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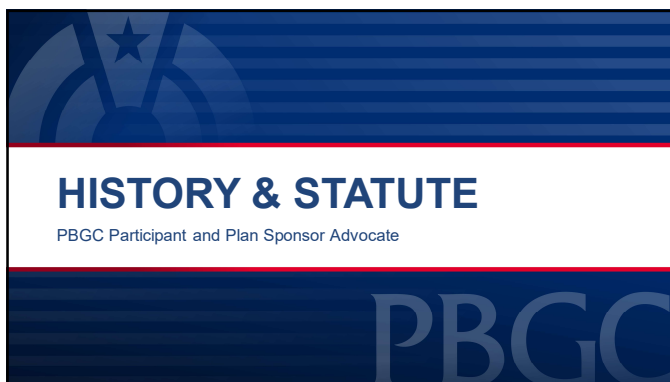
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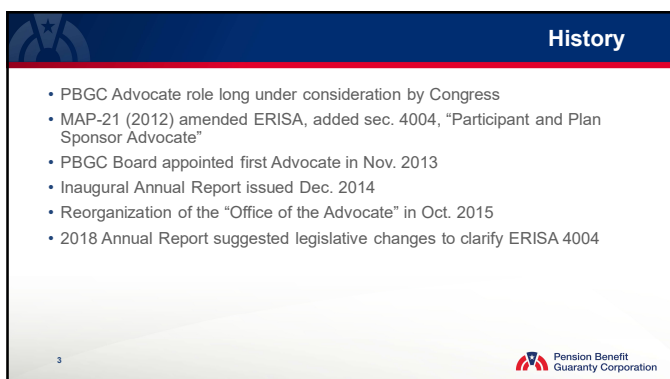
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### Advocate Statutory Duties

1. Act as a liaison between PBGC, DB plan sponsors, and participants...;
2. Advocate for the full attainment of the rights of participants...;
3. Assist plan sponsors and participants in resolving disputes...;
4. Identify persistent problems...;
5. Propose changes in administrative practices...;
6. Identify potential legislative changes; and
7. Refer instances of fraud, waste, and abuse... to Office of the Inspector General.

ERISA § 4004(b)



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### Advocate Annual Report


**Content:**

- Submit by Dec. 31
- Summarize requests for assistance...
- Identifies significant problems and legislative changes...

**Submission:**

- Concurrently: PBGC Committees of Jurisdiction, Secretary of Labor, PBGC Director...

ERISA § 4004(e)



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### Advocate 2019 Annual Report – Notable Themes

- Delays when resolving matters with PBGC
- Need for transparency in communications/negotiations
- Coordination issues when a case involves multiple PBGC departments
- Lack of finality



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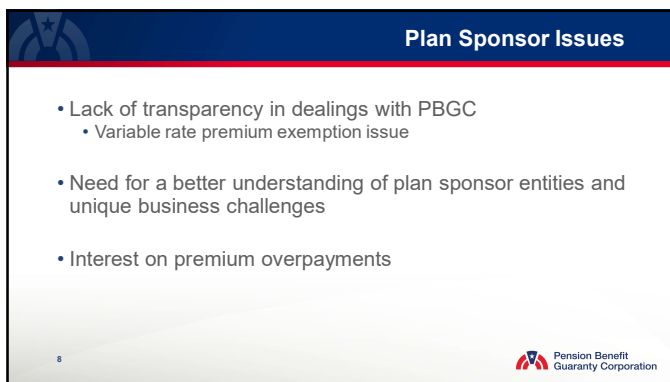
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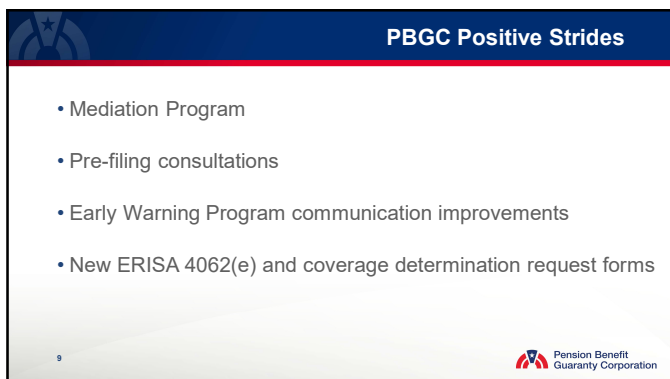
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**Issue: Case Management and Supervision Concerns**

**Situation:**

- Participants contacted the Advocate after experiencing delays, contradictory information, and/or other unsatisfactory customer service from PBGC's Field Benefit Administration (FBA) offices

**Advocate Observations/Recommendations:**

- Need for heightened supervision, management, and training at FBAs
- Evaluate the current FBA structure
- Create federal employee on-site manager/supervisor position

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**Issue: Hardship Waiver and Debt Recoupment Process**

**Situation:**

- Participant roadblocks and issues when dealing with PBGC on overpayment recoupment matters and hardship waiver requests

**Advocate Observations/Recommendations:**

- Formalize the process for handling overpayment cases
- Improve participant communications

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**Case Example: Challenges when Proving Paternity**


**Situation:**

- Beneficiary seeking to prove paternity to PBGC faces delays, confusing communications, and documentation challenges

