

**2015 Annual Report
of the
Participant and Plan
Sponsor Advocate**

Pension Benefit Guaranty Corporation

December 31, 2015



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I respectfully submit for your consideration the 2015 PBGC Participant and Plan Sponsor Advocate Annual Report in accordance with my reporting duties under ERISA section 4004.

I am so pleased that the Report makes note of progress with participants and their advocates regarding PBGC administrative practices that can sometimes make it difficult for participants to secure benefit entitlements. Moreover, our new Director has made a positive influence that will lead to improvements with PBGC and the sponsor community particularly when sponsors come to PBGC for assistance with their plans.

Noteworthy of highlight, PBGC has an internal working group in place to address premium penalties to account for honest mistakes by plan sponsors. This working group holds great promise in addressing concerns sponsors have with the automatic-like application of premium penalties especially in light of skyrocketing premium costs. On the participant side, PBGC has made strides in working with the Pension Rights Center and the seven pension counseling projects in the field that have done good work, to remove and alleviate some of the obstacles that make it difficult for participants to secure their benefits in a timely manner.

Last year's inaugural report established persistent and systemic problems that participants and plan sponsors have in their dealings with the corporation, and over this past year, PBGC leadership and staff have been open to changes in their practices to help mitigate those problems. As you read this year's Report, you will see that some of these changes have not necessarily been hugely monumental. For example, minor changes in PBGC practices helped one participant receive his small disability payment in a timely matter, allowing him to buy his monthly prescriptions which is something we may take for granted, but makes a huge difference to this man who now has some modest income to care for himself.

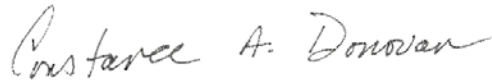
I have hope and expectation for change on the plan sponsor side of the house because a healthy and financially sound defined benefit system is an objective shared by both PBGC and the plan sponsor community. Frankly, that is a great start and a profound shared objective in and of itself. To that end, PBGC and the sponsor community will be exploring options for improving and enhancing PBGC's risk-mitigation tools and resources to address both the corporation's genuine concerns and the plan sponsor's views about how to balance those concerns with the goal of furthering the mission to protect and maintain the defined benefit system. PBGC and their regulated community need not have all the answers, but I am confident that over the years, some considerable thought has been given to this, and I would like to bring those ideas forward for policymakers' consideration.

Whenever asked to address a group or organization, I always preface my remarks with the observation that no one is calling the Advocate because the participant or the sponsor are happy with PBGC. So, the 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 persistent and often systemic problems that sponsors and participants experience with PBGC.

Having said that, I remain encouraged by developing relationships with my colleagues at PBGC who work so faithfully with the Office of the Advocate to help with difficult and challenging participant and sponsor issues that often requires change in PBGC practice, custom, and historical ways of doing business. Change in business 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 in the New Year.

Respectfully, I submit this Report and stand ready to assist you in any way that I can.

Sincerely,

A handwritten signature in cursive script that reads "Constance A. Donovan".

Constance A. Donovan
PBGC Participant and Plan Sponsor Advocate
December 31, 2015

Statutory Authorization¹

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 trusted by the corporation;
- (2) Advocate for the full attainment of the rights of participants in plans trusted 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).

Participant Issue #1: Complex Benefit Entitlement and Omitted Participant Cases

Last year, the Advocate Report highlighted a number of troubling individual cases where PBGC's handling of the cases fell far short of its customer service commitment. Although PBGC has been willing to take steps to address complex benefit entitlements and omitted participant cases that require more judgment and discretion, these steps are just the beginning in improving the claims process for participants.

BACKGROUND:

Cases brought to the Advocate by individual participants or through the Pension Rights Center and the pension counselors who staff the Administration on Aging's ("AoA") seven regional counseling projects tend to fall outside typical PBGC transactions and generally involve complex benefit issues requiring extensive research of historical records, careful due diligence, and in many instances, discretion and judgment.

In particular, the Advocate often assists with cases where various burdens are placed on participants as claimants. These encumbrances have included requesting that the participant to submit years, if not decades, of tax returns to prove no prior receipt of the benefit, placing the burden on the participant to show that he or she is entitled to the benefit since PBGC's default position assumes that the participant received a benefit (aka, was "lumped out"). Other instances have involved PBGC refusing to acknowledge entirely appropriate Letters of Representation from the counseling projects, causing confusion for the participant and sometimes delays in proceeding with his or her appeal rights, not to mention continued long delays in communication from PBGC, drawing out cases for years before there is resolution.

One example of a participant facing delays and demands from PBGC in order to receive his benefit involved an 80-something-year-old participant omitted from his company's standard termination. The participant spent years seeking payment of his benefit from PBGC. He had provided records, including past tax returns for decades, sufficient to establish that he was owed a benefit and had not already received it.

This information was not enough for PBGC. Despite establishing his entitlement and confirming his non-receipt, PBGC wanted to delay payment, which was already long overdue, in order to ensure that there was no successor employer who might be responsible for the benefit payment which the prior employer had not made, as this could potentially violate the Improper Payments Elimination and Recovery Act ("IPERA").² As you can imagine, this process would involve time, extensive research, and possibly lengthy negotiations to encourage the successor employer to step in for the prior employer's failure. Time is something that an 80-something-year-old does not have on his side. When the Advocate pointed this out, I was asked if this gentlemen had any

² 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). IPERA does not go into detail as to what an agency may do in the above situation.

beneficiaries to whom his benefit could be paid if the process was as time-consuming as seemed likely. I was quick to respond that this was not the correct standard: the participant proved he was entitled to the benefit, and if PBGC believed it must explore the possibility of collecting from a potential successor employer in order to satisfy its interpretation of the IPERA, this practice by PBGC should not hold up payment to this elderly participant.

Fortunately, PBGC has found a way to pay participants, like this gentleman, once they prove their eligibility without waiting until PBGC determines whether a successor employer may be potentially responsible for the benefit. This is a most commendable collaboration with PBGC's Office of the General Counsel ("OGC") and the Office of Benefits Administration ("OBA"), and was well-received by the seven pension counseling projects

RECOMMENDATION:

PBGC's benefits administration staff has suggested a shared tracking log with the Advocate. Such a tool should be created and utilized, and would be helpful with these complex, long-running cases. However, that tool should also be shared with the appropriate PBGC management and executive management team so that interventions can occur to facilitate resolution. Invariably, one of the root problems that manifests in all of these types of non-routine cases is a breakdown in management escalation and lack of constructive involvement with PBGC front line workers to help them resolve these kinds of problems, which are challenging for them and put them well out of their comfort zone.

Participant Issue #2: MPRA

On September 25, 2015, the Central States Pension Fund (CSPF) filed an application with the U.S. Department of the Treasury seeking approval for a pension rescue plan under the Multiemployer Pension Reform Act of 2014 (MPRA).

