



**2018 Annual Report  
of the  
Participant and Plan  
Sponsor Advocate**

Pension Benefit Guaranty Corporation

December 31, 2018



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This statutorily required 2018 Annual Report discusses the activities of the Office of the PBGC Participant and Plan Sponsor Advocate (Office of the 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.

This Annual Report marks the five-year anniversary of establishing the position of the Advocate at PBGC and provides an opportunity to consider the evolution of the Advocate's role in the context of past experiences assisting participants and plan sponsors. The Report contains suggestions to enhance and clarify the Advocate's enabling legislation under section 4004 of the Employee Retirement Income Security Act (ERISA). These suggested legislative amendments will strengthen the Advocate's statute to better serve participants and plan sponsors who come to our Office for assistance. The suggestions are also consistent with legislative recommendations by the Internal Revenue Service's Taxpayer Advocate to her enabling statute, which the PBGC Advocate statute models, and the International Ombudsmen Association's Standards of Practice.

This report details positive changes PBGC made in response to prior Advocate Reports as well as new and ongoing recommendations which may help address some of the enduring difficulties participants and plan sponsors encounter in their dealings with the Corporation. One positive change attributable to the leadership of Director Reeder is the example he sets encouraging a productive and collegial work environment at PBGC. Director Reeder has also ensured that the Office of the Advocate receives proper resources, so it can efficiently operate and work with our PBGC colleagues to assist participants and plan sponsors. To that end, the Office of the Advocate is now fully staffed and able to serve a growing demand for help from participants and plan sponsors.

Over the years, the Office of the Advocate has noted common themes from participants and plan sponsors regarding their encounters with PBGC. These parties have observed and still often note long delays in resolving their matters with PBGC, confusing and contradictory exchanges between PBGC and the participant, plan sponsor, or their advisors, and difficulties when an issue transcends multiple departments within the agency.

To address these ongoing themes, it may be useful to consider establishing a Chief Executive Officer (CEO) position responsible for operational oversight of the different departments within PBGC. These various departments often function independently from each other when they need

to work together. A CEO would unify these disparate departments, much like the conductor of an orchestra who brings together different musicians and their instruments, to make beautiful music.

PBGC's newly announced Customer Experience initiative, which contains guiding principles reinforcing the customer service goals the agency strives to achieve, is an extremely positive step toward meeting the needs of the agency's customers that include participants and plan sponsors, and the internal departments within PBGC. These principles provide a foundation to guide and shape how agency staff interacts with and projects themselves to the internal and external parties served by the agency. I commend Director Reeder for adopting these principles consistent with best business practices.

Additionally, the Office of the Advocate completed the second part of its study on single employer pension plan de-risking, which can be found in the Appendix of this Report. Unlike the quantitative approach of the first part of the de-risking study, Part II took a qualitative approach, which consisted of a focus group from a small but diverse group of plan sponsors on varying paths toward de-risking. The small group format allowed for a deeper probe into the reasoning behind de-risking decisions which can be helpful to inform and shape retirement policy for all Americans.

The study notes that rising PBGC premiums represent a significant driver of de-risking activity. Given these rising premiums and the dwindling premium payer base as sponsors de-risk their defined benefit plans, the agency must be mindful of the resources it uses when pursuing plan sponsors for prolonged periods of time, such as during protracted negotiations in the distress termination process. There is a need for quantitative analysis that justifies the agency's rate of return on expended resources, as the time and monetary costs associated with long negotiations add up quickly. This kind of cost-benefit analysis should be a matter of course when undertaking any intervention with either plan sponsors or participants.

Respectfully, I submit for your consideration the 2018 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 31, 2018

cc: Camille M. Castro, Senior Associate Participant and Plan Sponsor Advocate  
Javier J. Diaz, Associate Participant and Plan Sponsor Advocate  
Lauren A. Pierce, Management and Program Analyst

## **STATUTORY AUTHORIZATION – ERISA § 4004**

### **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.
- (3) Concurrent Submission—The Participant and Plan Sponsor Advocate shall submit a copy of each report to the Secretary of Labor, the Director of the Corporation, and any other appropriate official at the same time such report is submitted to the committees of Congress under paragraph (1).

## **SUGGESTED LEGISLATIVE CHANGES TO STRENGTHEN THE OFFICE OF THE ADVOCATE**

The Office of the Advocate makes the following suggestions for certain statutory amendments to the Advocate's enabling statute codified in section 4004 of ERISA. The recommendations are based on the Office of the Advocate's past five years of experience assisting participants and plan sponsors resolve disputes with the Corporation while working within the framework of the current statute.

The suggested changes are also consistent with legislative recommendations by the Taxpayer Advocate to enhance the Taxpayer Advocate's statute, which was the model used in establishing the role of PBGC's Advocate and the Office of the Advocate.<sup>1</sup> Further, the recommendations incorporate the International Ombudsman Association's (IOA) Standards of Practice, IOA's Best Practices, and the American Bar Association's Standards for the Establishment and Operation of Ombuds Offices.<sup>2</sup> This guidance encourages independence, neutrality and impartiality, and confidentiality, and emphasizes the off-the-record problem resolution role of Ombuds functions. The guidance notes the role of an Ombudsman office in making recommendations to address procedural and broader systemic problems, and reinforces that an Ombudsman Office, like the Office of the Advocate, is a place worthy of trust.

### *Clarify the Role of the Advocate*

The Advocate's statute lists seven main duties for the Advocate. There is currently a distinction between the Advocate's role as it relates to participants compared to plan sponsors. ERISA § 4004(b)(1)-(2) states that the Advocate shall “**Advocate** for the full attainment of the rights of participants in plans trusteeed by the Corporation,” and “**Assist** pension plan sponsors and participants in resolving disputes with the Corporation” (emphasis added). Specifying that the Advocate can “advocate” for both participants and plan sponsors would clarify the statute and be consistent with a recommendation from the PBGC Office of Inspector General.

**Recommendation:** Amend ERISA § 4004(b) to clarify that the Advocate is authorized to advocate for both participants and plan sponsors.

### *Advocate's Compensation and Recommendation to Eliminate Bonus Eligibility*

PBGC employees, which include the Advocate, are eligible for a variety of cash awards and performance bonuses. For example, PBGC employees may receive individual performance awards based on the employee's performance review, which is generally assessed by the employee's supervisor. Other awards include special achievement awards for a one-time contribution to a product, activity, program, or service that improves efficiency, economy, or

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<sup>1</sup> See Internal Revenue Service's Taxpayer Advocate Purple Book, available at <https://taxpayeradvocate.irs.gov/reports/2017-annual-report-to-congress/NTA-Purple-Book>.

<sup>2</sup> See IOA's Standards of Practice & IOA Best Practices, available at <http://www.ombudsassociation.org/About-Us/IOA-Standards-of-Practice-IOA-Best-Practices.aspx>. See also American Bar Association Standards for the Establishment and Operation of Ombudsmen Offices, available at <https://www.americanbar.org/content/dam/aba/migrated/leadership/2001/107d.authcheckdam.pdf>.

other aspects of PBGC operations. These types of special achievement awards are distinguishable from performance rating-based awards.

The function of the Office of the Advocate is similar to the Office of Inspector General, which is an independent organization within PBGC. The Inspector General Act of 1978 (the “Act”) establishes Inspector General offices as “independent and objective units.” The Act sets the Inspector General’s compensation at a fixed level and furthers the office’s independence by stating that an Inspector General “may not receive any cash award or cash bonus.”

Unlike the Inspector General, under ERISA § 4004(d), the Advocate’s annual rate of basic pay is “the same rate as the highest rate of basic pay established for the Senior Executive Service under section 5382 of title 5 or, if the board of directors of the Corporation so determines, at a rate fixed under section 9503 of such title.” The statute does not contain any language that would preclude the Advocate from accepting a cash award or a performance bonus, and as a PBGC employee, the Advocate would be eligible for such awards or bonuses. Additionally, this language is identical to the Taxpayer Advocate’s statutory provision on compensation under Internal Revenue Code § 7803(c)(1)(B)(i), and the Taxpayer Advocate is eligible for an annual performance bonus.