**Advocate Observations/Recommendations:**

- Revise potential beneficiary communications
- Case disposition should reside with business unit
- Cost/benefit analysis when evaluating cases

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**PBGC Positive Strides**

- Consolidating review of potentially omitted participant claims
- Interagency initiative to locate missing participants
- Sustained routine meetings with participant groups
- Office of Benefits Administration technology modernization

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**MULTIEMPLOYER ISSUES**

Advocate 2019 Annual Report

**PBGC**

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**Advocate's Role: Multiemployer Pension Reform Act of 2014**

**Benefit Suspension**

- Advocate may submit recommendations to Treasury Secretary (systemically important plan)

**Partition**

- PBGC consults with Advocate on all reasonable measures to avoid insolvency

**Merger**

- PBGC consults with Advocate on the effect of the merger on participants and beneficiaries

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**Multiemployer Activities – Examples**

- Consultation with PBGC regarding first facilitated merger
- Retiree inquiries
  - Financial assistance-related questions
  - Insolvency issues
  - Multiemployer pension system solvency questions

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**DE-RISKING STUDY**

PBGC Participant and Plan Sponsor Advocate

PBGC

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**De-risking Study – Overview and Part I Findings**

Background/Objective

Part I Findings

- Top factors influencing de-risking activity:
  - Accounting/earnings/funding volatility
  - Balance sheet liability management
  - Rising PBGC premiums
- Risk transfer is on the rise with no signs of slowing down

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**De-risking Study – Part II Findings**


Part II Findings

- Confirmed Part I conclusions
- Continued concern over PBGC premium levels
- De-risking is an undeniable part of the pension plan journey

Future Considerations

- Effect of reducing PBGC premium levels
- Anti-selection problem/future of single-employer defined benefit system

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**PENSION PLAN REGISTRY PROJECT**

Advocate 2019 Annual Report

**PBGC**

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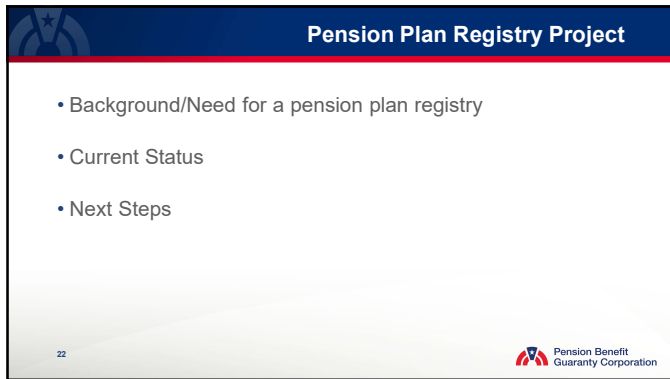
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**Pension Plan Registry Project**

- Background/Need for a pension plan registry
- Current Status
- Next Steps

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**Office of the Advocate Contact Information**

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 Fax: (202) 229-5301  
 Email: [advocate@pbgc.gov](mailto:advocate@pbgc.gov)  
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 (202) 229-3858

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## **FACTS**

Once upon a time, in a small hamlet located in the smallest state of our country, Rhode Island, lived an elderly lady whose husband died many years ago. Her name was Mrs. Bousquet.

One day, Mrs. Bousquet received a notice from the Social Security Administration, advising that she may be the beneficiary of her now deceased husband's defined benefit from his former employer in Providence, R. I., Blacher Bros. Jewelry, Inc. Mrs. Bousquet's husband was employed by Blacher Brothers many years ago and was vested in their defined benefit plan. Mrs. Bousquet had been pursuing her survivor benefit as a widow with PBGC for over four years with help from the Pension Action Center (PAC). Her attorney at the PAC contacted the newly minted Participant and Plan Sponsor Advocate at PBGC and asked for help. She received help from a variety of sources that could not be contemplated at that time, even by the Advocate.

So, what happened next?

Well, to make a long story short, there was a dusty old collection of Summary Plan Descriptions (SPDs) on Microfiche, of all things, stored at the Department of Labor's Employee Benefits Administration (EBSA) slated to be destroyed as the SPDs were no longer statutorily required by EBSA. Coincidentally, retaining these SPDs and Mrs. Bousquet's search for her deceased husband's benefit collided!

So how could this happen? Let's get the conversation going!

## **FACTS**

Betty is 70-year-old woman who worked for Paper R' Us, Incorporated as an order processing clerk from 1990 to 2009. In May 2006, Paper R' Us froze its Paper R'Us Hourly Retirement Pension Plan and did not allow plan participants to receive credit for years of service after this date. In December 2008, Betty was injured while transporting a large replenishment order to a client of Paper R'Us. Eventually, Betty was declared permanently disabled from this incident.

Paper R' Us filed for bankruptcy on March 24, 2009. On July 21, 2009, Betty was declared disabled by the Social Security Administration (SSA) and Paper R' US approved Betty for a disability retirement benefit application under the Paper R'Us Hourly Retirement Pension Plan. Betty began to receive a monthly benefit of \$495. Eventually, PBGC terminated the plan, with a Date of Plan Termination (DOPT) of January 12, 2010, and it trustees the plan on June 18, 2010. Betty continued to receive her monthly benefit of \$495 from PBGC once the agency trustees the plan.

