes that arise with … the regulated community and others with whom the agency does business."

PBGC should consider expanding its use of ADR to its disputes with plan sponsors rather than subjecting them to the costly administrative review process. The Advocate's 2014 Annual Report recommended the corporation consider ADR as a faster and more cost effective solution for sponsors to resolve their disputes with the corporation, and I again make that recommendation.

> ***CASE STUDY: More than Four Years of Negotiation without Resolution Creates Uncertainty for Businesses and Triggers a Chain Reaction of Adverse Effects for Investors, Customers, Employees, and Unions***
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> A large multiemployer plan seeking PBGC's approval of a hybrid withdrawal liability method has been discussing this issue with the agency for more than four years. Although PBGC is now working toward resolution with this plan sponsor, many interactions with PBGC and the sponsor caused significant friction with the sponsor, leading it to contact the Advocate and seek political and Board agency assistance to bring focus to the difficulties in resolving the issues in a businesslike manner with the corporation.
>
> During four years while negotiations have languished, the business climate for potential contributing employers in this new hybrid withdrawal pool has significantly changed. Throughout the negotiations PBGC has also often gone "dark" for periods of time, only to return with what the plan sponsor views as additional terms and conditions to what was thought to be a settled deal.
>
> Time continues to pass without a finalized agreement. While PBGC and the sponsor continue to meet to try to finalize an agreement, the lack of resolution means continued uncertainty for the contributing employers in this multiemployer plan, the participants and retirees in this plan, the employees of the employers, and organized labor who represent these employees, not to mention what this quagmire signals to the competitors and investors of these contributing employers.

Recommendation:

When a substantial part of a company's job becomes managing its defined benefit plan rather than creating value for shareholders and customers, then sponsors begin the process of de-risking and shedding their defined benefit plan obligations. As one plan sponsor advisor observed to me, "the company is not running a business to run a pension plan." By reviewing its administrative

[8] See 64 Fed. Reg. 17696 (Apr. 12, 1999).

practices and increasing transparency when dealing with plan sponsors, PBGC could mitigate problems such as those highlighted in this Report.

A review of PBGC's administrative practices should also address PBGC's communications to plan sponsors. If PBGC rejects a sponsor's request, it should provide a detailed explanation instead of a blanket "facts and circumstances" reason for denying the request. Many companies who come to PBGC with various requests believe they have a good case. When they are turned down by the agency with very little explanation, many become frustrated with the lack of transparency and subsequently contact the Office of the Advocate, describing their interactions with PBGC as lacking substance.[9] If PBGC provides sponsors with more thorough explanations of its decisions, this would facilitate sponsors' understanding of PBGC's review process and assumptions, and would go a long way in improving relations with sponsors who just want to be compliant.

Since one of PBGC's goals is to preserve the voluntary defined benefit plan system, its decisions are best received when they reflect and further this goal of preservation. Boilerplate communications and a lack of transparency by the agency are just two examples of PBGC engagements with plan sponsors that hinder this goal.

Case Study: The Small to Medium Sized and Not-For-Profit Plan Sponsors' Interactions with PBGC

Plan sponsors repeatedly share their view with me that PBGC's approach to enforcement is counterproductive to the agency's goal of maintaining a defined benefit system. The Advocate's 2014 and 2015 Reports describe instances of an aggressive second-guessing of – and interference with – routine private business operations, an overly adversarial approach to sponsors involving threats of litigation as a negotiation tactic, and overreaching demands for financial contributions to pension plans that exceed the financial wherewithal of the company. That is how sponsors who seek assistance from the Office of the Advocate view their interactions with PBGC, and this approach can be especially detrimental to small and medium sized businesses and not-for-profit organizations.

Small to medium sized employers and not-for-profit organizations that seek assistance from the Office of the Advocate describe encounters with PBGC that are much more adversarial than helpful when the agency works with these sponsors to address difficult business problems that may affect their pension plans. Many of these type of sponsors who contact the Office of the Advocate have proactively reached out to the corporation to assist with the distress termination process for pension plans they cannot sustain, or are otherwise engaged in negotiations with the corporation.