Since the Advocate must act under an independent and impartial standard, the review associated with a performance bonus or other special award could affect the independence and voice of participants and plan sponsors by the Advocate. In advocating and assisting participants and plan sponsors in resolving their disputes with the Corporation, the Advocate may take a position that runs contrary to policy decisions made by PBGC management. Performance assessments and special awards eligibility determinations, which would establish whether the Advocate receives a bonus or cash award, may have a chilling effect on the Advocate’s ability to effectively advocate. Setting the Advocate’s compensation at a fixed amount, such as the PBGC Director’s pay rate, and eliminating all awards removes any undue influence over the role of the Advocate.

**Recommendation:** Amend ERISA § 4004(d) to set compensation of the Advocate at a fixed rate of basic pay and stipulate that the Advocate may not receive any cash award or bonus. This suggestion is consistent with a recommendation made by the Taxpayer Advocate for her position in the 2017 Inaugural Purple Book submission to Congress.

### *Confidentiality*

The Advocate does not currently have the authority to provide participants and plan sponsors with confidentiality as it relates to information provided by or on behalf of these parties to the Advocate.

**Recommendation:** Amend ERISA § 4004 to expressly provide that the Advocate has discretion to not disclose contact with or information provided to the Advocate by or on behalf of a participant or plan sponsor to PBGC. This suggestion is similar to provisions in the Taxpayer Advocate’s enabling statute and the IOA’s Standards of Practice.<sup>3</sup>

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<sup>3</sup> See 26 U.S.C. § 7803(c)(4)(A)(iv). “Each local taxpayer advocate may, at the taxpayer advocate’s discretion, not disclose to the Internal Revenue Service contact with, or information provided by, such taxpayer.”

*Annual Report Submission*

ERISA § 4004(e)(3) (Concurrent Submission) requires the Advocate to submit the statutorily required Annual Report “to the Secretary of Labor, the Director of the Corporation, and any other appropriate official **at the same time** such report is submitted to the committees of Congress...” This concurrent submission contemplates that it will go to all parties without prior review to preserve the independence of the Advocate and views expressed in the Annual Report.

**Recommendation:** Amend ERISA § 4004(e)(3) to clarify that the Concurrent Submission requirement means that the Annual Report shall be submitted directly to the required parties without any prior review or comment.

*Outside Legal Counsel*

The Office of the Advocate may need legal advice from outside counsel to fulfill the Advocate’s statutory duties. Based on the Advocate’s experience, this would be a rare occurrence.

**Recommendation:** Amend ERISA § 4004 to expressly authorize the Advocate to hire outside legal counsel that reports directly to the Advocate.



## **PARTICIPANT ISSUES**

The Office of the Advocate has observed significant positive strides by the organizations within PBGC that serve participants seeking benefit entitlements. The most notable change is consolidating potentially omitted participants (POPs) claims in the Office of Benefits Administration (OBA). While this change is extremely positive, there are still outstanding issues involving case management and clarity of participant communications that require thoughtful consideration and correction.

As a customer service-oriented agency, PBGC must focus on initiatives that enhance the customer's experience, whether it is in the agency's written communications or any subsequent interactions agency staff may have with participants or their advisors. This is a formidable task considering the various inquiries and standard communications sent to participants and beneficiaries by PBGC. However, as the cases below show, there is a willingness to learn here at PBGC and adjust interactions with participants and their advisors.

### **POSITIVE IMPROVEMENTS**

#### *Potentially Omitted Participants Cases Consolidated in the Office of Benefits Administration*

Past Advocate reports have chronicled the positive evolution of OBA's methodology when reviewing complex benefit entitlement claims. OBA continues to take a more holistic approach when addressing these cases, particularly those involving POPs in plans trusted by the Corporation, by analyzing all available information and documenting reasoning and rationale supporting its decisions. Despite OBA's positive stance, prior Advocate reports, and some of the cases detailed in this report, illustrate a seeming disparity between the approaches taken by OBA and the Standard Termination Compliance Division (STCD), the other department within PBGC responsible for reviewing benefit claims from POPs, when determining an individual's eligibility for benefits.

The Advocate is pleased to report that the review of all POPs cases has been consolidated in OBA, effective October 2018. While STCD will still provide background research support, particularly for POPs benefit claims involving plans that have undergone a standard termination, OBA is now entirely responsible for reviewing POPs cases to determine whether an individual is entitled to a benefit. This consolidation will provide consistency in the review of these types of cases from a department that routinely makes benefit determinations. It will also alleviate the burden on POPs, as they will need to contact only one department for assistance. Moreover, this change responds to a recommendation in the 2014 Advocate Annual Report.

#### *Missing Participants Program Expansion and Interagency Initiatives*

The Advocate is supportive of the continued success and expansion of an initiative between PBGC and various regional offices of the Department of Labor's Employee Benefits Security Administration (EBSA). The initiative, which originated with the Office of the Advocate and EBSA's Chicago Regional office, involved interagency data-sharing which enabled the Chicago Regional office to actively search PBGC's unclaimed pension database to help reunite

participants with their benefits. This initiative has now expanded to seven additional EBSA regional offices, recovering over \$43.6 million for over 550 participants in 2018. Additionally, this is not only a great example of data-sharing among and between federal agencies resulting in substantial benefit entitlement recoveries for participants, but also a great compliance illustration because the unclaimed pension data files PBGC provided to EBSA's regional offices included participants who had missed their required minimum distributions under the Internal Revenue Code (the Code).

This positive initiative complements the expansion of PBGC's Missing Participants Program. PBGC updated its Missing Participants regulation to expand the existing Missing Participants Program to cover participants in most defined contribution plans that terminate on or after January 1, 2018, such as 401(k) and profit-sharing plans, and certain defined benefit plans that were not previously covered under the agency's program.

PBGC is also in the process of updating its "Finding A Lost Pension" guide which is one resource for individuals who think they have a pension but cannot find their pension plan or former employer to begin receiving their benefits. Coupled with the expansion of the Missing Participants Program, this revised guide will provide important information to assist participants and beneficiaries with their search for their missing retirement benefits.

#### *Collaboration Leads to Resolving Enduring Class Action Lawsuit*

Page-Collins was a class action lawsuit that had been a part of PBGC's history since the late 1980s. The case involved a class of participants from underfunded plans that terminated between 1976 and 1981 without changing their vesting rules to comply with ERISA. The participants were not vested in their benefits under the terms of their respective plans but did meet ERISA's minimum vesting requirements. PBGC agreed to pay these participants' benefits as part of the case's settlement, which also established a Class Action Settlement Board (CASB) consisting of a neutral representative, the class representatives, and PBGC representatives.

Over the years, PBGC paid over \$1 billion in settlement benefit proceeds, but when the processing of claims reached a stalemate, class counsel and the neutral representative contacted the Advocate for assistance. The Office of the Advocate brought together the class neutral, the class counsel, and PBGC staff to reach resolution with the class.

After numerous discussions with the Advocate, the class counsel, the CASB neutral representative, PBGC's General Counsel, and PBGC's Chief of Benefits Administration, the agency began to make changes to facilitate and resolve pending benefit claims. Eventually, after many noteworthy interventions by all parties, the class was closed under the supervision of the judiciary, and any remaining claims are currently being resolved. This is a good example of PBGC, the Office of the Advocate, and advisors of the defined benefit participant community coming together to solve enduring problems.

### *Routine Meetings with Participant Stakeholders*

PBGC's Office of Policy and External Affairs continues to coordinate and hold regular meetings with participant advocacy groups and stakeholders, providing a forum for these groups to discuss topics of concern with the agency. Past meetings have addressed questions about the agency's publications, such as the Annual Report, and other agency-wide initiatives, including the expanded Missing Participants Program. The Office of the Advocate commends this sustained effort to increase transparency and communication between the agency and the participant advocacy groups.

## **PARTICIPANT ISSUES AND NOTABLE CASES**

### *Piecemaker Participants and Their Quest for Benefit Entitlements*

As companies move, merge, change forms, or close their doors, it becomes increasingly difficult for participants to locate their former employers when it is time to commence their pension benefit. Many of these POPs eventually contact PBGC during their search, particularly if the plan underwent a standard termination. These claims by POPs often occur many years after PBGC closes its review of the standard termination. Due to the lack of available documentation and complexity of these cases, POPs may face significant hurdles when working with the agency on their claim for benefits, even when they are represented by counsel. The cases that follow highlight some of the difficulties that these POPs encounter.

The South Central Pension Rights Project (SCPRP) contacted the Office of the Advocate regarding a cohort of POPs claims. The participants or their spouses worked as hourly piecemakers at various plant locations of the same shoemaking company which had eventually terminated its pension plan through a standard termination. The SCPRP requested the Office of the Advocate's assistance on five outstanding cases, two of which are detailed below.