On November 5, 2019, Betty received a final benefit determination letter stating that PBGC determined she was not eligible to receive a disability benefit and that her benefit would be recalculated as an early retirement benefit. Betty's new benefit would be \$295 per month and as result of being overpaid \$15,000 since 2010, her benefit would be further reduced to \$165 per month for the recoupment of the overpayment.

PBGC has given Betty 45 days to appeal this decision. What should Betty do?

## **FACTS**

Gerad worked in ParrotCo's Jaffrey, New Hampshire plant from 1976-1989. He is now 67 and received a notice from the Social Security Administration (SSA) stating he may be entitled to a pension from ParrotCo Pension Plan. While spring cleaning, he also discovers a 1987 letter from ParrotCo's HR department stating he is vested in the ParrotCo Pension Plan. However, ParrotCo's Jaffrey plant closed years ago and Gerad believes the company no longer exists, as he attempted to locate it by writing to the address on the SSA notice, only to have the letter returned as undeliverable. After conducting more research at his local library, Gerad reads about the Pension Benefit Guaranty Corporation (PBGC) and contacts the agency looking for information about his missing pension.

PBGC's research and records indicate that BirdCo acquired ParrotCo in 1994 and merged the ParrotCo Pension Plan into the BirdCo Pension Plan. In 1997, BirdCo sold part of its company to FeathersLLC and spun off part of the BirdCo Pension Plan into a new plan, BirdFeathers Pension Plan. FeathersLLC eventually terminated this plan by standard termination in 1999. Additionally, BirdCo filed for bankruptcy in late 2003 and PBGC terminated and trustee the BirdCo Pension Plan in 2004. However, PBGC does have a record of premium filings for an ongoing plan called ParrotCo Pension Plan which was started in 2012 by a California-based plan sponsor, LawnCare4U.

In response to his inquiry, PBGC sends Gerad a short letter informing him that his name does not appear in the census records for the terminated BirdFeathers Pension Plan or the plan it trustee, BirdCo Pension Plan. It provides Gerad with the information about the ongoing ParrotCo Pension Plan and advises him to reach out to LawnCare4U regarding his benefit. Gerad is dissatisfied with this response and has questions about the terminated and trustee plans. He contacts LawnCare4U but it does not have a record of him in its plan.

What should Gerad do?



# **2019 Annual Report of the Participant and Plan Sponsor Advocate**

Pension Benefit Guaranty Corporation

December 31, 2019



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This statutorily required 2019 Annual Report discusses the activities of the Office of the Pension Benefit Guaranty Corporation (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 Labor 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.

We welcomed our new Director, Gordon Hartogensis, during this 2019 reporting period. Gordon brings a business and entrepreneurial background to the Director job which will be helpful in addressing the participant and plan sponsor issues discussed in this Report.

Let me begin as always by making it very clear that there are thousands of routine transactions PBGC flawlessly executes every day. This is reflected in PBGC's excellent customer satisfaction scores which are among the highest in the federal government. However, work remains to be done as there are still participants and plan sponsors who face challenges when dealing with the agency.

The participants and plan sponsors who come to the Office of the Advocate for assistance describe many of the same enduring problems that have been detailed in past Advocate Reports, such as:

- Lack of timeliness in resolving participant and plan sponsor matters;
- Lack of transparency by PBGC in communicating its reasons for a decision denying a participant's benefit, and a lack of transparency in negotiations with a plan sponsor;
- Lack of effective coordination among and between PBGC departments which contributes to confusion and delays in resolving plan sponsor and participant disputes with the agency; and
- Lastly, and perhaps most importantly, the lack of finality and certainty regarding when PBGC considers a case to be "closed" or "final," often resulting in a significant financial cost for plan sponsors and participants many years later.

Additionally, when I inquire about how much an ongoing case has cost the agency, particularly when the matter has been lingering for many years, we simply do not know. That alone should drive change in the agency's policies and practices because PBGC exists through funding by plan sponsor premium payments. It is striking to see disputes that start out as financially insignificant, but unresolved over long periods of time lead to costs that grow exponentially for the agency, the plan sponsor, and/or the participant. Conducting a cost-benefit analysis is a basic financial risk assessment that should be an integral part of all cases.

Along the same lines of cost efficiency, PBGC's mission includes encouraging the continuation and maintenance of voluntary private pension plans, as well as maintaining premiums at the lowest level to carry out the obligations of the agency. Due to concerns about the effects of rising costs associated with maintaining a defined benefit plan, the plan sponsor community asked the Office of the Advocate to commission a study on pension de-risking.

The Office of the Advocate conducted this de-risking study in two parts which were published in the Advocate's 2017 and 2018 Annual Reports. The study analyzed the underlying causes and drivers of pension de-risking, with a focus on potential PBGC and Congressional actions that may slow de-risking. The study's results noted the usual culprits of funding and balance sheet volatility and rising PBGC premiums as major contributors to de-risking and also detailed how certain encounters with PBGC that reflect the above enduring issues play a role in a plan sponsor's decision to consider de-risking.

Moreover, both parts of the study show that a significant decrease in single-employer premiums, particularly the variable rate premium, may stem the de-risking trend, although that alone will not stop risk transfer activities. To that end, a multifaceted approach that considers the important policy issue of what retirement security in America looks like is a key predicate to address the maintenance of voluntary private pension plans.