Over the past year, the Office of the Advocate received consistent and sustained feedback from participant advocacy groups and retirees from several multiemployer plans regarding MPRA, as follows:

- MPRA upends long-standing ERISA and Code protections that preclude cutbacks to accrued pension benefits.
- MPRA places the most vulnerable, the least able to defend themselves, and the least able to make up for lost income, namely the plan’s retirees, into financial jeopardy. Retirees reported that they worked decades to earn their pensions and depend on their pension to support daily living expenses, including the expenses of extended family members. That should resonate with most of us.
- The requirement that “all reasonable measures” be taken to avoid retiree benefit cuts does not seem to contemplate plan operating expenses, advisor/consulting and lobbying fees, healthcare costs and expenses, and executive and deferred compensation arrangements for key plan employees.
- Plan sponsor actuarial assumptions and stated investment returns may also pose distorted and unrealistic projections that create a false assurance of plan solvency.

BACKGROUND:

MPRA authorized new actions by the U.S. Department of the Treasury and PBGC that were intended to extend the solvency of troubled multiemployer plans through mergers, partitions, and benefit suspensions. The new legislation provides a consultative role for the Advocate in certain facilitated mergers and partitions, and permits the Advocate to submit recommendations to the Secretary of the Treasury with respect to benefit suspensions.³

³ MPRA provides the following roles for the Advocate:

Sec. 121. Mergers.

When requested to do so by the plan sponsors, the corporation may take such actions as it deems appropriate to promote and facilitate the merger of two or more multiemployer plans if it determines, after consultation with the Participant and Plan Sponsor Advocate selected under section 4004, that the transaction is in the interests of the participants and beneficiaries of at least one of the plans and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans. Such facilitation may include training, technical assistance, mediation, communication with stakeholders, and support with related requests to other government agencies.

Sec. 122. Partitions of Eligible Multiemployer Plans.

For purposes of this section, a multiemployer plan is an eligible multiemployer plan if ... the corporation determines, after consultation with the Participant and Plan Sponsor Advocate selected under section 4004,

At the request of the Pension Rights Center, the Advocate met with a group of retirees from CSPF and retirees from other multiemployer plans in support of the retirees in the CSPF. These retirees discussed the hardships they would face if they were subject to the proposed monthly benefit cuts. Retiree concerns ranged from their own chronic health problems related to years of sitting and driving a truck, to other health issues associated with aging and financial commitments such as the costs of care for aging parents and adult children unable to live independently because these young adults are unable to find a job that pays a living wage. Some of the retirees discussed other financial obligations, such as paying college tuition for their grandchildren. Retirees from well-funded plans expressed concerns to the Advocate about their future too, should their plan suffer a turndown in funded status.

RECOMMENDATION:

Multiemployer plans support so many of our American workers who are in the trades. As I look at the education quality and value that our community colleges provide students, I am concerned for the future of so many multiemployer plans subject to MPRA that provide pensions to nurses, pharmacy assistants, gourmet chefs, dental assistants, electricians, emergency medical assistants, physician assistants, and others. All of them are graduates of community colleges and they are American workers seeking to improve their lives and our lives too. They have earned and deserve a secure retirement.

I have great empathy for the retirees subject to benefit cuts in the Central States Pension Fund, and other retirees in multiemployer plans who may await the same fate. In this great country which has such abundant resources, I know we can find a way to provide a secure retirement for the men and women in the trades along with proper support for the pension promises made by multiemployer plans to their participants, beneficiaries, and retirees.

that the plan sponsor has taken (or is taking concurrently with an application for partition) all reasonable measures to avoid insolvency, including the maximum benefit suspensions under section 305(e)(9), if applicable.

Sec. 201. Conditions, Limitations, Distribution and Notice Requirements, and Approval Process for Benefit Suspensions under Multiemployer Plans in Critical and Declining Status.

Not later than 30 days after a determination by the Secretary of the Treasury, in consultation with the Pension Benefit Guaranty Corporation and the Secretary of Labor, that the plan is systemically important, the Participant and Plan Sponsor Advocate selected under section 4004 may submit recommendations to the Secretary of the Treasury with respect to the suspension or any revisions to the suspension.

Participant Issue #3: Consultation with the Participant Advocacy Groups and PBGC

Consistent with recommendations in the 2014 Advocate Report, PBGC had substantive meetings and discussions with the participant advocacy groups in 2015. The meetings enhanced communications and understanding between PBGC and the advocacy groups, helped address certain PBGC administrative practices that presented challenges to one of the groups in their representation of participants, and established a forum for the advocacy groups to raise concerns regarding PBGC's implementation of MPRA. The final meeting of the year provided the groups with an update and discussion on PBGC's financial condition in both the single-employer and multiemployer programs in the PBGC FY 2015 Annual Report.

BACKGROUND:

As noted in my 2014 report, PBGC has regular meetings and appearances before a wide variety of sponsor-based or professional/consulting organizations. Its interaction with participant groups has traditionally been less than substantive and consistent. In 2015, under Acting Director Alice Maroni, PBGC began to make a genuine effort at substantive and sustained in-person attention to participant groups and the questions and issues they bring forward for the large populations they represent. Meetings with the participant advocacy groups and PBGC also spawned a working group subset that addressed changes to a number of PBGC administrative operations to mitigate problems participants encounter with PBGC.

To that end, PBGC held three quarterly meetings with participant advocacy groups including the Pension Rights Center, AARP, and the National Retiree Legislative Network. The very first meeting resulted in a follow up discussion consisting of PBGC, the Pension Rights Center, and several of their counseling project attorneys to address PBGC procedures that make it difficult for participants omitted from defined benefit plans to secure benefit entitlements and other more complex benefits cases that require the exercise of discretion and judgment. Despite the positive benefits derived from meeting with the participant groups, more action and real-time changes and adjustments to PBGC's practices are necessary to promptly address and resolve obstacles to PBGC operational practices raised by the counseling project attorneys. In other words, the important meetings with the advocacy groups need to be seen as more than an opportunity for PBGC to "check the box" on items identified from last year's Advocate Report. PBGC needs to act in real-time to make changes that make doing business with PBGC easier for participants and their counselors. The word that comes to mind is "execution" - then move on to the next issue with some modicum of agility and management engagement of the details associated with execution that includes supporting their staff.

Meetings with the participant advocacy groups are so important because the outcomes of such meetings can effect positive change to PBGC administrative and operational practices, benefitting both PBGC and enhancing the participant experience with the agency. Just a small example relates to PBGC's insistence that outside counsel representing participants making benefit claims use the standard PBGC's Power of Attorney (POA) form rather than a "Letter of Representation" which is actually more appropriate because it shows that the participant is represented by counsel. PBGC prefers the standard PBGC POA form because they do not have

to exercise any benefits administration judgment in determining whether the letter of representation contains the necessary provisions for a valid representation. One of the counseling project attorneys submitted a participant's claim for benefits using a perfectly valid letter of representation. PBGC refused to acknowledge the participant's representation by the counseling project attorney and communicated a benefit denial directly to the participant, notifying him of appeal rights. The participant did not understand the importance of the communication and did not immediately contact his counseling project attorney, so time ran on his appeal rights since PBGC left the participant's attorney completely out of the communication just because the attorney did not use the PBGC POA form.