[9] A sponsor contacted the Office of the Advocate for assistance regarding its request for a 4010 waiver. Section 4010 of ERISA requires certain underfunded plans to report identifying, financial, and actuarial information to PBGC. Based on a newly issued final rule regarding section 4010 reporting, the sponsor would have been subject to a 4010 filing for the first time. *See* 81 Fed. Reg. 15432 (Mar. 23, 2016). The sponsor requested a 4010 waiver from PBGC, providing the agency with detailed information supporting its request. PBGC's denial of the waiver request did not explain the agency's reasoning, stating, "[a]fter a careful review of the facts and circumstances, PBGC denies your request." This is but one example of the non-responses that occur between PBGC and plan sponsors.

> Employers who come to PBGC for help to facilitate an orderly distress termination of their pension plan are often met by unreasonable financial demands for more cash than they can afford. In our experience, PBGC often makes these demands to an employer maintaining a small pension plan that has long been frozen and which will never exceed PBGC guaranteed benefits in the event PBGC trustees the plan. Thus, such large financial requests and additional extractions of cash from the company will rarely benefit plan participants but rather inure to the benefit of the single-employer trust fund.
>
> We also hear from small to medium sized employers engaged in negotiations with PBGC for a variety of other reasons. In some cases, PBGC files litigation seeking to extract cash beyond that available to the company. This litigious approach by PBGC signals to the plan sponsor's competitors, the creditors, its suppliers, and its employees that the company cannot be counted on as a going concern, so it is best not to do business with or work for it.

Recommendation:

These small to medium sized and not-for-profit plan sponsor cases can drag on for years, hurting the sponsor while also potentially putting PBGC's recovery at risk. For example, one small sized plan sponsor has been dealing with the corporation for almost six years over distress termination issues that have led to litigation.

PBGC needs to track and report the amount of time it takes to settle cases, incentivize analysts to reach settlements, and develop some system for triggering management oversight when cases are open more than six months. Currently, there is little incentive for PBGC to settle cases. This tracking system should monitor situations where PBGC lingers on settling a case as well as when the corporation takes too long to settle a distress termination. As there is currently no time limit for PBGC to act on distress terminations, management should establish time limits and monitor when staff goes past these limits in reviewing distress termination cases. This type of tracking system may improve PBGC interactions with plan sponsors who often wait in limbo for months or even years while PBGC reviews their cases.

While PBGC's risk mitigation tools can be used for good and protective purposes, its overreach quickly becomes destructive and harmful to American businesses, especially small to medium sized companies and not-for-profit organizations, when the agency stalls on acting on a distress termination or settling cases. I would like to reiterate my 2015 Annual Report recommendation to explore with the sponsor community and PBGC options for improving the corporation's risk mitigation tools so the enforcement tools and practices protect the sponsor's plan without impairing a company's ability to engage in business transactions which will strengthen its business and the retirement security of its workers.

PBGC Positive Steps to Address Sponsor Concerns

PBGC has taken positive steps, however, over the past year to address a number of plan sponsor issues raised in previous Advocate Annual Reports, and those changes are certainly noteworthy, commendable, and well received by the sponsor community and plan sponsor practitioners.

Premium Penalty Relief

PBGC recently finalized its regulatory change for automatic-like penalties for premium penalty failures.[10] The final rule, effective October 24, 2016, reduces the financial burden of PBGC's late premium penalties by reducing penalty rates for all plans and waiving most of the penalty for plans that meet a standard for good compliance with premium requirements. The rule is an effort by PBGC to reduce the regulatory costs and make it easier for plan sponsors to maintain traditional defined benefit plans.

While the rule was well received by the sponsor community, this relief only addresses a dimension of the problem: penalties for honest mistakes can still be significant depending on when the error is caught. I have heard from plan sponsors regarding PBGC's apparent refusal to use its authority to exercise discretion when a penalty is imposed for an "honest human mistake" by a consistently compliant sponsor. In these situations, since the penalty does not fit the offense and does nothing to further compliance, the effect is harmful and encourages the exit of sponsors from the defined benefit system.

Mechanical formulas should not overrule good judgment. Leaders in management are paid to make distinctions and exercise sound judgment.