In the meantime, as de-risking continues and the defined benefit system evolves, it is important to ensure that participants receive benefits due to them, even in situations where corporate transactions, such as mergers, acquisitions, or company and plan name changes, make it difficult to locate the plan. The Office of the Advocate is currently pursuing a Pension Plan Registry project which would provide a tracing service so participants and plan sponsors can track what happened to a pension plan.

Let me close by commending PBGC and my fellow colleagues for their responsiveness to recommendations made by the Office of the Advocate in prior Annual Reports. Many of the recommendations adopted by PBGC were transactional and did not come easily for the agency. Nonetheless, changes were made and endure to this day.

As noted in the Advocate's 2018 Annual Report, transformational change is also required, and this type of change takes time and can be challenging. Many of PBGC's longstanding practices and procedures came to fruition because of a particular case or problem. It is now time for transformational change which involves reexamining outdated practices and procedures in light of the changing defined benefit landscape. This transformational change is possible, particularly with leadership from our new Director who comes to us with experience in creating and building a business. We can all take advantage of and learn from this business experience.

Respectfully, I submit for your consideration the 2019 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, 2019

cc: Camille M. Castro, Senior 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).

## **PARTICIPANT ISSUES**

The Office of the Advocate recognizes that there are thousands of routine transactions PBGC performs flawlessly on a daily basis, particularly as it relates to the high volume of participant inquiries handled by the agency, not to mention the billions of dollars in benefits the agency pays accurately and timely each month. PBGC measures its performance on many of these routine requests for assistance using customer satisfaction surveys and frequently receives high satisfaction scores well above the recognized American Customer Satisfaction Index threshold of excellence from retirees and pension plan participants.

While the Office of the Advocate normally does not receive assistance requests from participants on these standard and ministerial types of matters, it has experienced a substantial increase in the volume of participants seeking assistance after facing roadblocks when navigating through the agency on issues that should be routine. These assistance requests differ from the more complex cases detailed in past Advocate Annual Reports and often involve a breakdown of a process or procedure or an unsatisfactory interaction with the Office of Benefits Administration's (OBA) various Field Benefit Administration (FBA) offices.

However, PBGC has made strides with its handling of complex cases, particularly for potentially omitted participants (POPs) seeking entitlement to a benefit. This is largely attributable to the consolidation of the review of POPs cases into OBA which occurred in late 2018 and the dedicated staff in OBA who analyze these cases in a holistic manner. Additionally, management has been receptive to feedback from the Office of the Advocate regarding its concerns. The Office of the Advocate shares the same objective as PBGC to provide participants with the best customer experience possible and anticipates continuing its good working relationship with management to provide constructive feedback to further improve processes and procedures.

### **PARTICIPANT ISSUES AND NOTABLE CASES**

#### *Participant Challenges When Working with Field Benefit Administration Offices*

The Office of the Advocate received an unusually high number of requests for assistance from participants experiencing issues while working with the FBA offices. Many of these inquiries involved routine transactions such as obtaining tax information and applying for a benefit. Despite the ministerial nature of these requests for assistance, participants contacted the Advocate after facing delays, contradictory information, or other unsatisfactory customer service from the FBA offices.

For example, one participant reached out to the Office of the Advocate after PBGC reclaimed his monthly benefit from his bank account without sending any notification. The participant initially contacted an FBA office inquiring about his spouse's survivor benefits. After this conversation, PBGC inexplicably marked the participant as deceased and immediately reclaimed his monthly benefit, which had been paid almost two weeks prior. The participant tried to resolve the issue with the FBA office but received inconsistent information, prompting him to contact the Advocate for assistance. While PBGC did eventually reissue the participant's monthly benefit, its error resulted in financial hardship to the participant.

**Recommendation:** Participants seeking assistance from the Advocate after numerous unsatisfactory encounters with the FBA offices demonstrate a need for heightened review and supervision and also raise questions about the structure of the FBA offices. PBGC currently contracts with a service provider to operate its FBA offices and there are no federal employees on site full-time. Due to this structure, PBGC's ability to actively manage its contractors is limited, which is concerning based on the increased volume of FBA office-related inquiries experienced by the Office of the Advocate. While it would be beneficial to have at least one dedicated federal staff member at each location, PBGC must find a way to increase oversight which may need to involve reexamining the structure of the FBA offices and the use of contractors.

In the interim, PBGC must determine how to supervise these FBA offices so that participant matters are timely resolved. For example, perhaps PBGC needs to institute a daily end of the workday call with contractor supervisors from the FBA offices to discuss the cases that represented anomalies and raised difficult questions, as well as potential solutions and action items. These daily calls will ensure that OBA is aware of these complex participant matters so items of interest can receive prompt attention from management at PBGC headquarters.

At a minimum, PBGC must provide continued training and regular oversight which includes adhering to prescribed time deadlines for closing cases. Many of the issues detailed later in this report, such as the examples regarding claiming an unclaimed pension, often stall at the FBA office level. Contractor training should emphasize when it is appropriate to escalate a case and seek guidance from upper level management within PBGC so that cases can move toward resolution. PBGC should also conduct periodic reviews to determine whether there is a subject area where additional contractor training is needed.