Now, this matter has been successfully resolved in a win-win for both the participant and PBGC through the hard work of the OGC and the PBGC benefits staff. The benefits staff learned the difference between a POA and a letter of representation, and that anyone can execute a POA compared with a letter of representation by an attorney on behalf of his client. PBGC's comfort with its standard PBGC POA form that precluded the exercise of judgment was not beneficial to PBGC in the end when counsel represents the participant. PBGC staff also "did the right thing" by extending the participant's appeal rights timeframe by 60 days to account for PBGC's denial of the valid letter of representation form that had caused the problem. Michelle Gray, a manager in the Office of Benefits Administration (OBA), has agreed to be the single point of contact for the counseling project attorneys representing participants in trustee plans, and Charles Korb, the Branch Manager in the Standard Termination Compliance Division, has agreed to be the point of contact for non-trustee plans. Michelle and Charles' willingness to accept these additional responsibilities will go a long way toward facilitating a more streamlined process for the experience the counseling project attorneys have with PBGC in their representation of often poor and disabled participants seeking their benefits from PBGC.

Another area that participant groups consider most urgent for deeper discussion is the issue of PBGC's financial picture. PBGC has a variety of means and methods for reporting on the plan assets it holds and receives, premium income it collects, liabilities it bears, expects, and monitors, investment experience, and much more. In light of the growing concern by participant groups regarding PBGC's financial position, particularly in light of the 2014 multiemployer reform law, these groups are requesting more concrete and helpful engagement in understanding the ways in which PBGC measures and models the future obligations facing its two insurance programs. As currently presented, the data can be daunting, peppered with footnotes and jargon, particularly for participants trying to engage with policymakers, attorneys, consultants, actuaries, and sponsors. PBGC must remember that it has a special responsibility to ensure that its data is clear and informative to concerned participants and participant advocacy groups.

PBGC held a session in December 2015 with the participant advocacy groups regarding the recent release of the PBGC FY 2015 Annual Report. This constructive meeting provided a valuable briefing and opportunity for questions on PBGC's financial outlook with the participant advocacy groups and PBGC staff. This is likely to become a most welcome tradition between PBGC and the participant advocacy groups.

RECOMMENDATION:

Well-planned meetings with the participant advocacy groups can go a long way in resolving many of the legitimate concerns the participant advocacy groups have with PBGC operations, and such enhanced communications can only benefit PBGC. These meetings provide valuable feedback and can spawn follow-up discussions to resolve specific issues participants experience with PBGC, such as with the simple matter of the POA form.

However, a fundamental change in PBGC's mindset and approach in serving participants and the groups that represent them will go a long way in resolving many problems such groups and participants experience with PBGC's administrative and operational procedures that do not lend themselves to more complex benefits administration issues. A change in approach such as trying to find a reason to confer a benefit rather than looking for reasons to deny the benefit might help.

Additionally, next year, as PBGC prepares to release its FY 2016 Annual Report, it should consider offering a briefing and question and answer session for participant groups, as it often does to Congressional Staff and members of the benefits press. This would be a powerful sign to participant groups that PBGC heard and acted on two important, and very doable, requests and recommendations made in my 2014 Annual Report, and again this year.

Participant Issue #4: Interagency Coordination and Participant Benefit Entitlements

PBGC and the Chicago Regional office of DOL's Employee Benefits Security Administration (EBSA) are in the process of entering into an agreement whereby the Regional office employees would actively work with PBGC's Missing Participant database with the expectation of reuniting participants with their missing benefits. The Advocate was pleased to be a part of bringing the parties together for this joint venture. However there are other interagency agreements such as the one between PBGC and the Social Security Administration (SSA) that are critical in PBGC's work to assist participants in the attainment of benefits from plans trusted by PBGC. This critical agreement with SSA needs strengthening, but in the near-term PBGC must work more proactively with SSA to obtain earnings histories that may be old and difficult to locate so that participants can be served in a timely manner. Participants waiting months and several years is not an acceptable standard of service.

BACKGROUND:

DOL's EBSA Chicago Regional Office reached out through the Advocate to propose a coordinated effort with PBGC to locate certain missing participants whose benefits are safeguarded at PBGC. The Advocate is pleased to have been a conduit in forming this coordinated effort. This project has the potential to reunite participants with benefits they may have "lost" or given up on finding.

Once the agencies get past the paperwork and procedure required to launch this effort, which includes executing an interagency MOU, I hope this teamwork will help to return more of these unclaimed benefits to participants' household budgets. Given the expansion underway for PBGC's role in taking in benefits for missing participants, this is an especially timely opportunity. It also shows the importance of collaborating with sister agencies to alleviate some of PBGC's burdens and ultimately benefit participants.

Another example where PBGC could improve its coordination with other agencies involves its interagency information sharing agreement with SSA. PBGC uses Social Security earnings information, obtained via this agreement, to determine benefit eligibility.

Although there is an agreement in place, problems still arise in regard to managing and tracking requests to SSA. The Advocate encountered an 80-something year old woman struggling to receive her benefit from a plan sponsored by an employer that had long gone out of business. The participant was a manager with the company for 15 years and closed the company's operation in Mississippi when the company wrapped up its business. PBGC needed her Social Security earnings information in order to determine her benefit eligibility. Although the interagency information sharing agreement was valid and in place, SSA did not provide any information about the participant's Social Security earnings history for over nine months. During this time, PBGC staff did nothing of substance to obtain this elderly woman's earnings data from SSA nor did PBGC staff escalate the issue to management. However, once senior management and the PBGC General Counsel were engaged, SSA responded promptly and obtained the participant's earnings history, which confirmed her eligibility for a benefit. Thankfully, PBGC's

Office of Benefits Administration paid the benefit the next pay period, allowing the participant to obtain much needed round-the-clock hospice care.

Another example where a case languished while PBGC waited for SSA to provide Social Security earnings information involved an illiterate gentleman who was transient, but whose attorney at the pension counseling project always kept up with him. The case dragged on for over four years while PBGC made several unsuccessful attempts to assist the participant but never proactively sought to obtain earnings information from SSA in order to determine his disability pension eligibility. After PBGC leadership intervened, PBGC determined that this individual was owed a small but much needed \$25 monthly disability benefit and over \$4,000 in back benefit payments, including interest.

In both examples, PBGC had the tools and information to resolve the case but failed to escalate the cases appropriately in order to obtain the information from SSA and resolve the matter for the participants. The participants patiently waited much longer than they should have and were ultimately conferred benefits. Continued communication with all parties involved, including SSA, would help ensure that these types of cases do not languish.

RECOMMENDATION:

PBGC carries out its responsibilities with efficiency and accuracy regarding participant concerns, requests and even benefit entitlements that fit well within PBGC's defined processes and procedures. Participants and their advocates' concerns that require judgement and discretion remain difficult for PBGC, and it takes far too much time for PBGC to assess just what to do when routine procedures and agreements like those with the SSA go off the rails. Revising and strengthening the PBGC agreement with the SSA is also in order to better serve and respond to participant benefit determinations.