Merger of OCC back into OGC

In the Advocate's 2014 Report, I recommended that PBGC's Office of the Chief Counsel (OCC) report directly to the Office of the General Counsel for all purposes, as they already did for all legal matters. OCC was reporting administratively to the Office of Negotiations and Restructuring (ONR), which included all performance appraisals, bonuses, and compensation. I recommended this change to ensure greater independence regarding consultation and legal advice provided to the program offices of ONR. I am pleased to report that the merger of OCC back into OGC was finalized this year. This is a positive change in the eyes of the plan sponsor community and will help ensure impartiality of legal advice and consultation.

Missing Participants Regulatory Update

In late September, PBGC issued a proposed rule that would expand its missing participants program to cover missing participants in most terminated defined contribution plans, such as 401(k) and profit sharing plans, as well as certain defined benefit plans not currently covered under PBGC's existing program. The proposed rule is anticipated to become effective in 2018. Although the program is optional for most defined contribution plans subject to ERISA, it will still have a significant impact for many plan sponsors, as it provides a new alternative to assist

[10] 81 FR 65542 (Sept. 23, 2016).

with plan termination. Under the proposed regulation, plan sponsors have the option to transfer missing participant accounts to PBGC to hold until claimed by the missing participant. This will be helpful for plan sponsors, as it may be cheaper than setting up IRA or escrow accounts for the missing participants and also may increase the ease which participants can search for their missing benefits.

Pension De-Risking Study

As I mentioned in last year's Report, plan sponsors have raised the possibility of the Advocate commissioning a study on pension de-risking, including the effects of increased premiums on de-risking activity. Because the Office of the Advocate does not have a budget for such a study, plan sponsor trade groups have explored other options in terms of entities that might partner with the Advocate. One possible collaboration has not worked out, but I do want to report that conversations with senior PBGC leadership were very constructive on this topic. I would like continue these conversations to further pursue the possibility of commissioning the study this coming year in consultation with the PBGC Board, the PBGC, participant groups, and plan sponsors.

PARTICIPANT ISSUES

The Office of the Advocate receives many requests for participant assistance directly from participants and participant advocacy groups, and also from various departments within PBGC. These requests for assistance have also involved facilitating broader participant-focused initiatives with other organizations both within and outside the Federal government. The Office of the Advocate works primarily with PBGC's Office of Benefits Administration (OBA) and Standard Termination Compliance Division (STCD) to address these various participant concerns.

While there are certain PBGC processes and procedures that present ongoing challenges for participants, I would be remiss to not initially acknowledge that PBGC has taken major strides over the past year to address a number of ongoing participant concerns related to benefit entitlement claims and assistance in resolving participant disputes with the corporation. PBGC has also made proactive changes in its administrative practices to help reunite participants with their missing pension benefits, and some of these changes have resulted in PBGC partnering effectively with participant advocacy groups and other federal agencies for the benefit of a broad spectrum of plan participants. These changes are noteworthy and have been well received by participants and their advocates. I proudly share these participant-focused initiatives with you.

PBGC Strides Regarding Participant Concerns

Missing Participants Regulatory Update and Inter-Agency Collaboration

PBGC issued a proposed rule in late September that would expand its Missing Participants Program.[11] This rule would cover missing participants in most terminated defined contribution plans, such as 401(k) and profit sharing plans, as well as certain defined benefit plans that are not currently covered under the existing program, and also makes changes to the existing program. The regulation is expected to be implemented in 2018, after public comment and publication of a final regulation. This expanded rule should hopefully increase opportunities to reunite participants and beneficiaries with their lost retirement benefits.

Additionally, during this past year, the Office of the Advocate worked with the Department of Labor's Employee Benefits Security Administration (EBSA) Chicago Regional office and PBGC to enable the Chicago Regional office's benefit specialists to actively work with the PBGC's missing participants database. These additional resources will further accelerate reuniting participants with their missing benefits. This initiative was discussed in last year's Advocate Report, and both EBSA's Chicago Regional office and PBGC have been working together to successfully find missing participants.

There is a perception that the missing participants database at PBGC is not "actively worked," but rather represents a passive database housing pensions of participants that is only useful if the participant happens to find his or her pension in the database. That perception is not accurate, and the additional resources from EBSA's Chicago Regional office actively working the

[11] 81 FR 64699 (Sept. 20, 2016).

database in addition to the work done within PBGC, will go a long way toward clarifying this misconception.