*Ready to Say "No" Without All Relevant Documentation:* One participant worked as an hourly piecemaker for the company for twenty-eight years. She had been searching for her pension benefit for years before reaching out to the SCPRP for assistance. The SCPRP submitted the participant's claim for benefits to PBGC in February 2015, providing copies of W-2s, union membership cards, plant locations where the participant worked, and other relevant background information to support her claim. In December 2016, STCD, the department then responsible for reviewing this cohort of POPs claims, sent the participant a letter stating it was closing the case due to lack of documentation, such as a record of hours worked or actual timesheets, supporting entitlement to a benefit. The letter retained the possibility of reopening the case if the participant provided additional documentation supporting her entitlement to a benefit.

The SCPRP subsequently contacted the Office of the Advocate for assistance, questioning how the December 2016 letter fit into PBGC's administrative procedure regulations for benefit appeals since it neither fully denied nor approved the participant's benefit claim.

Upon receiving the case, the Office of the Advocate requested all documentation related to the participant from the SCPRP. The documentation included the participant's Social Security

Administration (SSA) Earnings Statement as well as the information submitted to PBGC. After reviewing the relevant plan document and supporting documentation, the Office of the Advocate noticed a plan provision which, when coupled with the participant's SSA Earnings Statement, supported granting the participant a benefit. STCD concurred and finally approved the participant's benefit claim over three years after the SCPRP first submitted the claim.

There was no explanation from STCD as to why it had not followed up with the SCPRP regarding obtaining the participant's SSA Earnings information which would have facilitated a prompt resolution of the case. This is particularly troubling because the agency reviewed the participant's benefit claim without obtaining this information even though PBGC has an interagency memorandum of understanding (MOU) with SSA which allows it to directly request a participant's SSA Earnings information at no cost to the participant to determine eligibility for a PBGC benefit.

*Dying While Waiting for a Benefit Determination:* Another case involved a spouse pursuing a survivor benefit. The SCPRP submitted the spouse's claim to PBGC in late 2015, and in December 2016, PBGC sent the spouse a letter stating it was closing the case since it could not determine eligibility for a benefit based on existing documentation. The letter preserved the possibility of additional review if the spouse submitted further documentation supporting the claim.

The SCPRP contacted the Office of the Advocate in February 2018 for assistance with the matter since the December 2016 letter raised procedural questions about the agency's administrative review process. After conducting additional research, the Office of the Advocate located a historical document providing information about the company that could be combined with existing documentation to support granting the spouse a benefit. Additionally, the Office of the Advocate learned that the spouse had passed away during the prior year.

After the Office of the Advocate provided STCD with its analysis showing how the historical document could be used during the case review process to justify granting the spouse a benefit, the agency issued a posthumous benefit determination denying the claim. The letter stated it was "likely" that benefit eligibility requirements were met (contrary to the agency's December 2016 letter), but that the claim was being denied based on PBGC's interpretation of a provision in the plan document. Denying a benefit based on questionable plan interpretation could have been communicated to the spouse years ago before she died without a concrete decision from PBGC on her benefit claim. We owe participants a full and meaningful, yet timely, review of their case before denying a claim.

**Recommendation:** While consolidating POPs cases in OBA is a commendable development, there are lessons to be learned from these past cases. Participants often face an uphill battle in their claim for benefits, particularly when they left the company many years ago and no longer retain documentation that may be useful to their claim. In the absence of definitive documentation showing entitlement to a benefit, the agency may need to consider other

secondary pieces of information, such as historical summary plan descriptions or company background information, as part of its case review.<sup>4</sup>

PBGC should ensure that it collects all available documentation and information before making a decision regarding a participant's benefit claim. One avenue for obtaining relevant information is the interagency MOU between PBGC and SSA which allows PBGC to directly obtain a participant's SSA Earnings information for purposes of determining eligibility for a PBGC benefit. It may be beneficial to explore expanding the scope of the MOU to allow PBGC to directly request and obtain a participant's Form SSA-L99-C1 ("L99"), Notice of Potential Private Pension Benefit Information.<sup>5</sup> While the L99 is not definitive proof of entitlement to a benefit, it provides salient information such as a plan name and an estimated amount of the benefit. When coupled with other supporting documentation, the L99 is invaluable to determining a participant's eligibility for a benefit. Including the L99 in the scope of the MOU will save time and reduce the burden on the participant to obtain this document.

In addition to the MOU with SSA, PBGC's own records often provide valuable information for individuals searching for their pension. PBGC's historical premium filings can help participants trace the history of a plan even when the agency has not trusted or terminated the plan. The premium filings often indicate when the plan changed names or sponsors or merged into or consolidated with another plan, potentially leading participants to an ongoing plan which now has responsibility for their benefits. PBGC's Financial Operations Division (FOD) has custody of PBGC's historical premium filing information, and access to this database should be shared with those individuals in OBA handling POPs cases.

Additionally, while PBGC often plays a role in a participant's search for his or her lost pension, there is a need for a National Pension Registry which would allow workers to track information about their retirement plans and locate their former plan administrators. This registry would require data-sharing among and between multiple agencies, including PBGC, the Internal Revenue Service, the Department of Labor, and SSA, as all hold data that would be needed to populate such a registry. PBGC's MOU with SSA demonstrates the value and utility of interagency data-sharing, and interagency collaboration to create this pension registry would benefit participants searching for their missing pension benefits. There is great interest in establishing this registry, and the Office of the Advocate has discussed the pension registry with the Boston College Center for Retirement Research, which is currently exploring options and researching ideas.

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<sup>4</sup> PBGC is the custodian of summary plan descriptions (SPDs) filed with the Department of Labor from 1975 to 1991. These SPDs often contain valuable historical information that can prove entitlement to a benefit. The SPDs are publicly available by submitting a request to PBGC. See <https://www.pbgc.gov/about/pg/other/requesting-a-summary-plan-description>.

<sup>5</sup> The L99, Potential Private Pension Benefit Information notice, contains information provided by the plan administrator to SSA about a participant's potential deferred vested retirement benefit. The notice, which is generally sent to participants when they file a claim for Social Security Benefits, lists information such as the plan name, plan number, EIN, and estimated benefit, and may be used as evidence to determine whether a participant is entitled to a pension benefit.

*Unanswered Actuarial Questions Lead to a Need for a Supplemental Response*

The Office of the Advocate received a request for assistance from counsel representing a participant who had been in communication with the agency for some time regarding his benefit amount from a plan trusted by PBGC. The participant, a majority owner, had worked past his normal retirement age and received in-service distributions after age 70 ½ in accordance with the Code's required minimum distribution rules while continuing to accrue benefits. When the participant finally retired, he began receiving a monthly annuity amount which PBGC continued to pay upon trusteeing the plan. After the agency trusteeed the plan, the participant questioned his benefit amount based on his interpretation of actuarial provisions in the Code and the plan document.

The participant and the plan's actuary repeatedly discussed the matter with PBGC's actuaries before involving their counsel. Once involved, the participant's counsel also participated on multiple calls with actuaries at PBGC but had yet to receive a written response to issues raised regarding the participant's benefit calculation. Instead, PBGC issued a final "no change" benefit determination stating that the amount of the participant's benefit would remain the same. The benefit determination did not give any detailed information about the calculation or address the issues raised by the participant and his counsel.

At the encouragement of the Office of the Advocate, PBGC revisited the participant's case and drafted a supplemental response which addressed the substantive issues raised by the participant and his counsel. While PBGC did not change the participant's benefit amount, this supplemental letter cited the relevant law and PBGC's policies which supported its decision regarding the participant's benefit calculation.

**Recommendation:** Complex benefit calculations require more than a generic response, particularly when the participant has engaged in additional communication and posed substantive questions. A participant should be able to understand the reasoning and policies informing PBGC's decision. In complex cases, this information must be customized so the individual can understand how PBGC arrived at a decision regarding a benefit amount.

Additionally, if a participant is represented by counsel, PBGC should also ensure that its own counsel is involved with the matter. In the above case, the participant's counsel participated on multiple calls exclusively with PBGC actuaries. While PBGC did finally refer the matter to OGC to assist with drafting the supplemental response to the participant and his counsel, earlier involvement by OGC may have mitigated the situation, resulting in a more efficient resolution of the matter.