However, when the right resources and proper management support are in place, PBGC can work out important interagency agreements such as the arrangement with EBSA's Chicago Regional office that can benefit participants and PBGC. When this initial joint venture with the Chicago Regional office and PBGC was suggested, many obstacles toward implementation were raised by PBGC, many of those very understandable. Nonetheless, PBGC worked through their concerns with the Chicago Regional office and EBSA's national office to launch a participant-focused project that reunites participants with their missing benefits.

Plan Sponsor Issue #1: PBGC Must Improve Relations with Plan Sponsors

PBGC must noticeably improve its relations with plan sponsors. Plan sponsors continue to come to the Advocate with examples of encounters with PBGC where they express that PBGC's communications lack transparency or a complete explanation as to why the sponsor is in violation of certain provisions of Title IV of ERISA.

PBGC's style of threatening plan termination or threatening litigation first when the sponsor wants to talk settlement sets an adversarial tone from the start of the encounter. It is at this point that the Office of the Advocate is often engaged by plan sponsors and their advisors to help facilitate getting the engagement with PBGC on a more business-like footing which sponsors have come to expect from other federal regulatory agencies. More importantly, plan sponsors express that PBGC wastes their time, which they should be spending with customer-facing activities, with veiled and inappropriate threats and months and months of delay in responding to their submissions.

I admire and respect the passion that PBGC officials bring to their job. This has never been the issue. The issue is unfortunately that this passion has caused PBGC to cross lines into less professional behavior that hurts rather than helps the defined benefit system. As noted in last year's Advocate Report, "[t]his damaging and adversarial perception of PBGC held by plan sponsors is an area of great opportunity for PBGC to grow, if we can establish a partnership with the plan sponsors we serve."⁴ That opportunity to grow and make positive changes in relations with plan sponsors remains a constant in this year's 2015 Advocate Report.

However, early indications are that PBGC's new Director will set the right tone in working with and helping our sponsors of DB plans who come to the Advocate for assistance. But given the size of the organization, this will be a challenge that requires a concerted effort by the whole organization.

BACKGROUND:

Aggressive second-guessing of private business operations. The Advocate usually becomes involved in a plan sponsor matter when PBGC refuses to engage in a meaningful, substantive exchange of information with the sponsor that includes a refusal to share with the sponsor the substance of why PBGC believes the sponsor has violated some provision of ERISA. Often the sponsor has provided PBGC with a complete financial disclosure, PBGC has a comparable financial analysis, and PBGC refuses to share the basis of that analysis with the sponsor, and the sponsor is concerned that PBGC has misunderstood certain aspects of their financial picture.

One sponsor seeking PBGC's help with a distress termination under the "business continuation test"⁵ asked for assistance from the Advocate when PBGC took the position that PBGC would take over the company, and asserted that the sponsor may as well "hand over the keys." This

⁴ See PBGC Participant and Plan Sponsor Advocate 2014 Annual Report.

⁵ 29 CFR § 4041.41(c)(3).

company had sponsored three defined benefit plans which they agreed to retain at the insistence of PBGC when the company sold certain assets during the 1990's. The company responsibly terminated two of the three defined benefit plans in standard terminations. The third plan threatened their business as an ongoing concern so they came to PBGC for assistance with this distress termination. The Advocate was brought in when PBGC treated the sponsor as worth more "dead than alive," ignoring the business continuation test under ERISA section 4041. The case is now moving towards final resolution based on a settlement agreement in principle having been reached between the sponsor and PBGC, but not without the sponsor having faced great expense and unnecessary machinations.

This matter also highlighted the independent role of the Advocate in a bipartisan letter from members of three Congressional Committees of jurisdiction when PBGC refused to meet with the sponsor if the Advocate attended that meeting. The letter clarified the independent role of the Advocate who should not be barred from participating in meetings with sponsors and PBGC.

Late retirement issue. Other situations emerge that involve the Advocate when PBGC refuses to meet with a sponsor on a complex benefit feature regarding actuarially equivalent late retirement benefits, where virtually the entire actuarial community disagrees with PBGC's interpretation of how that benefit should be calculated. If PBGC prevails in its controversial interpretation of this plan benefit feature, it will launch a major plan qualification and corrections process with the IRS for sponsors with a similar benefit feature.

The plan sponsor, a non-profit university that is well respected by the community, has earned a reputation for sound and fair employee relations. This plan sponsor completed a standard termination of its plan over three years ago. However, the closing audit regarding the calculation of a late retirement benefit remains in dispute with PBGC after more than two years.

Noteworthy is that this matter was also discussed in last year's Advocate Report, the sponsor or its representatives have requested a meeting on several occasions, no meeting had been granted, and no meaningful meeting of the minds has taken place between PBGC and the sponsor. PBGC initially refused a request to meet with the sponsor, as well as with a trade group representing the interests of multiple sponsors and with interested members of the U.S. actuarial community, on this complex benefit/actuarial issue unless and until all administrative review rights and judicial appeals were fully resolved. PBGC finally relented in part by agreeing that it would meet with at least the sponsor, but only after the sponsor filed a request for reconsideration. The sponsor then submitted an extensive administrative review request at considerable expense. PBGC still has not scheduled a meeting.

Had PBGC been willing to meet with the sponsor and interested members of the U.S. actuarial and employer communities at an earlier stage in this matter, there very well may not have been any need for the sponsor to incur the considerable expense of preparing the formal request for administrative review. Instead, PBGC insisted that the filing of such a request was a precondition to any meeting – despite the time, resources, and expenses required to prepare such a request. This case highlights the need for PBGC to be willing to have a dialogue with its regulated community, particularly when that community is expressing significant concerns about a PBGC position.

Communications with Sponsors. When communications reach a stalemate between the plan sponsor and PBGC, the Advocate will often request the appropriate PBGC leadership team member become involved with the sponsor and the PBGC negotiations team to help work through the stalemate, so as to ensure there is a meaningful discussion of both the sponsor's view and the PBGC view on the matter in question. This approach has been quite effective at times over the past year with the PBGC leadership team and brings satisfaction to the sponsor who is anxious to resolve the matter with PBGC and get on with their business.

The plan sponsor will also seek assistance from the Advocate when discussions with PBGC become inappropriate, including the use of unprofessional observations about the sponsor's management of their business.

PBGC took a similar approach with another plan sponsor, a prominent print and media company. The plan sponsor received a letter from PBGC that contained few facts except for what had been generally reported in the investment trade and private equity press about the upcoming spin-off, and PBGC's own generalizations about how the company should restructure itself. PBGC's letter failed to recognize that the plan sponsor had presented an offer, including contingencies, memorialized in its 10-K that the sponsor was about to file with the SEC on its required filing date. The sponsor was surprised to learn that PBGC did not seem to recognize a revised offer with no contingencies presented to PBGC as the plan sponsor's final offer. If PBGC did not accept that final offer, then the offer with contingencies in the 10-K filing would remain in place. Although it may be common for negotiations to continue after a "final" offer, this case demonstrates unnecessary machinations and delays by PBGC, as well as PBGC's failure to recognize when a plan sponsor makes a true final offer. PBGC thought that the company could just refile its 10K with the SEC about the subsidiary spin-off, which would signal chaos in the capital markets. Fortunately, PBGC and the plan sponsor ultimately settled on an offer for a contribution to the plan that did not contain contingencies. It is my understanding that PBGC ultimately sent a letter of apology to the company for the disparaging letter previously sent by PBGC, and that the Acting Director wisely instituted a quality review process for such communications by PBGC to plan sponsors.