I want to commend OBA and the Office of the General Counsel for their leadership in working with EBSA and the Chicago Regional office to get this great initiative off the ground. It is an example of coordination between two federal agencies to help participants make sure they get their benefit entitlements. In this day and age where retirement resources seem so scarce for so many of our senior citizens, this is one small step in providing additional retirement security.

Continued Meeting and Interaction with Participant Advocacy Groups

PBGC met with participant advocacy groups in late June to discuss the financial and projections reports of the corporation, and the newly released report required under the Multiemployer Pension Reform Act of 2014 (MPRA). This meeting was well received by the participant advocacy groups and a thoughtful exchange occurred between PBGC and the advocacy groups around a number of important pension policy issues, particularly those that relate to multiemployer pension plans. Additionally, PBGC met with participant advocacy groups after issuing its 2016 Annual Report, providing a forum for discussion about PBGC's financials.

Past Advocate Reports noted that the participant advocacy groups wanted more regularly scheduled exchanges with PBGC. PBGC's Deputy Chief Policy Officer and his staff have been diligent in ensuring these exchanges take place on a routine basis.

New PBGC Retroactive Benefit Policy

PBGC recently addressed an important policy change concerning participant benefit entitlements when the corporation recently updated its retroactive benefit practices. This policy change was well received by the pension counseling projects because it is particularly relevant to many potentially omitted participants who often reach out to the pension counseling projects for assistance. PBGC revised its policy for participants who are past their normal retirement date so that they may now be eligible for retroactive annuity start dates.[12] This is welcome progress, and sustained interaction and communication between PBGC and outside participant advocacy groups must continue, particularly when it may result in changes or amendments to policies and procedures.

Participant Issues that Remain a Challenge and Present an Opportunity for Change

PBGC processes, procedures, and historical administrative practices still present challenges for participants and their advocates. In past Reports, I have highlighted certain persistent problems faced by participants who come to PBGC seeking a benefit, such as cumbersome requests for old documentation and delays in responding to participant claims. These problems have continued, particularly in the context of claims from potentially omitted participants. These participants often begin looking for their benefit after receiving a notice of potential benefits from the Social Security Administration (SSA), and subsequently reach out to PBGC for assistance. These cases

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[12] *See* http://pbgc.gov/wr/benefits/payments/if-you-are-not-yet-receiving-benefits.html for information on PBGC's updated policy.

are complex and may involve much time and effort by the participant to prove his or her entitlement to a benefit.

The Office of the Advocate works on potentially omitted participant cases with two departments at PBGC: the Office of Benefits Administration (OBA) and the Standard Termination Compliance Division (STCD). However, based on working with both departments to address potentially omitted participant cases, I have observed that these two departments appear to have inconsistent ways of analyzing documentation from participants and their advocates to prove entitlement to a benefit.

OBA has made progress in its analysis and response to claims from participants who may have been omitted during the trusteeship process when the plan moves from the sponsor and is trusteed by the corporation. In many cases, the participant does not have the relevant tax returns that would show whether the participant was "lumped out," meaning paid the entire benefit as a lump sum by the sponsor prior to the plan's trusteeship by PBGC. Instead of automatically denying these participants a benefit due to the lack of tax returns, OBA is making benefit determinations based on the exercise of sensible judgment and sound discretion, reviewing and evaluating the validity of secondary documentation, and properly documenting the reasoning of their determination to ensure a complete audit trail.

CASE STUDY: Potentially Omitted Participant with Secondary Documentation

A potentially omitted participant contacted the Office of the Advocate after trying for more than three years to prove his entitlement to a benefit. The participant initially reached out to PBGC in August 2012 regarding a possible deferred vested retirement benefit from a plan the corporation trusteed in 2006. The participant provided PBGC with a letter from the pension plan's committee detailing his deferred vested retirement benefit, years of service, and benefit rate.

PBGC initially reviewed the letter and plan documents and did not find a record of the participant's deferred vested benefit. PBGC subsequently requested the participant's authorization to access SSA earnings in an attempt to further validate the letter. When these attempts by PBGC failed, PBGC sent a letter to the participant in May 2013 requesting he provide SSA Potential Private Retirement Benefit information as well as tax returns to prove he did not receive a lump sum distribution.