*Review of Domestic Relations Order: From Boilerplate to a Custom Response*

In a similar matter, a participant's counsel contacted the Office of the Advocate regarding challenges with the agency when trying to qualify a domestic relations order. The participant finalized her divorce from her spouse almost thirty years ago and had a divorce decree stating that her former spouse would designate her as both a surviving beneficiary and 100% Joint & Survivorship (J&S) beneficiary. PBGC trusteeed the plan many years later, and upon her ex-

spouse's death, the participant's counsel contacted the agency regarding her survivor benefit. PBGC verbally informed the participant's counsel that it could not qualify the divorce decree as a qualified domestic relations order (QDRO) but did not give further explanation. The participant's counsel then contacted the Office of the Advocate for assistance on the case.

Further case research determined that the participant's ex-spouse never submitted the divorce decree to the plan administrator for qualification. By the time PBGC trusted the plan, the ex-spouse's benefit had already commenced, and he had named another individual as beneficiary and recipient of the 100% J&S benefit.

PBGC agreed to provide a written response to the request to qualify the divorce decree as a QDRO. Early drafts of the response used generic boilerplate language and did not fully explain the agency's reasoning for refusing to qualify the participant's domestic relations order. Upon urging from the Office of the Advocate, PBGC revised the response to add custom, fact-specific language, including case law and statutory citations supporting the agency's decision. PBGC also participated on a conference call with the Office of the Advocate and the participant's counsel to explain its decision, and further availed itself to any questions from the participant's counsel about the decision.

**Recommendation:** Cases involving QDROs can be very complex and fact-specific. While boilerplate language can be useful for certain parts of a response, decisions from the agency should fully explain the agency's rationale as it relates to a participant's unique situation. In the above case, the earlier drafts of PBGC's decision included generic language that was not relevant to the participant's case. While PBGC's final decision was not favorable to the participant, the participant's counsel expressed appreciation for the level of detail and specificity to his client's situation in PBGC's response and the customer service provided by the agency. It means so much to participants, and plan sponsors too, when they understand PBGC's reasoning as it is applied to their client's specific facts and circumstances.

### *Lax Supervision Leads to Case Management Woes*

The Office of the Advocate received multiple requests for assistance from participants in a plan that had been trusted by the Corporation in 2009 regarding obtaining detailed benefit determination worksheets. While PBGC had trusted the plan many years ago, the agency was still in the process of issuing final benefit determinations during 2018. The agency had decided to provide summary benefit determinations, and participants were required to separately request a detailed benefit determination statement worksheet if they wanted additional information regarding their benefit calculation. These detailed benefit determination statement worksheets are often manually produced using information from multiple systems and sources and can take weeks to complete for participants with complex benefit calculations such as those involving QDROs.

While the participants initially contacted the Office of the Advocate due to delays in obtaining the detailed worksheets, the interactions eventually shifted to contacting the Office of the Advocate to make an initial request for the worksheet. Despite referring the cases to OBA to address each participant contact, the Office of the Advocate quickly learned that participants had

subsequent follow up questions but no direct contact information for the individuals in OBA assisting with their cases. Instead, the participants would contact the Office of the Advocate again since they had a direct phone number and point of contact in the Office. Since the Office of the Advocate did not have the subject matter expertise on the plan, it referred the cases back to OBA for resolution. This process did not serve the participants well since they were forced to contact multiple people to receive answers to their questions. After several conversations between the Office of the Advocate and OBA leadership, OBA eventually designated a point of contact for these participant inquiries.

**Recommendation:** There is a need for greater supervision and employee accountability for participant cases that do not lend themselves to standardized procedures. Managers should be aware of their employees' cases and provide appropriate supervision and guidance to ensure that participants' cases are being thoroughly and correctly handled. Greater supervision ensures that cases do not "fall through the cracks" and provides for efficient resolution of matters.

This lack of oversight is often prevalent in the various Field Benefit Administration (FBA) offices within OBA. These offices are comprised entirely of contractors, with no federal employees on site full-time. At the time of the above situation, there was no point of contact in the FBA and the contractors handling the cases did not provide participants with their direct phone numbers for follow up questions. This resulted in participants being required to interact with multiple contractors regarding the same issue. Greater contractor supervision is needed to ensure that a participant's inquiry is fully addressed with proper follow up if needed, particularly for matters that cannot be resolved by one customer interaction.



## **MULTIEMPLOYER PENSION REFORM ACT OF 2014**

The Office of the Advocate continued to receive outreach from retirees and beneficiaries facing benefit suspension and/or partition under the Multiemployer Pension Reform Act of 2014 (MPRA). These individuals imparted one resounding message—sheer disappointment and frustration with MPRA and a system that has shattered their expectation of a secure retirement after years of working and paying for post-retirement security. The Office of the Advocate has great empathy for these retirees and beneficiaries, and appropriate stakeholders must coalesce around the best options for retirement security for these workers. The Office of the Advocate is available to assist with this endeavor consistent with the Office’s statutory duties.

### *Role of the Advocate in Partitions*

The Advocate has a limited consultative role during the partition process. PBGC is required to consult with the Advocate regarding whether the plan has taken all reasonable measures to avoid insolvency. During 2018, PBGC consulted with the Advocate regarding two plans’ applications for partition. In both cases, PBGC staff provided responsive comments to concerns raised by the Advocate on behalf of the affected retirees, including questions about administrative expenses and the potential use of other “side funds” as sources to financially assist the pension fund. The collaboration among the Office of the Advocate, the Office of the General Counsel (OGC), and PBGC’s Multiemployer Program Division (MEPD) enabled the Advocate to satisfy her statutory duties to ensure that the plans had taken all reasonable measures to avoid insolvency.

### *Insolvent Plans and PBGC Financial Assistance for Appropriate Benefit Administration Expenses*

The Office of the Advocate continued to receive requests for assistance from retirees in a fund which went insolvent in 2017. These requests involved questions about benefit calculations and the payment of certain lobbyist expenses by the pension fund while receiving financial assistance from PBGC. The Office of the Advocate is appreciative of the prompt response provided by MEPD and OGC staff which confirmed that only appropriate benefit administration expenses are paid by the insolvent fund receiving PBGC financial assistance, and that lobbying expenses are not appropriate benefit administration expenses when PBGC is providing financial assistance to the plan.

### *MPRA Merger Rule*

PBGC published a final rule implementing its authority to facilitate mergers of multiemployer pension plans in September 2018.<sup>6</sup> With the many challenges facing the multiemployer pension system, this final rule may help preserve retirement benefits for participants and beneficiaries as facilitated mergers are a tool to help struggling multiemployer plans. While the final rule is not the entire solution to the funding crisis faced by the multiemployer pension system, it may encourage troubled multiemployer plans to merge in an effort to obtain financial stability.

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<sup>6</sup> See 83 FR 46642. The rulemaking also updated the general rules on plan mergers and transfers.

## **PLAN SPONSOR ISSUES**

The Office of the Advocate routinely receives a variety of requests for assistance from different types of plan sponsors including small businesses, charities, not-for-profits, and large companies. Some of these assistance requests can be resolved very quickly by coordinating with the appropriate PBGC department to move the case forward. However, other cases present larger, more complex issues, particularly when the parties reach a stalemate, often requiring months of involvement by the Office of the Advocate.

The agency has made positive changes to address some of the enduring problems these sponsors face in their dealings with the Corporation. This report focuses on the challenges that lie ahead, but it is important to recognize the very substantial progress that has been made. Upper management has been very engaged in the effort to improve the plan sponsor experience. Discussion of the marked improvement is provided at the end of this section.

There are still, however, longstanding issues including (1) lack of timely case resolution; (2) lack of case team management oversight and clarity regarding who is leading the case team; (3) ineffective coordination among and between PBGC departments; and (4) insufficient transparency and certainty in PBGC's actions which lead to difficulty in terms of the sponsor carrying out its business. These issues are illustrated in the cases below.

### **PLAN SPONSOR ISSUES AND NOTABLE CASES**

#### *Charity's Termination Liability Settlement Discussions Continue to Languish*

After PBGC terminates a plan, whether it is through a distress or involuntary termination, negotiations with the plan sponsor continue in order to settle the outstanding termination liability. While discussions leading to the actual plan termination or trusteeship can involve months, if not years, of negotiations, the termination liability settlement discussions may also add significant time and expense.