Overly adversarial relationship. The word "negotiation" is "[a] consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter."⁶ PBGC describes its relations with sponsors that come to it with plan issues, or that PBGC identifies as having a Title IV violation, as an "inherently adversarial" process in working with the sponsor to find an appropriate solution. The words "inherently adversarial" do not belong in this situation, which contemplates parties working together to come to a meeting of the minds. The issues may be contentious, but the relationship between PBGC and the plan sponsors need not be an additional roadblock. This was demonstrated last year with PBGC's approach and overreach to broad 4062(e) enforcement authority.

Moreover, sponsors tell the Advocate that when PBGC threatens the sponsor with litigation that threat can cause financial harm to the company, which adversely affects their relationships with customers, suppliers, creditors, the capital markets and ultimately, even PBGC, because it can

⁶ Black's Law Dictionary (10th ed. 2010).

cause the very issue of financial collapse the company and PBGC are trying to avoid. PBGC has a number of statutory tools to address their concerns of plan sponsor underfunding of their pension plans, but when those tools are used as a threat or “negotiation tactic” without foresight and discretion, the result can be adverse to both PBGC and the sponsor.⁷

PBGC overriding Congress. PBGC defends its actions with plan sponsors by saying that sponsors of underfunded plans are often putting “shareholders ahead of pension plans” and asserts that the agency’s actions are justified by the risk they believe PBGC faces from inadequate funding rules that were established by Congress and are overseen by the Department of the Treasury. However, funding rules involve major policy issues that are not within the authority of the PBGC to modify indirectly through their enforcement practices. Corporations have a fiduciary duty to put shareholders first, and without shareholders, there are no customers, and without customers, there are no suppliers and employees, and without employees there are no pension plans. If PBGC does not like or agree with the funding rules or the priority given pension plans within the context of the corporation’s fiduciary duties, then PBGC should develop recommendations to discuss with the Board so that the Administration can determine whether to pursue legislative changes, rather than substituting its judgment for the judgment of Congress through PBGC enforcement of Title IV.

Early experiences with the new Director hold promise of a cultural shift in the agency that will bring a change in approach to PBGC in working with plan sponsors on problems and challenges that they bring to us for our help.

RECOMMENDATION:

PBGC must not view sponsors of defined benefit plans as an adversary, but rather as a premium-paying customer seeking assistance from PBGC.

A prominent employee benefits advisor reminded me that the CEOs and CFOs of sponsors maintaining defined benefit plans, a dwindling group, do talk with each other in various forums about their encounters with PBGC. A number of employers discussed recent demands from PBGC for company financial information about certain business transactions and noted PBGC’s growing and continued adversarial approach which will guide their decisions about the voluntary maintenance of their defined benefit plan.

⁷ See PBGC Participant and Plan Sponsor Advocate 2014 Annual Report:

PBGC Must Improve Working Relationships with Sponsors

SPONSOR ISSUE # 1: A COMPELLING NEED TO SHIFT TO A LESS ADVERSARIAL AND MORE COLLEGIAL PARTNERSHIP APPROACH IN WORKING WITH THE PLAN SPONSOR COMMUNITY. BACKGROUND:

Generally, individual plan sponsors seek assistance from the Advocate when they are shut out of meaningful dialogue with PBGC or they need access to executive management within PBGC when they believe that their concerns are being summarily dismissed by PBGC. These experiences with PBGC and the Advocate are a large topic of conversation among sponsor organizations, including law firms, trade associations, consultants, actuaries, and others, and they have a huge impact on how PBGC is perceived and discussed on the Hill, and on the legislative and regulatory initiatives that the groups then embrace. The issues discussed have been brought to the attention of PBGC management, and they are issues that the sponsor community believes strongly to be among the “persistent problems” that the Advocate is charged with exploring. Excerpt from 2014 Advocate Annual Report to Congress, the PBGC Board and the PBGC Director.

To that end, the Advocate has a statutory role to report on the activities and assistance requests sponsors and participants bring to my attention. It does not matter that PBGC reached some kind of resolution with the sponsor, no matter how “successful.” Sponsors remember the hostile and adversarial way they were treated by PBGC and American businesses who sponsor defined benefit plans will likely terminate those plans at the first opportunity after they experience encounters by PBGC as discussed in this Report.

Plan Sponsor Issue #2: Premiums and Premium Penalties Need a Fresh Look

As discussed in last year's Advocate Report, plan sponsors are keenly aware of the escalating costs associated with maintaining a defined benefit plan. However, many plan sponsors are also keenly aware of how efficient defined benefit plans are in delivering a lifetime annuity as an important part of retirement security for their employees. Yet an increasing number of plan sponsor officials and representatives are telling the Advocate that the volatility around pension funding primarily driven by fluctuations in discount rates and returns on plan assets can significantly impact both profit and loss statements and cash requirements from year-to-year, creating a huge disincentive to maintaining such plans. Moreover, sponsors say that when you add in the skyrocketing premium costs which seem to be tied to no comprehensive retirement policy, combined with automatic-like premium penalties for honest mistakes, the sum total of all of these things is driving sponsors to de-risk and enhance benefits payable under their defined contribution plans to serve as the mainstay for their workers' retirement security. Our new PBGC Director is eager to understand and act on what can be done to reverse this trend.

BACKGROUND:

Rising Premiums. In last year's Advocate Report, both participant advocacy groups and plan sponsor trade groups observed that it was challenging to draw helpful conclusions from PBGC's release of the Projections Report which does not purport to predict PBGC's future but instead projects the results of modeling thousands of possible outcomes.

The participant groups reported a growing concern with respect to single employer plans, which are experiencing major changes as they work to address funding volatility by offering lump sums to terminated vested participants and retirees or distributing private sector annuities to retirees previously paid from the plan. Participants and the advocacy groups found it to be incredibly challenging to appreciate what the numbers traditionally reported say about what the single-employer program needs for the long term.

Similarly, plan sponsors point out that PBGC's projections methodology explicitly does not take into account either standard plan terminations or de-risking transactions. Plan sponsor advisors conclude that if higher PBGC premiums and funding volatility can be projected to drive employers out of the defined benefit plan system, and erode PBGC's premium base dramatically, PBGC would not take this into account at all in the Projections Report.

Most recently, plan sponsors have raised concerns about the Projections Report again in 2015. Plan sponsors state that the current level of PBGC premiums is one of the compelling factors driving employers out of the defined benefit system, which could seriously erode PBGC's premium base. This erosion should be of concern to PBGC because it threatens PBGC's financial viability in lost premium income from financially sound plan sponsors and may trigger unmanageably large premiums for the small number of companies left in the system that may not have the resources to exit the system.