#### *Hardship Waiver and Debt Recoupment Process Issues*

The Office of the Advocate received multiple requests for assistance relating to recoupment of benefit overpayments and the hardship waiver process. In dealing with each matter, the Office of the Advocate observed inconsistencies, confusing communications, and a lack of transparency related to PBGC's processes and procedures to address hardship waiver requests and overpayment-related questions.

One case involved an elderly participant represented by the Pension Action Center. Many years ago, PBGC informed the participant that she was entitled to a benefit. However, PBGC later discovered it had erred and the participant was not eligible to participate in the plan, resulting in years of overpayments. After the participant went through the administrative review process and received an adverse decision from the Appeals Board, PBGC notified the participant regarding collecting the overpayment, sending multiple letters demanding immediate repayment of the entire debt. Eventually, PBGC informed the participant of the option to apply for a hardship waiver by submitting detailed financial information including tax returns. However, the participant's spouse did not want to share jointly-filed tax returns with the agency, so the Office of the Advocate coordinated with PBGC, which agreed to accept an affidavit detailing only the participant's financial information. The participant then submitted the affidavit along with a financial offer to compromise the debt.

After reviewing the participant's submission, PBGC initially refused the offer and instead verbally made a sizable counteroffer. When questioned by the Office of the Advocate regarding its process and standards for evaluating and responding to the participant's hardship waiver request, PBGC stated that it needed additional information despite previously agreeing to accept the limited affidavit as documentation. The elderly woman refused PBGC's counteroffer and upon further review, PBGC wisely agreed to her original compromise offer to settle the matter.

In a similar case, a participant's nephew reached out to the Office of the Advocate after months of trying to discuss a hardship waiver for overpayments erroneously paid to the participant. He contacted various parts of the agency about information needed for the hardship waiver but was not successful in getting a response to his questions. In the meantime, PBGC referred the debt to its debt collection agent, the U.S. Department of the Treasury's Centralized Receivables Service (CRS), since it had not received any information from the participant. The participant eventually received a notice from CRS regarding collecting the debt, prompting her nephew to contact the Advocate for assistance. The participant's nephew questioned the nature of the overpayment and requested documentation related to the matter. At the request of the Advocate, PBGC sent the participant's nephew a letter providing more information about the nature of the overpayment and how to request a hardship waiver.

In other recoupment cases brought to the attention of the Office of the Advocate, participants expressed frustration in the lack of response from PBGC to questions about the nature of the overpayment. In one matter, the participant contacted PBGC multiple times regarding an overpayment and did not receive any response. Instead, PBGC referred the matter to CRS for collection without responding to the participant.

**Recommendation:** PBGC must take an inventory of outstanding overpayment cases to ensure that it has responded to all communications. Additionally, PBGC needs to establish and formalize its process for handling overpayment cases. It is unclear which department or group within a department is responsible communicating with the participant and evaluating these types of requests and what standards PBGC uses when assessing a participant's ability to repay a debt. Additionally, further clarification is also needed regarding when a matter is referred to Treasury's CRS and how a participant may request information regarding the overpayment.

The Advocate has also observed inconsistencies and confusing language in letters notifying participants of overpayments. Communications should clearly state where the participant can request information about the overpayment, how to request a hardship waiver, and who the participant can contact if there are additional questions about the overall process. PBGC's communications must provide more detailed information about the overpayment, including an accounting of the dates of each overpayment and why it occurred. PBGC's current communications provide contact information for both PBGC and Treasury's CRS and it is unclear which agency a participant should contact for more information.

To further complicate matters as in the case discussed above, the offer/counteroffer process used by PBGC to settle a debt may not be appropriate for many of our senior participants. This type of negotiation can often go on for many months, creating financial uncertainty for the participant and adding costs that escalate rapidly for both the participant and PBGC. It is not unusual for the

Office of the Advocate to observe the internal and external costs of this offer/counteroffer process exceeding the debt that may be owed to the agency. For many participants, these costs can be more than just financial, as haggling with PBGC over a debt can take an emotional toll.

### *Beneficiary Trying to Prove Paternity*

An attorney from the Ohio Pension Rights Office of the Mid-America Pension Rights Project contacted the Office of the Advocate for assistance regarding a client who was trying to prove her paternity to PBGC. The beneficiary had been in contact with the agency since 2012 regarding documentation to demonstrate that she was the child of a deceased participant in a plan trusted by PBGC. Due to a complicated and tragic family situation limiting the availability of records, the beneficiary could only produce a certificate of live birth which did not list the deceased participant as her father. However, the beneficiary sent PBGC other information including affidavits from her and her niece supporting her claim as the eldest child of the now deceased participant, as well as a divorce decree for her parents and her mother's funeral program which listed her as one of four children with the deceased participant.