The 2017 Advocate Annual Report detailed a request for assistance regarding protracted negotiations between the Corporation and a charity plan sponsor. The matter had been pending for three years and last year's report described how PBGC finally completed the process to approve the plan termination in late December 2017 after intervention by the Office of the Advocate. The ongoing interruptions and hurdles to reach resolution during both the trusteeship process and the termination liability settlement caused innumerable financial issues for the charity, which depends on grants from state and federal agencies to fund its operations. The 2017 Annual Report expressed an expectation that PBGC would respond expeditiously to an offer for settlement submitted by the charity in May 2017 to finally close the case.

Despite active involvement by the Office of the Advocate throughout 2018, delays continued regarding resolution of the termination liability. While PBGC responded to the sponsor's May 2017 offer in late March 2018, negotiations between the agency and charity continued, with a tentative agreement reached in late July. However, the charity continued to run into issues when

finalizing the terms of the settlement agreement relating to PBGC seeking a security interest in the charity's real estate.

In late November 2018, the charity reluctantly agreed to settlement terms that it felt differed from those that had been agreed to in late July 2018 in order to move forward after over four years of dealing with PBGC, so it could return to its core mission: to serve disadvantaged and at-risk children who otherwise lacked family and institutional support systems. This situation could have been ameliorated if PBGC moved promptly to resolve the outstanding issues.

**Recommendation:** Charity plan sponsors do not have the same business model as for-profit organizations, or even other not-for-profit organizations. Charities providing social services primarily based on federal and/or state and local government funding may have constraints on how their monies can be spent, resulting in minimal liquidity. In this case, the only substantive asset was the charity's real estate. Additionally, protracted negotiations with PBGC caused the charity undue financial hardship by limiting its ability to obtain grant funding, as discussed in last year's Advocate Annual Report. Moreover, the charity was forced to pay for advisors and counsel to assist with the termination and liability settlement process, further eroding its limited funds.

PBGC needs a better model to evaluate a charity or not-for-profit organizations' wherewithal to support the plan and settle the termination liability. While PBGC has been developing a streamlined process for negotiating with these types of plan sponsors, the issues faced by the above charity plan sponsor indicate that PBGC is analyzing the charity in much the same manner as a for-profit plan sponsor. The agency must cultivate appropriate internal industry expertise in these types of charity and not-for-profit organizations which will require appropriate training and development. We urge PBGC to bring this streamlined process for charities and not-for-profits to fruition, which includes considering input from those types of entities rather than just creating a process without context from these special plan sponsors.

Once this streamlined process is in place, it would be appropriate to consider its use more broadly in similar situations involving other types of organizations facing similar financial pressures and constraints, which can include for-profit entities like the following case.

#### *Small Employer Plan Sponsor's Decade-Long Struggles with PBGC*

A small employer plan sponsor in negotiations with PBGC to settle its termination liability contacted the Office of the Advocate for assistance after negotiations with the agency stalled. The plan sponsor's longstanding relationship with PBGC began almost ten years earlier, with the sponsor contacting PBGC regarding a funding waiver request in 2008. The matter languished for two years while the funding waiver request was under review with the Internal Revenue Service (IRS).<sup>7</sup> However, after being informed that the waiver request would be denied, the plan sponsor later applied in 2012 for a distress termination which was eventually converted by PBGC to an involuntary termination. After years of negotiations with the plan sponsor and repeated requests for additional financial information, the agency finally terminated and trustee the plan in

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<sup>7</sup> By statute, PBGC coordinates with the IRS on minimum funding waiver requests, with the IRS responsible for decisions regarding these requests.

September 2017, following an inquiry on the status from the office of one of the plan sponsor's United States Senators. Thereafter, the plan sponsor continued to negotiate with PBGC regarding settlement of the termination liability.

In December 2017, the plan sponsor's advisor requested mediation under the agency's newly announced Plan Sponsor Pilot Mediation project. PBGC told the plan sponsor's advisor that the case was not a candidate for mediation at the time since it claimed it needed more information from the plan sponsor (despite the plan sponsor repeatedly providing the agency with updated financial information over the years). The plan sponsor made a settlement offer to PBGC in April 2018, only to have PBGC request additional financial information in a completely different format than was provided over the years.

After involving the Office of the Advocate, the plan sponsor requested an in-person meeting with PBGC and the Office of the Advocate. When the parties finally met in October 2018, the meeting ended without an agreement, despite the plan sponsor offering a substantial one-time payment to end its relationship with PBGC. After protracted negotiations, a term sheet agreement was entered into in late November, memorializing an agreement in principle to resolve the liability.

**Recommendation:** There is no justification why a case should languish at the agency for almost a decade. The 2016 and 2017 Advocate Annual Reports recommended that PBGC management develop a system for triggering management review when cases are open for more than six months. It is troubling that a case like the one detailed above was pending at the agency for almost a decade despite PBGC informing the Office of the Advocate and PBGC's Advisory Committee that it regularly reviews outstanding cases.

Certain delays in the above case are attributable to the time that the IRS was reviewing the funding waiver request and when the sponsor was evaluating the potential for a standard termination. However, when a case sits unresolved at an ERISA sister agency, PBGC has an interest in and accountability for escalating a matter of interest to the agency in order to bring it to closure. PBGC management has expressed to the Advocate that they do not see it this way. This kind of thinking needs modification. Without engaged oversight, these cases become very expensive for both the plan sponsor and the agency with the cost of staff time and outside advisors. When the Office of the Advocate asked PBGC staff how much the agency spent on this case and what it would get in return for that cost expenditure, there was no readily available response.

Plan sponsor advisors have observed that PBGC routinely demonstrates that it has the knowledge, skills, and ability to move at a reasonable pace during the bankruptcy process, and there is no reason why the agency cannot move at that same efficient pace outside of bankruptcy.<sup>8</sup> Perhaps the agency needs a formal process for mandatory review by upper management automatically triggered upon a case reaching certain time milestones. This type of formal review must include standard quantitative and qualitative exhibits and explanations that specify what is holding up the case, and what is needed to expeditiously resolve the matter. This

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<sup>8</sup> These same plan sponsor advisors also observed that PBGC can move at an unreasonably rapid pace when the bankruptcy process moves very quickly, such as in airline bankruptcy matters.

review could have consequences for staffing, resources, and other management changes in order to triage the issues in the case and move it toward resolution, resulting in positive consequences to PBGC's bottom line. For example, this case review can determine whether the case team has the proper staff and outside resources to evaluate the unique characteristics of the plan sponsors' business, ensuring the agency's ability to bring cases to closure in an efficient manner. More importantly, such a formal review can be helpful to the case team by bringing obstacles to case settlement into the open so that the best ideas can be heard to encourage resolution between the sponsor and the agency.

#### *Coverage Determination Communication Lacking in Clarity*

The Office of the Advocate received a request for assistance from an actuary working with the agency on a coverage determination request. The plan originally applied for a coverage determination from PBGC in September 2013 stating it was exempt from Title IV coverage since it was a church plan. However, PBGC was unwilling to determine whether the plan was exempt from PBGC coverage without a letter ruling from the IRS. After obtaining a determination letter from the IRS, the plan re-applied for a coverage determination from PBGC in January 2018 and received a decision two months later that the plan was not covered under Title IV. The letter stated, "[s]eparate to this initial Title IV coverage determination, PBGC's Financial Operations Department (FOD) will determine whether any refund of premiums are due to the Plan Sponsor or Administrator" but did not give timing or other information regarding the next steps to receive the potential premium refund.