After the participant contacted the Office of the Advocate, conversations with the participant revealed that he did not have the documentation, as he lost most of his records, including old tax returns, in a fire in 1999. He was also unable to obtain the relevant information from the Internal Revenue Service (IRS) or SSA. However, at the request of the Advocate, OBA reviewed supporting evidence and information available in PBGC's files on the trusteed plan, and determined that there was sufficient secondary evidence to grant the participant his deferred vested retirement benefit.

STCD has taken a more inflexible approach when analyzing and responding to potentially omitted participant claims. STCD addresses benefit entitlement claims where a participant may

have been omitted during a standard termination. As PBGC's records, particularly for older standard terminations, are often poor, STCD places the burden on the participant to produce years of old tax returns to prove that the participant did not receive a lump sum. These demands for old tax returns and other documentation are couched as concerns about violating the Improper Payments Elimination and Recovery Act (IPERA).[13]

Based on the experiences the Office of the Advocate has had with potentially omitted participants searching for their benefit from plans that have undergone the standard termination process, there has been a reluctance by STCD to use and analyze secondary information to create a record in the absence of other documentation, and the process quickly becomes adversarial and frustrating for the participant.

Recommendation:

Even though there may be differences in the quantity and amounts of information received by each department, both OBA and STCD have authority to make benefit determinations. Although the Office of the General Counsel has committed to providing guidance which may help relieve the burdens of document production and trying to "prove a negative," there are many repeat issues discussed in this Report that have appeared in previous Advocate Reports. These Reports had represented that many of the issues raised here had been resolved, but there is more work to be done.

In the absence of guidance and consistency between OBA and STCD's practices and procedures, the entire process can easily turn into an adversarial case review, with PBGC looking for reasons to deny the benefit rather than finding ways to analyze available case and other documentation to interpret information in a way that could support granting a benefit. PBGC also continues to demand aged documentation that may be impossible for the participant to obtain. It is unknown how many potentially omitted participants give up during this cumbersome and frustrating process, particularly elderly participants who are often the subject of this kind of administrative action.

> ***CASE STUDY: Widow Searching for Months for Late Husband's Benefit***
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> The New England Pension Assistance Project brought the case of a widow seeking survivor benefits to my attention earlier this year. The widow's husband left his company after becoming term vested in his pension and died shortly after. When the widow turned age 60, she started hunting for her late husband's benefit thinking it would be easy to initiate, as she had a notice from the SSA of a potential retirement benefit from her late husband's plan and a letter from the company's human resources department specifying the same benefit.
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> The widow's counsel reached out to PBGC and was advised to contact two annuity companies that handled the purchase of annuities for the plan sponsor. As neither

[13] The Improper Payments Elimination and Recovery Act (IPERA) is intended to prevent improper payments, and would preclude a governmental agency from making a payment for which it has no responsibility (such as when the responsibility to pay belongs to another party). *See* Pub. Law 111-204 (July 22, 2010).

insurance company had an annuity for the now deceased participant, the widow's counsel then contacted every successor company to the original employer, but none of the successor employers had assumed the pension liability. Finally, the widow's counsel filed a potentially omitted participant claim with PBGC in November 2015, including tax returns which showed no lump sum distributions to the participant or surviving spouse.

In addition to the tax returns submitted by the widow's counsel, PBGC requested three additional year's tax returns. The widow was unable to locate these returns and could not obtain the documents from the IRS, as the tax returns had not been retained due to their age. PBGC also embarked on additional, duplicative research regarding the annuity companies and any potential successor companies. The case continued without resolution while PBGC completed its due diligence, reaching the same conclusion as the widow's counsel regarding the lack of a successor company assuming the plan's liabilities. PBGC also requested the additional tax returns from the IRS and was informed that the records did not exist. PBGC did not explain the relevance of the additional tax returns to the widow's counsel, and it remains unclear as to how these years relate to the widow's claim.

The widow finally received a favorable determination from PBGC, over six months after the widow's counsel filed the initial claim with PBGC. The New England Pension Assistance Project detailed the widow's case in its Summer 2016 "Pension Notes" newsletter, noting "We have found that it is a very steep uphill battle to get the PBGC to pay benefits to these omitted participants, as it assumes that everyone entitled to a benefit has been accounted for. We need to assemble a body of rock-hard evidence to succeed in these cases."[14] This widow was fortunate to be represented by competent counsel, but there are many other potentially omitted participants who have reached out to PBGC and eventually give up, disheartened by the process.