Throughout the years, PBGC sent the beneficiary multiple letters regarding her status as a child of the now deceased participant and her entitlement to a modest one-time lump sum benefit. Each letter from PBGC contained stronger and more definitive language regarding her paternity. A letter dated July 2019, after the Advocate was involved with the case, was the most definitive communication to date, stating *"Based on information in our records, PBGC has determined that we owe you [a benefit]. This money is due to you as a beneficiary of [the deceased participant] ... **You are a child of [the deceased participant]** ... PBGC used information in our files and information provided by you or other individuals to determine that you are a beneficiary of the deceased payee."*

Despite sending these communications, PBGC indicated it needed more information from the beneficiary to substantiate her paternity claim based on various states' paternity requirements even though it had recently located the deceased participant's employment record card which indicated he was married to the beneficiary's mother and had four children, consistent with information provided to PBGC by the beneficiary regarding her paternity.

**Recommendation:** While OBA may seek legal advice regarding a matter, the overall decision regarding the case's disposition should reside with the business unit. In the above case, a reasonable person could determine from the available documentation that the beneficiary was one of the deceased participant's children and entitled to the benefit. Given the modest amount of the benefit, the agency's costs in reviewing this matter far exceed the benefit.

Additionally, PBGC should revise its potential beneficiary communications so they do not give conflicting information. In the above beneficiary's situation, it is unclear why PBGC sent multiple communications stating that it had determined that the beneficiary was the child, yet also requested and required more information before issuing payment. These types of communications are confusing to beneficiaries and can prolong matters by saying conflicting things.

### *Letter of Representation Issue*

Participants seeking assistance through outside representatives are required to have a power of attorney (POA) or letter of representation in order for the outside party to receive information and communicate with the agency on behalf of the participant. When the outside representative is an attorney, a letter of representation is more appropriate than a POA since it shows that the participant is represented by counsel. Additionally, POAs such as PBGC's POA form often grant broader powers than are needed for a standard attorney-client relationship.

Counselors from the various pension counseling projects have brought the issue of PBGC refusing to accept letters of representation to the attention of the Advocate since 2015, as detailed in the Advocate's 2015 Annual Report. While PBGC initially addressed this issue by working with the counseling projects to ensure that their letters of representation were valid for purposes of PBGC communicating and releasing information, the Office of the Advocate has observed situations where there are still issues with PBGC accepting letters of representation and communicating directly with attorneys about their clients.

In one situation, a counseling project attorney reached out to the Advocate for assistance on a participant case that had been pending unresolved at the agency for months. The attorney's initial submission to PBGC included a letter of representation signed by the participant with her claim for benefits. Upon discussing the matter internally, PBGC informed the Office of the Advocate that it could not communicate with the participant's attorney without the participant on the phone since the letter of representation did not contain the correct language to allow the agency to communicate and release information to the attorney. It is unclear why PBGC did not initially review the letter of representation for sufficiency and inform the attorney and participant that it needed additional language in order to be valid for PBGC's purposes.

**Recommendation:** PBGC should routinely coordinate with the various pension counseling projects to request and review copies of their letters of representation to ensure that they satisfy the agency's requirements. Additionally, if PBGC receives a letter of representation that does not include the language needed for the agency to allow it to communicate with and release information to the attorney, it should notify the participant and the attorney immediately so it can be remedied. PBGC may also want to consider creating and posting on its website a model letter of representation for purposes of assisting with PBGC-related matters.

### *Process for Claiming an Unclaimed Pension*

The Office of the Advocate received multiple participant requests for assistance regarding claiming an unclaimed pension from PBGC. PBGC maintains a publicly-searchable unclaimed pensions list containing missing participant information for plans it has trustee, as well as plans ending in a standard termination or covered by certain settlement agreements.<sup>1</sup> Individuals who believe they are due a benefit may submit claims by completing an online form or contacting the agency. The participants who contacted the Office of the Advocate expressed frustration with the overall process and communications when submitting a claim, as well as delays in obtaining information.

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<sup>1</sup> See <https://www.pbgc.gov/search-unclaimed-pensions>.

For example, one participant reached out to the Office of the Advocate after facing delays when trying to claim his deceased mother's unclaimed pension even though he provided the agency with information supporting his claim. Another participant who found his name on the unclaimed pension list received conflicting information when he contacted PBGC to inquire about making a claim for the benefit. These situations are just two examples of the challenge participants face when trying to obtain information about a potential unclaimed benefit.

**Recommendation:** PBGC's website needs more detailed information about the process for claiming an unclaimed benefit, such as expected processing times, examples of acceptable identification, and other required documents that may be needed to make a claim. Participants are often surprised to learn that they must provide PBGC with additional documentation before being able to even speak with the agency about a potential unclaimed benefit. It is in PBGC's interest to connect missing individuals with their unclaimed benefit, so the process should be as transparent as possible.

*PBGC's Memorandum of Understanding with the Social Security Administration*

PBGC's memorandum of understanding (MOU) with the Social Security Administration (SSA) allows the agency to request and obtain a participant's earnings history directly from SSA. A participant's earnings history is helpful information to support a benefit claim. As part of this process, participants give written authorization for PBGC to request these records from SSA. SSA then directly provides PBGC with the participant's earning information at no cost to the participant.

As discussed in the Advocate's 2017 Annual Report, the MOU limits use of the earnings information to determine eligibility for a PBGC benefit. Situations may arise where the earnings information indicates that the participant is not eligible for a PBGC benefit but may be entitled to a benefit from an ongoing plan. PBGC is unable to directly provide the participant with his or her own earnings information since the terms of the MOU restrict disclosure to determining eligibility for a PBGC benefit. Instead, the participant must request the information directly from SSA which can take months, adding time to the process.