The plan's actuary contacted the Office of the Advocate for assistance regarding the steps to obtain a refund of premiums paid to PBGC, which he estimated as approximately \$5 million. After reaching out to PBGC, the Office of the Advocate learned that the agency generally waits until the end of the statutorily required 45-day period to appeal the determination before beginning to process the request for a refund. While the refund request is handled by FOD, PBGC also requires sponsors to sign a settlement agreement which involves the Office of the General Counsel (OGC). The coverage determination and PBGC's website detailing the coverage determination process did not contain this information, so the timetable and next steps were unknown to the plan sponsor's actuary.<sup>9</sup>

**Recommendation:** While the plan sponsor detailed above ultimately received a refund of overpaid premiums after the Office of the Advocate facilitated coordination with the sponsor's advisor, FOD, and OGC to complete the required settlement agreement, the Office of the Advocate encouraged PBGC to revisit standard language in the agency's coverage determinations regarding receiving a refund of overpaid premiums. While PBGC did provide the Office of the Advocate with draft language applicable to church plan coverage determinations which explain the timing and process for obtaining a refund of overpaid premiums, the agency should consider revising its other coverage determination letters to verify that the letters contain

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<sup>9</sup> In the eyes of plan sponsor advisors, PBGC coverage determinations take far too long, whether they are for church plans, plans established and maintained in Puerto Rico, or governmental plans. To facilitate and expedite these coverage determinations, PBGC may need to work closely with the IRS to bridge the gap in time so that a determination can be made in a reasonable period of time.

contact information and information about the process for obtaining overpaid premiums. PBGC may also want to include information about the next steps to receive a premium refund once a sponsor receives a coverage determination on its PBGC Insurance Coverage website.<sup>10</sup>

Additionally, it would be useful for plan sponsors to have a tracking mechanism for coverage requests in PBGC's My Plan Administration Account (My PAA) website. My PAA currently allows plan sponsors to monitor the status of submitted premium filings, view PBGC mailed correspondence, and submit other online requests for assistance. Enhancing My PAA to add functionality for tracking coverage requests in real-time would continue to improve the ease with which plan sponsors engage with the Corporation.

#### *Payment of Interest on Plan Sponsor Premium Overpayments to PBGC*

The Pension Protection Act of 2006 (PPA) provided PBGC with authority to pay interest on premium overpayments on a retroactive basis back to August 17, 2006. As mentioned in prior Advocate Annual Reports, the agency believes it cannot act upon this authority until it issues regulatory guidance. PBGC routinely collects interest on plan sponsor underpayments but the agency has yet to issue guidance regarding paying plan sponsors interest on premium overpayments.

PBGC added the item as a proposed rule with a June 2008 publication target date in its Fall 2007 Regulatory Agenda. It subsequently designated the issue as a long-term action item in Fall 2008 through Fall 2016. In May 2017, PBGC announced it was withdrawing the regulatory action, stating "PBGC reformed the premium payment process that gave rise to most overpayments (Payment of Premiums; Large-Plan Flat-Rate Premium, 79 FR 347, January 3, 2014) and also instituted a process to rectify identifiable premium overpayments promptly. As a result, overpayments have declined significantly since institution of this project, and it is no longer necessary or cost-effective."<sup>11</sup>

While the changes PBGC has made—eliminating the requirement that large plans pay flat rate premiums on an estimated basis and instituting a process to rectify identifiable premium overpayments promptly—may have partially addressed the issue on a going forward basis, there are other situations involving premium overpayments that are not mitigated by PBGC's actions. Plan sponsors may pay premiums for a non-covered plan while it waits for a coverage determination from the agency, resulting in overpayments if the plan is not covered under Title IV. Other potential premium overpayment situations may include overpayments due to the standard termination exemption from the variable-rate premium and where the premium is prorated for a short year, occurring when the plan sponsor pays the full premium without knowing the length of the short year. Inadvertent mistakes that may affect the premium calculation for several plan years can also result in potential overpayments. Additionally, even in areas where PBGC has mitigated overpayments in connection with the flat rate premium estimation rules and errors that are "identifiable" by PBGC, there is no relief back to August 2006 as permitted by PPA.

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<sup>10</sup> See <https://www.pbgc.gov/prac/other-guidance/insurance-coverage>.

<sup>11</sup> See PBGC's current and historical Regulatory Agendas and Plans, available at <https://www.pbgc.gov/prac/pg/other/guidance/regulatory-agendasplans>.

**Recommendation:** Past Advocate Reports recommended issuing guidance to allow the agency to pay interest on overpayments on a retroactive basis back to August 17, 2006. Paying interest on premium overpayments, whether prospectively only or prospectively and retroactively, may be cost-effective when all interests of the regulated community are considered, including the need to provide equity since PBGC collects interest from plan sponsors on their underpayments. The Advocate recommends that PBGC give serious consideration to reinstating this regulatory project on both a prospective and retroactive basis.

*Plan Sponsor Faces Roadblocks When Navigating Across Different PBGC Departments*

A plan sponsor's actuary contacted the Office of the Advocate in late June 2018 for assistance in receiving reimbursement for actuarial work performed at the request of PBGC. The actuary had assisted PBGC by performing over \$28,000 worth of actuarial services related to a plan the agency trusted in October 2016. The actuary first sought reimbursement in January 2017 and had repeatedly followed up with the agency with required information supporting the reimbursement request. PBGC informed the actuary that the amount of the reimbursement was not in dispute, yet the agency was non-responsive regarding moving the request forward for reimbursement.

After researching the matter internally, the Office of the Advocate learned that the request was still pending upper-management approval from two different departments. PBGC did not give the Office of the Advocate a reason why the reimbursement request had been outstanding for over a year and a half. While we recognize that PBGC is a large agency where administrative issues can lead to occasional mistakes and oversights, it is important to focus on how internal coordination can affect the agency's customers.

**Recommendation:** Issues that touch on various departments require proper handoffs and tracking. The plan sponsor and its advisor often view its various interactions with PBGC as one continuous experience. The plan sponsor or its advisor should not be responsible for internally tracking its matter since it is impossible to know where a matter lies within the agency. Rather, the agency should ensure that cases are handed off between departments and properly resolved.

This case is one small example of a situation where a Chief Executive Officer (CEO) position could bring together these various departments to ensure that cases are adequately tracked and resolved. This CEO would provide much needed internal coordination and oversight so that cases such as the one detailed above, do not fall through the cracks.

*Generic Adversarial Language Used Inappropriately in Resolving Mistaken Premium Filing*

Plan sponsors often express an issue with the unnecessarily adversarial tone used by the agency during its dealings with the regulated community. A well-known actuarial firm, who routinely interacts with PBGC on behalf of plan sponsors, contacted the Office of the Advocate to express concerns regarding the Corporation's use of adversarial language when the firm attempted to correct a prematurely submitted payment filing. The firm accidentally submitted an incomplete premium filing three and a half months before their October deadline. After receiving a filing

error letter and emails from PBGC staff asking them to amend the filing, the firm informed PBGC staff that the filing was inadvertently submitted, and it intended to resubmit a corrected filing prior to the filing deadline.

Approximately a month and a half before the filing deadline, a new PBGC staff member took over the case and sent the firm multiple emails stating that it had not received the amended filing and as such, the agency would soon refer the matter to the U.S. Department of the Treasury for debt collection. Upon receiving these emails, the firm asked PBGC staff why it was required to submit an amended filing before the mid-October due date. Several days later, the PBGC staff member provided the firm with an option to delete the erroneous filing.

**Recommendation:** Taking a proactive approach to resolve premium filing errors is commendable but not at the cost of straining customer relations by communicating with unnecessarily adversarial language. Language threatening referral to the Treasury Department for debt collection should not be loosely used to propel the premium filing process, as such a referral has profound financial implications. The Office of the Advocate encourages PBGC to conduct staff training that imparts the Corporation's new Customer Experience initiative principles for exceptional customer service.

## **POSITIVE IMPROVEMENTS**

### *Interagency Cooperation Regarding IRS Excise Taxes for Unpaid Minimum Required Contributions*

Plan sponsors who fail to satisfy their minimum funding obligations under Internal Revenue Code sections 412 and 430 are subject to an excise tax.<sup>12</sup> While Title IV of ERISA provides the opportunity for plan sponsors that cannot satisfy their minimum funding requirements to apply to PBGC for various forms of relief, the plan sponsor may still be liable for IRS excise taxes even if the sponsor and PBGC reach a mutually agreeable resolution regarding the sponsor's liabilities. PBGC has demonstrated a willingness to work with plan sponsors to coordinate with the IRS on excise tax issues, including the use of those excise taxes to reduce the plan's unfunded benefit liabilities. This has received much praise from the plan sponsor community and we commend Director Reeder's leadership in this important cooperation between two ERISA sister agencies.

### *Informal Staff Guidance Provides Useful Information for Practitioners*

PBGC has developed a collection of webpages to post informal staff guidance on Title IV issues such as bankruptcy claims, guaranteed benefits, reportable events, and liens arising from large missed contributions.<sup>13</sup> PBGC intends to update the content periodically as it receives additional questions from practitioners. This is a positive shift showing PBGC's effort to further engage the regulated community with easily accessible responses to substantive issues.