Plan sponsors applaud PBGC's issuance of a de-risking report earlier this month entitled Risk Transfer Study Plan Years 2009-2013. This was an extremely helpful study of past de-risking transactions and provides vital factual information about de-risking activity through 2013. However, all, including PBGC, would agree that this is just a first step. Plan sponsors believe that further examination is needed to determine the causes of the exodus from the defined benefit system and ways to be proactive and slow the exodus. Such an investigation will have the added advantage for PBGC in that the agency may be in a better position to plan and adjust its financial outlook accordingly.

Plan sponsors have raised the possibility of the Advocate commissioning a study on these broader issues regarding 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 sponsors have asked the Director of the PBGC if the agency could fund such a study, which could provide important financial forecast data to the PBGC, and PBGC Director, Tom Reeder, is amenable to better understanding the reasons behind this exodus so as to stem the tide.

This request has only recently been raised, and I would like to proceed carefully to ensure that I am working in concert with all parties. Thus, it is my intent to consult with the PBGC Board, the PBGC, participant groups, and other plan sponsors to explore this possible study.

Another area of concern that results from the rising level of premiums has to do with the treatment of interest on premium underpayments and overpayments. PBGC charges interest on premium underpayments but does not pay interest on premium overpayments. This was less of a problem when premium levels were much lower. As part of the Pension Protection Act of 2006, Congress gave PBGC the authority to pay interest on premium overpayments. To date, the PBGC has not yet taken any action to implement this authority. As a matter of equity, with the rising level of premiums, it is becoming increasingly important that PBGC move forward to implement this authority.

Premium Penalties and Need for Discretion. Last year I identified premium penalty procedures as one area where more dialogue is needed between PBGC and plan sponsors. I echo last year's sentiments and also would like to highlight growing issues related to the lack of flexibility in PBGC's implementation of premium penalty regulations and policies, rising premium costs, and the overall adverse effect on plan sponsors of these automatic-like penalties for honest mistakes. On a hopeful note, however, PBGC has established an internal working group to more closely examine premium penalty issues raised by sponsors; this has great potential for positive change.

Although premiums have grown exponentially, PBGC has not changed its premium penalty procedures. PBGC seems to have forgotten that the purpose of a penalty is to encourage voluntary compliance, not to increase PBGC's revenues, which is truly not PBGC's intent, but PBGC's enforcement of premium penalties causes plan sponsors to have that reaction. Instead, many premium penalties far outweigh the dollar amount that might even conceivably be appropriate in light of the nature of the error, especially when sponsors make honest mistakes. Moreover, there is little or no evidence from the view of the Advocate that facts and circumstances are taken into account in accord with the regulation and published PBGC policy.

In a recent case brought to my attention, a plan sponsor submitted incorrect premium amounts as a result of a single, honest, human mistake made by an employee of the sponsor who has since retired. Before the premium payment was due, the sponsor timely and properly submitted its premium filings and accurately reported to PBGC the full premium amounts due. The mistake in this case was simply that the employee had looked at the wrong spreadsheet and entered the wrong amount when arranging to wire the premium payments to PBGC. It was clear that there was no attempt by the plan sponsor to dodge paying the correct amount of premium payments, as the sponsor properly and timely reported what was owed.

When the plan sponsor received a notice from PBGC about the discrepancy, it immediately wired the balance to PBGC within four hours in order to fully remedy the error. The plan sponsor has since revised its detailed internal control process to impose an additional safeguard in order to ensure that this type of error would not occur again. Despite its best efforts, the plan sponsor was not only required to pay \$35,000, of interest on the late premiums, but an additional almost half million dollars in penalties based on one human error that was corrected within hours of the time the employer learned of the discrepancy. When the plan sponsor's counsel reached out to PBGC to request that it exercise waiver discretion to reduce the penalty in light of the facts and circumstances surrounding the violation, PBGC refused. This company sponsors eight defined benefit plans, most of which remain open to newly hired employees. All but one of the plans continue to provide ongoing benefit accruals to all active participants. (The active participants in the eighth (frozen) plan earn benefit accruals in one of the other plans.)

When PBGC refused to exercise discretion in lowering the penalty in this particular case, I brought the case to the attention of PBGC's director. He indicated a willingness to consider the bigger issues raised by the matter and to work to examine outstanding issues. This is a refreshing willingness because, although this case is not "typical" since it involves its own unique set of facts and circumstances, it is "typical" in that it involves PBGC's routine resistance, in the premium area, to making a judgment based on unique facts and circumstances. I am encouraged that PBGC is reexamining issues relating to the total dollar amount of the penalty and its excessiveness in light of the facts and circumstances surrounding the error. I am optimistic that there can be a fairer way to address assessed penalties that is more proportionate to the error if PBGC is willing to exercise discretion when appropriate.

Another example of PBGC's rigidity and unwillingness to exercise discretion to account for a "non-typical" case arose in a context that does not, strictly speaking, involve premium penalties, but that has an effect that is similar to a premium penalty.

The plan sponsor is a rural co-op of Midwestern farmers. Their pension plan is a multiple employer plan covering over 400 participating farm employers, with both employer and employee contributions. The sponsor has always had a practice of designating "grace period" contributions made during a plan year, but before the contribution due date for the prior plan year, as being for the prior plan year. This enables the contributions to be included in the value of plan assets when determining PBGC premiums for the plan year, and has potential for lowering the variable rate premium.

During 2008, the sponsor deviated from this historical practice due to an anticipated plan change that would have enabled the participating employers to select different benefit accrual options for their employees. This plan change would have required a change in the plan year and the method of collecting employee contributions, and represented a staggering administrative undertaking for the over 400 payroll feeds of the participating employers. It was expected that there might be some administrative difficulties as the new process was implemented, however, deviating from the historical practice of designating contributions enabled the plan sponsor to confirm the payroll feeds and contribution amounts being reported, while enabling a “cleaner” audit process for the initial plan year for which the new plan design would have applied.

During the financial crisis later in 2008, it was determined that the plan change could not be successfully rolled out at that time. The plan sponsor then needed to rapidly revert to prior administrative processes to ensure that the correct contributions would be collected and ensure that the minimum contribution requirements were satisfied for the original plan year. This required significant effort and focus by the plan sponsor’s benefits administration staff and its professional advisors. While the plan sponsor could theoretically have reverted back to its historical practice of designating contributions, this was not practical at the time since it would have required significant additional resources in order to revise the plan’s Form 5500 and related attachments and audited financial statements, and these resources were not available due to the effort involved in reverting to the prior administrative processes. The plan sponsor left open the option of revising the Form 5500 at a later date to be consistent with its historical practice of designating contributions, given the longstanding ability of sponsors to revise Schedules B/SB and PBGC premium filings within a six-year period in order to reflect contribution re-designations.

The sponsor ultimately amended the 2007 and 2008 Schedules B/SB and Forms 5500 on December 11, 2011 to re-designate the grace period contributions made during the 2008 plan year in accordance with its historical practice, and then prepared to amend the 2008 PBGC premium filing, consistent with the PBGC’s own premium regulations. It is notable that, while the IRS issued written guidance in September 2012, indicating that contributions generally may not be re-designated once filed on a Schedule B/SB, this guidance was issued well after the plan sponsor amended their filings. As noted above, plan sponsors had long understood that there was a six-year window during which contributions could be re-designated, and the sponsor’s re-designation in this case has never been questioned or challenged by the IRS.