**Recommendation:** PBGC's interagency MOU with SSA is a useful tool for the agency to obtain a participant's SSA earnings as part of its analysis of a benefit claim. However, it may be helpful to revisit the terms of the MOU to carve out a narrow exception which would allow PBGC to release obtained SSA earnings to a participant, such as in situations involving case delays and an elderly participant near death. It may also 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, Notice of Potential Private Pension Benefit Information. While this document is not definitive proof of entitlement to a benefit, it provides information that can be useful in determining an individual's eligibility for a benefit. Including this notice in the scope of the MOU will also save time and reduce the burden on the participant to obtain the document.

In addition to the MOU with SSA, PBGC's own records often provide valuable information for individuals searching for their pension or seeking to make a claim for benefits. For example, PBGC's standard termination files often contain participant distribution information which is useful for potentially omitted participants seeking benefits. However, under PBGC's current records retention schedule, these files are often destroyed after a certain point in time. PBGC must reevaluate its General Records Schedule, with a particular focus on records that are relevant to determining a benefit, to ensure that the current retention period for both trustee and non-trustee plan records is adequate.

In the case of a standard termination, while PBGC generally only oversees the standard termination and does not trustee the plan, the agency may be responsible for paying a benefit for a participant inadvertently omitted from the standard termination in the future. Without a long enough records retention period, salient records that may be used to determine a benefit can be destroyed. Securing these records which are used to determine a participant's eligibility for a benefit will go a long way toward facilitating prompt resolution of future claims from participants, benefitting both participants and PBGC.

## **POSITIVE IMPROVEMENTS**

### *Potentially Omitted Participants (POPs) Case Review Consolidation*

The Advocate's 2018 Annual Report commended management for its decision to consolidate the review of POPs cases to OBA. Prior to the consolidation, both OBA and the Standard Termination Compliance Division (STCD) shared responsibility for reviewing these types of cases. OBA handled POPs claims from plans trustee by the agency and STCD reviewed POPs claims from plans that underwent a standard termination. Now, all claims are reviewed and decided by OBA, providing consistency to the process from a department that routinely makes benefit determinations. The consolidation also benefits POPs and their advisors, as they now only need to contact one department for assistance. This positive change has made a material difference in the way POPs are handled by the agency.

### *Sustained Routine Meetings with Participant Stakeholders*

PBGC's Office of Policy and External Affairs (OPEA) continues to organize regular meetings with participant and retiree advocacy groups, providing a forum for these groups to discuss topics of concern with the agency. The Advocate's 2014 Annual Report recommended PBGC engage participant and retiree organizations to build a regularized, continuing practice of communication. OPEA, in coordination with other departments at PBGC, facilitated meetings among the parties to discuss participant and retiree-focused issues such as multiemployer pension reform and updates on PBGC's financial status. PBGC has also supported these organization's initiatives, such as the Pension Rights Center's Initiative on Retirement and Divorce, by providing thoughtful feedback on issues that affect participants.

*Continued Interagency Coordination Success*

PBGC continues to work with select Department of Labor Employee Benefits Security Administration (EBSA) regional offices to execute a data-sharing agreement which allows the regional offices to actively search PBGC's Unclaimed Pension database to help reunite participants with their unclaimed benefits. The Advocate's 2015 Annual Report initially reported on the initiative, which originated with the Office of the Advocate and EBSA's Chicago regional office. The initiative has expanded to include nine participating EBSA regional offices, recovering almost \$68 million for 1534 participants and beneficiaries in Fiscal Year 2019. This is no small accomplishment and much recognition for the successful implementation of the project and the financial gains to the participants belongs to OBA staff and EBSA's Employee Benefits Law Specialists in participating regional offices. The Advocate is supportive of this initiative which is a good example of data-sharing among and between federal agencies resulting in reuniting numerous participants and beneficiaries with their unclaimed pension benefits.

*Office of Benefits Administration Modernization*

OBA informed the Advocate that it is currently undergoing technology modernizations that will enhance how it interacts with participants and processes cases. OBA is exploring changes to customer relationship management software and systems which will allow it to focus on customer experience by making it easier to track and manage ongoing cases. Other changes include automating certain processes such as scanning and verifying documents. This long overdue modernization is part of an ongoing plan to improve and streamline OBA's overall interactions with its customers, making it easier for participants when interacting with the agency.

## **PLAN SPONSOR ISSUES**

When reflecting on plan sponsor issues from prior Advocate Annual Reports, there are many areas where the agency has improved and acted on past recommendations. For example, a longstanding Advocate suggestion that the agency consider the use of Alternative Dispute Resolution to resolve plan sponsor issues was initially adopted by PBGC as its Pilot Mediation Program, which is now a permanent program that benefits both plan sponsors and PBGC. PBGC has also made strides in how it interacts with plan sponsors and their advisors, prompting fewer plan sponsors to involve the Advocate in their dealings with PBGC.

However, there are still areas that require further consideration and action by PBGC. Plan sponsors often tell the Office of the Advocate that they face (1) repeated requests by PBGC for information it already has or has been advised is unavailable; (2) inexplicable delays; and (3) a lack of communication when dealing with the agency. The Advocate repeatedly raises these concerns to leadership and has been assured that the issues are being actively managed and addressed through system and process changes. Changes, particularly transformational change or modifications to PBGC's long-established procedures, are often difficult and take time to effectuate, so the Advocate looks forward to continued and sustained improvement.