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<sup>12</sup> See 26 U.S.C. § 4971(a)(1). The excise tax is equal to 10 percent of the cumulative unpaid minimum required contributions for all plan years.

<sup>13</sup> See Staff Responses to Practitioners Questions, available at <https://www.pbgc.gov/prac/staff-responses-prac-questions>.



### *Updated Premium Instructions Address Two-Step Spinoff and Termination Transactions*

The Office of the Advocate received an inquiry regarding the use of a two-step “reverse spinoff” transaction to avoid paying a significant portion of the statutory variable rate premium (VRP).<sup>14</sup> After bringing the issue to PBGC’s General Counsel’s attention, the agency subsequently addressed the issue in its informal staff guidance and updated its premium filing instructions to clarify VRP exemptions. This update and informal staff guidance are useful to plan sponsors contemplating such transactions. Plan sponsor advisors suggest PBGC should add this item to its Regulatory Agenda.

### *PBGC Plan Sponsor Pilot Mediation Project*

The 2017 Advocate Annual Report lauded PBGC for the introduction of a Pilot Mediation project to facilitate resolution of negotiations in the Early Warning Program and Termination Liability Collection Program.<sup>15</sup> Now in its second year, the project continues to have the potential to improve certain aspects of PBGC’s interactions and dealings with plan sponsors by providing a cost-effective way to bring finality to cases. The Office of the Advocate is supportive of this project and holds strong expectations for the program.

While a positive tool, the use of this project during the negotiation process requires some judgment. Plan sponsors have expressed that the project is not beneficial if it is not introduced in a timely and thoughtful manner, as it may add additional unnecessary time and expense to a dispute that has already consumed considerable resources.

### *Positive Interactions with the Plan Sponsor Problem Resolution Specialist*

The Office of the Advocate continues to have a good working relationship with PBGC’s Plan Sponsor Problem Resolution Specialist. Plan sponsors often contact the Advocate rather than PBGC’s Customer Service center with routine requests for assistance that do not involve a dispute with the Corporation. For example, one plan sponsor reached out to the Office of the Advocate with questions regarding whether PBGC received the sponsor’s premium payment. Working with the Plan Sponsor Problem Resolution Specialist, the Office of the Advocate learned that the sponsor filed but did not properly pay the premium payment, which was now late. Fortunately, PBGC provides for an automatic waiver of interest and penalties if payment is made within seven days of the due date, and the Plan Sponsor Problem Resolution Specialist worked with the sponsor to ensure that PBGC received payment. The responsiveness and prompt customer service provided by the Plan Sponsor Problem Resolution Specialist facilitated an efficient resolution of this matter for the plan sponsor.

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<sup>14</sup> The two-step “reverse spinoff” transaction to lower the VRP involves, for example, when a company that sponsors an underfunded plan creates a new plan that is identical to the old plan but with a new name, EIN, and plan number. The company spins off most plan participants into the new plan late in the year and leaves some participants (such as retirees) in the old plan, which it then terminates by purchasing annuities for the remaining participants.

<sup>15</sup> See <https://www.pbgc.gov/prac/other-guidance/pbgc-plan-sponsor-pilot-mediation-project>.

*PBGC Guidance on ERISA section 4062(e)*

Since the 2014 legislative changes to ERISA § 4062(e), plan sponsors and their advisors have repeatedly voiced the need for additional guidance on interpretative issues related to the revised law. The Office of the Advocate is supportive of the agency's recently enhanced ERISA § 4062(e) content on its website.<sup>16</sup> The revised webpages include basic information about the law, answers to frequently asked questions, and reporting information, providing much needed guidance to the plan sponsor community about section 4062(e) liability that may arise when an employer ceases operations at a facility.

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<sup>16</sup> See <https://www.pbgc.gov/prac/reporting-and-disclosure/erisa-section-4062-e>.

## **PENSION DE-RISKING STUDY: PART II**

### *Background*

Plan sponsors continue to shed their pension liabilities through de-risking activities heightening concerns about the viability of the voluntary defined benefit system. In response to plan sponsors' request that the Office of the Advocate study single employer pension plan de-risking and analyze the underlying causes and drivers of de-risking activity, the Office selected Mercer as a research partner to conduct a two-phase study focusing on risk transfers, which have a significant effect on the viability of the voluntary defined benefit system. The goals of the study were to identify the key causes of de-risking and potential PBGC and Congressional actions that may slow de-risking activity.

Part I of the study was published in the 2017 Advocate Annual Report. The study found that over 86% of plan sponsors take at least some steps to de-risk their pension plans, confirming that risk transfer is on the rise with no signs of slowing. Part I also highlighted the four top factors influencing plan sponsors' propensity toward risk transfer: (1) accounting and earnings volatility; (2) balance sheet liability management; (3) funding volatility; and (4) PBGC premiums. PBGC premiums, while set by statute, were the most significant PBGC-related factor driving risk transfer activity.

While Part I focused on a collection of quantitative data, Part II involved findings derived from a focus group of diverse plan sponsors to capture a qualitative perspective and add additional context to de-risking drivers. The participating plan sponsors were represented by decision-makers from various backgrounds within their respective organizations such as the Chief Financial Officer or Human Resources Officer. The participating focus group organizations also varied in size, industry, ownership structure, and pension plan size and status. The Office of the Advocate is pleased to present Part II of the study's findings in the Appendix.

### *Notable Findings*

Part II of the study supported the key findings identified in the quantitative study of Part I. Namely, de-risking is on the rise and continues to be embraced by plan sponsors. The defined benefit value proposition is also changing, and plan termination is often the end goal for plan sponsors.

Focus group participants were united in their view that PBGC premiums are a significant factor driving risk transfer activity. While plan sponsors do understand the value that defined benefit plans bring to an organization, these benefits are often outweighed by financial and funding volatility and the increasing costs of PBGC premiums, leading sponsors to consider de-risking. Other factors such as the desire to exit the defined benefit space completely, the changing defined benefit value proposition, and industry trends also play a role in a sponsor's decision to de-risk.

### *Future Considerations*

Information gathered from the focus group reinforces the key findings from Part I of the study concluding that de-risking activity continues to increase, there is a significant concern over rising PBGC premiums, seemingly not tied to any retirement policy, and a broadly changing outlook on the value of defined benefit plans. The findings suggest that a reduction in future PBGC premiums would have a significant beneficial impact on reducing further risk transfers.

However, de-risking is undeniable and has far-reaching implications for plan participants, plan sponsors, government, and regulatory bodies. Most notably, de-risking will continue to pose an anti-selection problem where healthier sponsors reduce or eliminate their obligation and risk, leaving larger shares of less healthy sponsors with more poorly funded plans in the defined benefit system, which diminishes the agency's premium base and increases the overall risk and exposure to PBGC.

**APPENDIX**

HEALTH WEALTH CAREER

# PENSION DE-RISKING STUDY – PLAN SPONSOR FOCUS GROUP

ANALYZING THE DRIVERS OF PENSION  
DE-RISKING ACTIVITY

JULY 25, 2018

PREPARED IN PARTNERSHIP WITH THE  
OFFICE OF THE PBGC PARTICIPANT  
AND PLAN SPONSOR ADVOCATE

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# 1

## OBJECTIVE AND BACKGROUND

As part of the first phase of a two-phase study in partnership with the Office of the PBGC Participant and Plan Sponsor Advocate (OPPSA), Mercer analyzed the underlying causes and drivers of pension de-risking activity, with a particular focus on factors that are related to the Pension Benefit Guaranty Corporation (PBGC) as well as those under Congressional jurisdiction. Examples of pension de-risking can be found in Appendix A.

The initial phase of the study yielded quantitative conclusions based on data from a variety of single-employer plan sponsors collected from discussion topic responses, surveys, press releases and government filings. The findings were published in the Advocate’s 2017 Annual Report.