PBGC issued a policy statement on December 22, 2011 indicating that it generally would not grant premium refunds based on contribution re-designations, but indicated that “PBGC’s consideration of amended premium filings takes into account the facts and circumstances of each case.” This co-op plan sponsor submitted its amended 2008 PBGC premium filing on January 17, 2012, and discussed the matter with PBGC representatives via phone and email to explain the facts and circumstances. The matter then sat with PBGC for over three years, despite periodic requests by the sponsor’s actuary for a status update. When PBGC finally responded after this delay, it would not accept the sponsor’s facts and circumstances as the basis for the amended filing, but did not say why. The sponsor’s actuary submitted additional questions and information in writing and via a conference call with PBGC. PBGC then indicated that it considered this a “request for reconsideration” and again denied the amended filing.

In all communications between PBGC, the sponsor, and its actuary, a major actuarial firm, PBGC never responded to any of the sponsor's substantive questions or indicated why the facts and circumstances were not sufficient to permit the amended premium filing.

The PBGC policy statement regarding contribution re-designations was intended to address an issue where some actuarial firms were "gaming the system" by encouraging sponsors who had not had a historical practice of designating grace period contributions as being for the prior plan year to re-designate such contributions for past years solely to reduce PBGC premiums. However, that is not the fact pattern here. Treating the co-op plan sponsor in the same manner as the plan sponsors the policy was directed at without regard to this sponsor's unique facts and circumstances seems both inappropriate and inconsistent with PBGC's own policy statement, which indicates that such facts and circumstances will be considered.

In addition to demonstrating situations where PBGC refuses to exercise discretion and consider unique facts and circumstances, the above cases illustrate that there must be a larger conversation about premiums, premium penalties and policies, and the effect on the defined benefit system in general. Plan sponsors state that the current level of PBGC premiums is one of the major factors driving employers out of the defined benefit system. Although premium levels are beyond PBGC's control, PBGC faces a serious financial viability threat if there is a mass exodus of plan sponsors from defined benefit plans. This exodus could trigger unmanageably large premiums for the small number of companies left in the system that may not have the resources to exit. This apocalyptic prediction may be on the horizon, as a recent study indicated that almost half of all surveyed large defined benefit plans stated that they have taken steps to, in whole or in part, exit the defined benefit system primarily due to the level of PBGC premiums.⁸

RECOMMENDATION:

It is my understanding that PBGC has an internal working group addressing the premium penalty issues noted in last year's Advocate Report and again this year. Some of the considerations the group is addressing involve the automatic-like premium penalties linked to the premium payment amount which of course has skyrocketed since the penalty regulations were adopted. PBGC is also looking more closely at its penalty waiver authority and whether it can establish criteria to use this discretionary authority when PBGC thinks that the penalty far outweighs the offense as discussed in one of the examples above. This holds much promise.

As noted last year, and worthy of emphasis again, premium payers and their advisors are generally a compliant group who want to abide by the myriad of laws and regulations that govern the defined benefit system. In other words, they are not out to "cheat" the government or to "scam" the system and get away with as much non-compliance as possible. The sponsor community would welcome a dialogue with PBGC to illuminate persistent problem areas associated with premium payment filings that particularly deal with how to effectively and equitably address honest plan sponsor mistakes so that interaction with PBGC seems less punitive and more constructive.

⁸ "Nearly Half of Large Plan Sponsors Have Taken Preparatory Steps for an Eventual Pension Risk Transfer," MetLife press release for new MetLife poll, October 22, 2015.

Finally, as noted last year, PBGC should take steps immediately to address the PPA authority it was given in 2006 to permit payment of interest on overpayments of premiums by sponsors, including the payment of interest on a retroactive basis for sponsors who have already settled their overpayment matter with PBGC.

Plan Sponsor Issue #3: PBGC's Early Warning Program

Plan Sponsors have observed that PBGC's Early Warning Program is being used as an end run around section 4062(e) restrictions enacted by Congress last year. Sponsors note that PBGC can and will intervene in routine business transactions, or can demand changes in business operations, which is hardly helpful in encouraging the maintenance of pension plans, a founding PBGC statutory mission. Further, pursuant to PBGC's mission, the threat of an involuntary plan termination, recognized by sponsors as a PBGC negotiating tactic, should only be made when there is good cause for such a threat. Plan sponsors also question whether PBGC has the expertise to intervene in business transactions and tell companies how to run their businesses as a plan sponsor experience noted in Plan Sponsor Issue # 1 in this Report.

BACKGROUND:

Background regarding the Early Warning Program. Under the Early Warning Program, PBGC intervenes in business transactions when PBGC believes that the transaction poses an increased risk of loss to the PBGC, such as a spin-off of a subsidiary. The focus of the Program is on transactions by (1) financially-troubled companies and (2) companies with pension plans that are underfunded. When PBGC identifies a transaction that in its view warrants intervention, PBGC will negotiate with the plan sponsor to obtain protections for the PBGC, such as additional contributions to the plan. PBGC uses the threat of involuntary termination of the plan, which would be devastating for the company, to gain leverage in the negotiation.

From 2006 through 2014, PBGC used ERISA section 4062(e) heavily to intervene in business transactions. Generally effective starting in December of 2014, Congress reformed section 4062(e), based on concerns about PBGC's application of that section in unintended ways. This issue was discussed in detail in my 2014 report. The result of the 2014 legislation has been far less use of section 4062(e) in 2015, in accordance with Congressional intent that that section only be used where an actual significant downsizing has occurred.

2015 developments. Plan sponsor representatives perceive an increased use of the Early Warning Program by PBGC during 2015 (though PBGC states that this is not the case), coinciding with the Congressional reform of section 4062(e). Plan sponsor representatives are concerned that, rather than following Congressional intent with respect to section 4062(e), PBGC has used a different tool to intervene in business transactions.

The Advocate has also 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. This is not consistent with the guidance issued by the PBGC on the Early Warning Program.

The issues flagged above raise several concerns. First, if companies feel that PBGC can and will intervene in routine business transactions, or can demand changes in business operations, that is hardly helpful in encouraging the maintenance of pension plans, which is part of the PBGC's statutory mission.

Second, again pursuant to PBGC's mission, the threat of an involuntary plan termination should only be made when there is good cause for such a threat, not as a negotiating technique. Under the statute, an involuntary termination should only be pursued where "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."⁹ This is a high standard, and PBGC needs to have an extensive factual basis before pursuing—or even threatening—this extraordinary step; a desire to intervene in a business transaction is a not sufficient basis.

Third, the perceived end run around the section 4062(e) restrictions enacted by Congress through increased use of the Early Warning Program is concerning to sponsors. However, I do not know if there has been increased use of the Early Warning Program as a result of the reform of section 4062(e), but if that has occurred, it is of great concern. Even if this has not occurred, I am concerned about the perception for two reasons. First, it indicates a continued adversarial non-trusting relationship between the agency and its premium-paying plan sponsors. Second, it speaks to a lack of transparency in policy and enforcement. The regulated plan sponsor community should know details about implementation of the Early Warning Program that includes greater transparency about the frequency of use, the causes for using the Program, and how the Program is applied to businesses.