Recommendation:

PBGC continues to demand definitive documentation to confer a benefit, such as old tax returns, to supplement inadequate PBGC documentation on former plans. As a result, participants seeking to obtain benefit entitlements incur great costs, including both the monetary cost of obtaining records as well as the time cost of looking for historical records that no regulatory authority requires individuals to retain.

CASE STUDY: Poor Standard Termination Documentation and Lack of Tax Returns

A 79-year-old participant reached out to the Office of the Advocate after he had been struggling with PBGC's STCD for several years to prove he did not receive a lump sum distribution from a plan that terminated in the mid-1980s. The available case documentation showed that the participant was term vested and eligible for a pension, but he did not appear on the list for an annuity purchase.

[14] "The PBGC and Omitted Participants," Summer 2016 Pension Notes Newsletter, available at http://blogs.umb.edu/pension/2016/08/24/the-pbgc-and-omitted-participants/.

As part of its case review, PBGC requested 30-year-old tax returns from the participant, since the administrative record did not contain any direct evidence establishing that the participant did or did not receive a lump sum distribution. Since the participant was unable to produce tax returns from the mid-1980s (despite working with the IRS's Taxpayer Advocate), PBGC issued an initial benefit determination, denying the benefit. PBGC's decision relied on "conclusive evidence that the plan sponsor distributed benefits in the form of lump sum payments,"[15] and stated that "based on the preponderance of the evidence, it is more likely than not" that the participant received a lump sum distribution. Additionally, PBGC found the participant's claim to be time barred under the doctrine of laches.[16] The letter gave the participant the right to appeal the benefit determination to the PBGC Appeals Board.

The participant contacted the Office of the Advocate after receiving the initial benefit determination letter denying his benefit. He could not understand much of the reasoning in the letter and had many questions about PBGC's analysis, including the denial letter's reliance on the doctrine of laches.

Citing the doctrine of laches may create a detrimental and prejudicial precedent for future potentially omitted participants. Perhaps PBGC has forgotten that it coined the phrase "woodwork participants," for participants like this individual who "come out of the woodwork" after years to claim a benefit. The participant advocacy groups and the Office of the Advocate are concerned that this legal reasoning can and will have a deleterious effect on future potentially omitted participants and their beneficiaries seeking entitlement to their benefits.

Potentially Omitted Participants and a Failure to Exercise Sound Judgment and Discretion: A Post Script for "Blaming the Victim"

In the absence of definitive documentation showing a distribution to this participant, it is unreasonable for PBGC to require a 79-year-old participant to produce 30-year-old documentation to basically "prove a negative" (that he did not get a distribution), while it appears that PBGC accepted inadequate and incomplete documentation in overseeing the plan's termination. Without question, PBGC needs to satisfy itself that it is not making an improper payment, but when does the demand for unreasonable and unavailable documentation end? Further, should the burden be on the participant to prove entitlement to a benefit when it is clear that certain records are missing and not accounted for even though PBGC requested the information from the sponsor?

Aside from the confused reasoning and selective use of secondary evidence in the initial determination letter denying the benefit and the application of the doctrine of laches to future

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[15] PBGC reached this conclusion despite being unable to produce a copy of a plan amendment permitting lump sum distributions, relying instead on "testamentary evidence from individuals involved in the Plan's termination." The only copy of the plan in the record does not allow lump sum distributions.

[16] The doctrine of laches is "defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity." Black's Law Dictionary (10th Ed. 2010).

claims of potentially omitted participants, a far more profound and troublesome practice emerges.

That practice is “victim-blaming”— a phenomenon that has been happening since at least the beginning of time, but over the years has been identified as a dynamic to maintain the status quo.

William Ryan coined the phrase “blaming the victim” in his book, *Blaming the Victim,* first published in 1971. The book was written as a response to the characterization that “victims” bring on their own problems.

The approach of “blaming the victim” as it relates to this potentially omitted participant is that it does not dwell on the callous government administrator determining whether or not the participant is entitled to a benefit, but rather attempts to confine our attention to this 79-year-old man and his defects. I have heard excuses, paraphrased accordingly, such as “… if only he came forward to PBGC with his pension problem sooner, … if only he challenged his employer more forcefully and frequently 30 years ago, insisting that he never received his pension or a lump sum distribution, … if only he had kept his 30-year-old tax returns, then maybe PBGC could have helped him.”