Phase One’s findings provided evidence of an actively evolving defined benefit pension plan landscape – one in which most plan sponsors are continuously considering, evaluating and implementing various de-risking strategies. The initial results highlighted several important observations regarding the status of defined benefit pension plans and de-risking activity, including the following:

- De-risking is on the rise, especially risk transfers
- Financial and funding volatility and the rising level of PBGC premiums are driving risk transfer activity
- The current structure of PBGC premiums creates incentives for risk transfer for certain sponsors
- Other PBGC-related factors (for example, compliance issues and the Early Warning Program) are significant pain points for some, but generally not widespread enough to drastically impact risk transfer activity levels
- The defined benefit value proposition is shifting and plan termination is often the end goal
- Industry, plan size and funded status influence levels of de-risking activity



The second phase of this study consisted of a focus group comprised of a diverse cohort of plan sponsors, designed to gather a more qualitative perspective on the drivers of de-risking activity to complement the robust, data-driven conclusions reached in the study's first phase. This focus group served as an opportunity to hear directly from plan sponsor decision-makers on issues surrounding pension de-risking actions and future plan outlooks. Information about the composition of the focus group may be found in Appendix B.

**However, by and large, the focus group participants echoed the key findings from the first phase of the study; their commentary confirmed what the data had already revealed.**

What follows outlines the overarching themes from the plan sponsor focus group and helps to provide more context, if not “color,” behind pension de-risking activity.

# 2

## FOCUS GROUP METHODOLOGY

A total of seven plan sponsors participated in the focus group, partaking in one of three conference calls.<sup>1</sup> The focus group was generally guided by a prepared set of questions provided in Appendix C but the discussion was open to any relevant topics raised by participants. The prepared questions asked plan sponsor representatives to opine on their decision-making processes surrounding maintaining open defined benefit plans and undertaking de-risking activities, their viewpoint on PBGC premiums and operational complexities pertaining to defined benefit plans and their ultimate outlook on the future of their plans. To ensure full candor, participants were promised anonymity; names of participating entities were not shared with OPPSA or the PBGC, and are not included in this report.

As is the case with any focus group, the plan sponsors selected to participate will not be perfectly representative of the larger plan sponsor universe. However, we chose a diverse group of plan sponsors with the goal of using their important and direct feedback to supplement the robust quantitative analysis performed in the first phase of the study.

Plan sponsors who participated in the focus groups were decision-makers from various backgrounds within their respective organizations including human resources, finance and treasury. Their representative organizations varied in size, industry, ownership structure and pension plan size and status. A summary of the participating entities is provided in Appendix B.

PBGC-related factors were an important element of this study. In this context, it is important to make the distinction that not all PBGC-related factors are formally regulated by the PBGC. As an example, PBGC premiums, which are a large part of the discussion in this report, are certainly PBGC-related, but are ultimately set by statute.

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<sup>1</sup> The number of participants in the focus group was limited due to the Paperwork Reduction Act of 1980.

# 3

## KEY FINDINGS

### DE-RISKING IS ON THE RISE AND CONTINUES TO BE TOP-OF-MIND

On the whole, focus group participants made one message loud and clear: each organization is in tune with the de-risking options available, their prevalence in the pension space and the value they can offer plan sponsors. All the participating entities had performed at least some degree of de-risking, whether in-plan de-risking or risk transfer, and that trend showed no signs of slowing. This was true independent of the status of the sponsors' pension plan(s) (e.g. open, closed or frozen).

Plan sponsors participating in the focus group were in strong agreement that de-risking dramatically reduced risk and liability, often significantly. This de-risking trend, backed by pension industry data collected in the first phase of this study, highlighted that de-risking is not viewed solely as a means to exit the defined benefit pension system in the short-term; rather it is a practice embraced by plan sponsors across the board, including those heartily committed to maintaining ongoing pension plans.

One respondent even took this a step further to suggest that it was the entities' *responsibility* to evaluate these de-risking tactics to make the most appropriate economic decisions for their organizations.

***“I think it’s our job to always continue to look for ways to transfer risk and to minimize the risk to make the best economic decisions both for the company and for our retirees.”***

Whether a step closer to winding-up a pension plan or a fiscally responsible way to maintain an ongoing plan, it was undeniably clear that de-risking is top-of-mind for all of the plan sponsors participating in the focus group. De-risking has become a part of the pension plan journey, regardless of a plan sponsor's destination or current location on the path.













# 4

## CONCLUSIONS AND FUTURE CONSIDERATIONS

Information gathered from plan sponsors in the focus group widely supported key findings identified in Phase One of the study. These qualitative inputs provided an additional layer of recognition for some of the most vital issues facing the pension landscape as a whole. Namely, the increasing prevalence of de-risking activity, a significant concern over rising PBGC premiums and a broadly changing outlook on defined benefit plans.

Potentially even more valuable, participating plan sponsors provided insight into their decision-making processes regarding de-risking activity. It is abundantly clear that cost-benefit analyses and a detailed evaluation of economic savings are often the ultimate gateways to de-risking activity. While other factors are surely at play, PBGC premiums heavily impact the economics of de-risking activity, specifically risk transfers.

As was the conclusion in Phase One of the study, the findings in Phase Two suggest that a reduction in future PBGC premiums would have a significant beneficial impact on reducing further risk transfers and preserving the remaining plans in the defined benefit pension universe.

# 5

## APPENDIX A – EXAMPLES OF DE-RISKING TECHNIQUES

### Examples of De-Risking Techniques

RISK TRANSFER (OUT OF PLAN DE RISKING)	IN PLAN DE RISKING
Lump sum payout offerings <sup>3</sup>	Liability-driven investment strategies <sup>4</sup> (LDI) and hibernation investment strategies
Purchase of insurance contracts (buy-out)	Plan design changes such as account-based formulas or variable annuities
Full plan termination	Plan closure or freeze

<sup>3</sup> This includes temporary lump sum windows and plan amendments to offer a permanent lump sum option.

<sup>4</sup> This includes insurance solutions (“buy-in”), which are prevalent in the UK but relatively uncommon in the US. A buy-in is an insurance contract that transfers risk for a subset of participants to the insurer. However, in contrast to a buy-out, the participants remain in the plan and the contract is held as a plan asset. Such arrangements are relatively unattractive to plan sponsors in the US because the sponsor must continue to pay PBGC premiums on covered participants.

# 6

## APPENDIX B – SUMMARY OF FOCUS GROUP PARTICIPANT ORGANIZATIONS

OWNERSHIP STRUCTURE	INDUSTRY	PLAN STATUS	DE RISKING ACTIONS COMPLETED
Privately held	Wholesale / Retail Trade	Closed to new entrants	Lump sum payout offering; purchase of insurance contracts (“buy-out”); plan design changes
Publicly traded	Auto / Industrial / Manufacturing	Benefit accruals frozen for some groups, open and accruing for others	Lump sum payout offering; liability-driven investment strategies (LDI); plan design changes
Not-for-profit	Education	Open and accruing benefits	LDI
Privately held	Media / Entertainment / Travel / Leisure	Closed to new entrants	Lump sum payout offering
Publicly traded	Auto / Industrial / Manufacturing	Benefit accruals frozen for some groups, open and accruing for others	Lump sum payout offering; purchase of insurance contracts (“buy-out”)
Publicly traded	Packaging	Open and accruing benefits	Lump sum payout offering; purchase of insurance contracts (“buy-out”)
Publicly traded	Energy / Utilities	Open and accruing benefits	Lump sum payout offering; LDI

# 7

## APPENDIX C – FOCUS GROUP QUESTIONS

1. If your organization sponsors an open defined benefit plan, what are the drivers that keep it open?
2. If your organization closed/froze a defined benefit plan(s), what were the primary reasons? What, if anything, could have changed your course and led your organization to maintain an open/ongoing plan?
3. If your organization previously decided to execute risk transfer, what were the primary drivers?
4. If/when interest rates rise, will your organization look to exit their defined benefit plan offering(s) promptly?
5. How concerned are you about rising PBGC premiums? Do rising PBGC premiums impact your organization's defined benefit plan outlook?
6. Do you think the PBGC is efficiently executing its mission of protecting and preserving pension plans and participants?
7. What is your view on the operational complexity of the PBGC? How about the operational complexity of other governmental agencies (e.g. DOL, IRS)? Does this complexity lead you to want to leave the DB system?
8. *For ongoing plans:* Do your employees value the organization's defined benefit plan(s)? Do you see it as a valuable tool for attraction and retention?
9. Is your organization concerned about the retirement security of employees? Does this thinking impact decisions about your organization's defined benefit plan(s)?
10. Does your organization have plans to execute risk transfer or full plan termination in the near future? If so, what and when?
11. *Special question for not-for-profit organizations:* Does maintenance of a defined benefit plan(s) adversely impact your organization's operations? If so, what drives this (e.g. plan administration, funding, operational complexity) and is there anything that could be done to ease this burden?

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