Finally, plan sponsors question whether PBGC has the authority or the expertise to intervene in business transactions and tell companies how to run their businesses.

RECOMMENDATION:

A healthy and financially sound defined benefit system is an objective shared by both PBGC and the plan sponsor community. To that end, I would like to explore with the sponsor community and PBGC options for improving and enhancing the PBGC's tools and resources to address both the its genuine concerns about transactions that may impair a sponsor's ability to maintain its plan, and plan sponsors' views about how to balance those concerns with the goal to protect and maintain the defined benefit system. PBGC and its regulated community need not have all the answers, but I am sure that over the years some considerable thought has been given to this, and I would like to bring those ideas forward for policymakers' consideration.

In order to make progress, I recommend that the focus of this collaboration be narrowly targeted to the use of PBGC's risk-mitigation tools. If we broaden the focus to other issues, like de-risking, I fear that the ability to make progress on this critical issue will be jeopardized. I very much favor looking into the causes of de-risking, as previously discussed, but to make progress on this business intervention issue, we need to focus on it separately.

As a first step in this dialogue, I am recommending that PBGC provide the maximum possible transparency about its use of risk-mitigation tools. The only caveat is that such transparency must be provided in a way that ensures the confidentiality of the private parties involved.

⁹ ERISA § 4042(a)(4) (29 U.S.C. § 1342(a)(4)).

Plan Sponsor Issue #4: Reportable Events Regulations

In September of this year, PBGC finalized regulations on reportable events. The biggest change in the regulations was a modification of PBGC's fundamental approach to providing regulatory waivers from the reportable event report requirements. The old regulations primarily focused on a plan's funded status to determine eligibility for a waiver. The new regulations, on the other hand, make it very difficult to qualify for a waiver by reason of a plan's funded status. Instead, the primary means of qualifying for a waiver is based on a company's financial condition, as measured by metrics created by the PBGC.

Qualifying for a waiver based on a company's financial condition is a far broader issue than the reportable event regulations. This issue relates to a fundamental difference in opinions with respect to the use of a company's financial condition to determine the regulatory burdens on that business.

BACKGROUND:

When PBGC issued final regulations on reportable events under section 4043 of ERISA, the new regulations significantly revised longstanding rules governing when administrators and sponsors of defined benefit pension plans needed to report certain events to PBGC, and signaled a fundamental shift in PBGC's view of the types of events that merit the agency's attention. In particular, the final regulations focus on indicators of a plan sponsor's financial health rather than merely the health of the pension plans. The new rules represent a significant and controversial change in the agency's focus, and when the rule was first proposed in 2013, PBGC held a very rare public hearing to collect public comment.

In many discussions with plan sponsors, PBGC indicated its desire to modify many of its rules so that the rules apply differently to "low-risk" companies as opposed to "high-risk" companies. It is my understanding that plan sponsor organizations and the vast majority of plan sponsors have been generally and strongly opposed to this type of modification.

PBGC points out that high-risk companies raise the greatest risk to the PBGC. Thus, these are the companies most in need of close supervision and regulation. Correspondingly, there is less reason to impose burdens and requirements on companies that do not pose a material risk to the PBGC.

Plan sponsors respond by pointing out that PBGC only suffers losses when a company fails. By imposing additional burdens on companies facing business challenges, PBGC can make it more difficult for the company to recover, which hurts the company, the economy, the workers, and ultimately the PBGC, since, as noted, PBGC only takes over liabilities from failed companies. Moreover, the threat of such burdens can drive companies out of the pension system, including healthy companies that fear a future down cycle, as may happen with any business. Plan sponsors also question whether PBGC has the authority or the expertise to create its own standards for assessing a company's financial soundness, as PBGC has done in the reportable event regulations.

Especially after the release of the reportable event regulations, there is a strong sense among plan sponsors that, regardless of the views of plan sponsors and the concerns that they have raised, PBGC is determined to spread the use of financial soundness throughout the regulatory process. Moreover, plan sponsors point out that Congress has repeatedly rejected numerous efforts by PBGC to authorize the use of financial soundness in this area.

This issue is alienating many in the plan sponsor community, which feels helpless to slow down an approach that PBGC is pursuing, seemingly without regard to their input. This is adding to the adversarial nature of the relationship between the PBGC and the plan sponsor community. Plan sponsors very much perceive PBGC as determined to impose the greatest burdens when a company can least afford to deal with those burdens. All of these factors are working together, with funding and accounting volatility and PBGC premium levels, to drive plan sponsors out of the pension system, which as discussed in a prior section of this report, is the greatest threat to the continued viability of the PBGC. This effect is also directly contrary to the mission of the PBGC to encourage the maintenance of pension plans. This all speaks to a greater requirement for consultation, dialogue, and collaboration between PBGC and the regulated community so that regulatory emphasis is placed on establishing a system that supports the maintenance of sound plans, but is not perceived by plan sponsors as hurtful to their ability to weather financial downturns.

If plan sponsors view the regulatory regime as supportive, they are much more likely to stay in the system, which will be far better for participants than having the plan shut down because of burdens imposed pursuant to financial soundness metrics of the plan sponsor created by PBGC. Or worse yet, those burdens could cause the plan to be taken over by the PBGC, with limits on benefit amounts and distribution forms.

To PBGC's credit, there are several aspects of the new reportable events regulations that are very helpful and that have been well received by the regulated community. In particular, the new rules provide expanded waiver relief for small plans, and rationalize the reporting of active participant reduction events by limiting the need to monitor the active participant count on a continuous basis unless the reduction is based on a single cause.

On the other hand, there are aspects of the new rules that may create difficulties for the regulated community. For example, the final rule greatly expands reporting of loan defaults by requiring reporting even if the default is technical in nature, even if it is cured, and even if the default does not occur because the lender waives the default or agrees to the amendment of a covenant, the effect of which is to cure or avoid a breach that would trigger default. This will require much more monitoring on the part of plan sponsors to ensure that even the most technical defaults, and even certain non-defaults, are reported pursuant to the regulations. And this may also lead to problems in connection with representations and warranties, notice requirements, default provisions, and cross-default provisions under a variety of corporate loan or other agreements.

RECOMMENDATION:

First, there is a need for much more dialogue on the use of financial soundness factors before PBGC uses such factors again in any administrative guidance. Without that dialogue, I fear that the divide between the PBGC and plan sponsors will continue to grow, further fueling the exit from the system.

Second, it is important that PBGC actively seek and obtain input from the regulated community as to any problems that may arise in connection with the implementation of the new rules, and that it take prompt action to provide any necessary relief. PBGC has the authority to provide waivers or extensions from the regulatory requirements without the need to engage in a new rulemaking action. For example, if PBGC learns that the expanded reporting requirements relating to loan defaults are creating problems, it should consider providing appropriate waivers or extensions by issuing a Technical Update.