But here is the tragedy: blaming the victim creates an illusion that all benefit denials are well-deserved for participants who are perceived to have “sat on their rights” for so many years. Instead of the presumed due process and fair and unbiased administrative review expected of our governmental entities, benefit entitlement claims are easily denied by placing the blame on the participant for shortcomings in retaining documentation and not bringing the matter to PBGC in a timely manner.

MULTIEMPLOYER PENSION REFORM ACT OF 2014

As PBGC and other agencies proceed with implementing the Multiemployer Pension Reform Act of 2014 (MPRA), opposition from the multiemployer retiree community grows. Although there is a valid concern about the limits of PBGC's financial resources, many participants and their advocates argue that there must be an alternative to the existing law, which currently allows multiemployer plans to cut back on benefit promises once thought to be untouchable.

The Office of the Advocate has experienced increased outreach from plan sponsors and participants and beneficiaries in plans applying for suspension and/or partition. We have spoken with many retirees from various funds who are facing potential benefit suspensions under MPRA. These conversations are often full of emotion: anger that the law has been changed to allow cuts to accrued benefits, undoing years of ERISA protection; fear about meeting financial commitments in their senior years when their benefits are facing severe reductions; sadness and hopelessness about the hardship that many retirees will face due to the pending benefit cuts; and utter astonishment that our government would pass this kind of legislation. These retirees have expressed outrage over having to bail out failed pension plans on the backs of retirees, that in their view were highly regulated, overseen by fiduciaries, and other professional advisors, which were all put in place to stand watch and protect their pensions.

PBGC staff and the Office of Chief Counsel have dedicated resources to the Office of the Advocate to respond to these many inquiries. PBGC collaborated with the Office of the Advocate to answer many participant-specific and general questions from retirees affected by MPRA, including a rather detailed inquiry related to questions about the PBGC guarantee for survivor benefits, drafting a plain English response which I shared with retirees and retiree advocacy groups.[17] This may not sound like much, but this is the kind of detailed response that plan sponsors of multiemployer pension plans must provide retirees and participants contemplating near-term retirement. Unfortunately, many pension plans do not seem equipped to handle these types of participant requests, and so the participants turn to PBGC for information.

PBGC also worked diligently with the Office of the Advocate regarding its review of partition applications, as PBGC must consult with the Advocate in partition and merger applications. PBGC has responded promptly and efficiently to questions raised by the Advocate concerning the corporation's first partition application under MPRA, and there has been continued communication regarding subsequent plans' applications for partition. This sustained collaboration is most appreciated and welcome by the Office of the Advocate, and demonstrates the sound working relationship between the Office of the Advocate and PBGC on MPRA matters.

I have great empathy for participants and retirees subject to benefit cuts under MPRA, and other retirees in multiemployer plans who may await the same fate. Perhaps our experience with MPRA can help our policy-makers find a way to provide a comprehensive and secure retirement for all Americans who have put their faith and money into these pension plans.

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[17] PBGC created a fact sheet detailing examples of a plan benefit and PBGC multiemployer plan guaranteed benefit for a participant and spouse. The document gave examples of the participant and spouse's plan benefits and guaranteed benefits at insolvency under a single life annuity and J&S annuity.

We are a country of great resources and immense business and financial acumen, all of which can be brought to bear to make retirement insecurity in America a thing of the past. This is what American families expect of our policy-makers.

PBGC recently issued its 2016 Annual Report and noted a deficit in the multiemployer trust fund of $58.8 billion, up from $52.3 billion a year earlier. These numbers are sobering and shocking.

Finally, think for a moment what is quietly happening with the single-employer pension trust fund where responsible corporate sponsors are efficiently de-risking their defined benefit pension plan obligations. Plan sponsors that can afford pension plans are de-risking, leaving the potential for PBGC to deal with single-employer plan premium payers who can barely afford their defined benefit plans. That is why the de-risking study discussed in last year's Advocate Report, and again in this year's Report, is so important in order to understand what is driving this de-risking beyond what we already know.