### **POSITIVE IMPROVEMENTS**

#### *PBGC's Mediation Program*

The 2017 and 2018 Advocate Annual Reports commended PBGC for the introduction of a mediation program to facilitate resolution of negotiations in certain plan sponsor matters. Originally launched as a pilot program limited to resolving Early Warning Program and Termination Liability Collection Program cases, PBGC made its Mediation Program permanent and expanded it to include fiduciary breach cases in January 2019. The program's website details information regarding timing, eligibility, and program mechanics.<sup>2</sup> While the Office of the Advocate supports the continued use of the program as an additional tool to resolve outstanding plan sponsor matters, introducing and encouraging its use during a negotiation must be timely and thoughtful, as mediation may add additional time and expense to a dispute that has already consumed considerable time and resources. It may be helpful to mention the program in the earlier stages of the discussion so plan sponsors know there is an alternative means of resolving the matter if negotiations start to break down.

#### *New Forms and Pre-filing Consultation Service*

The Advocate reported on PBGC's enhanced ERISA section 4062(e) content on its website in the 2018 Annual Report. Since the 2014 legislative changes to ERISA section 4062(e), plan sponsors and their advisors repeatedly voiced the need for additional guidance and information on interpretative issues related to the revised law. The updated website content provided much needed guidance to the plan sponsor community about section 4062(e) liability that may arise when an employer ceases operations at a facility. PBGC expanded on this guidance with the

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<sup>2</sup> See <https://www.pbgc.gov/prac/other-guidance/pbgc-mediation-program>.

introduction of a section 4062(e) form series, offering a uniform method for plan sponsors to provide PBGC with the relevant notifications required under the law.

PBGC also introduced a new form and instructions for requesting a coverage determination in 2019. The form lists the different types of plans not covered under Title IV of ERISA and documentation required by PBGC to make its coverage assessment. The form also introduces a pilot program which allows plans that are proposed but not established to request an opinion from the agency as to whether the plan would be covered by PBGC.

While this form is useful and should help streamline the coverage determination process, forms are not a substitute for active case management, whether it is while PBGC is reviewing the coverage determination request, or toward the end of the process if the sponsor is not covered by Title IV and is seeking a refund of premiums. PBGC must actively track and monitor the status of these coverage determination requests, particularly when they involve coordination between multiple departments or other federal agencies, such as if PBGC needs guidance from the Internal Revenue Service. Part of this active monitoring must also involve updating the plan sponsor on the case's status. It is not acceptable for a coverage determination request to languish at the agency without any explanation or finality for the plan sponsor who is still paying premiums while the agency makes its determination. Active tracking ensures that the matter moves toward resolution without issue. Since multiple departments are involved in this process, designating a team leader who is responsible for actively tracking the case to completion should help ensure the timely issuance of coverage determination decisions and prompt processing of subsequent premium refund requests if the plan is no longer or has never been covered under Title IV.

PBGC also introduced a Pre-filing Consultation service for plan sponsors filing pursuant to ERISA section 4010. Section 4010 requires certain employers maintaining underfunded plans to report identifying, financial, and actuarial information to PBGC. As this filing can be costly and complex, PBGC's pre-filing consultation provides plan sponsors with an overview of the process and filing software, as well as common errors and how to avoid them. PBGC offers similar consultations in other areas such as its distress termination pre-filing consultation. The Advocate supports PBGC providing plan sponsors with an additional forum to obtain information and customer service from the agency.

Overall, the use of forms benefits both plan sponsors and PBGC because it ensures that sponsors have a clear understanding of the information PBGC requires to review a particular matter. The pre-filing consultation service is another useful way of interacting with plan sponsors, particularly with complicated filings, such as the one required under ERISA section 4010, since it provides an opportunity to ask questions and receive clarifying information about filing requirements. PBGC should continue evaluating program areas that may benefit from forms or informal consultations, and also seek plan sponsor feedback during this process.

### *Informal Staff Guidance*

PBGC is continuing to offer informal staff guidance on its Staff Responses to Practitioners Questions website.<sup>3</sup> Practitioners may submit questions for informal response by PBGC staff. Topics range from bankruptcy claims to distress terminations and valuations and provide non-binding insight into the agency's informal positions on various topics. While this website is helpful and another way for the agency to communicate with practitioners, it would be useful if PBGC alerted the public when it adds, removes, or modifies its responses. This will ensure that practitioners have the most up to date information on various topics of interest.

### *Streamlined Framework for Charity and Not-For-Profit Plan Sponsors Negotiations*

Past Advocate Annual Reports recommended the agency develop a streamlined process for negotiating with charity and not-for-profit plan sponsors during the distress termination liability collection process. These types of plan sponsors are often subject to funding constraints and have materially different business models than for-profit plan sponsors. PBGC's Office of Negotiations and Restructuring informed the Advocate that it has established and is currently following a streamlined framework when negotiating with charity and not-for-profit plan sponsors. The framework focuses on other types of security available to the charity or not-for-profit, such as real estate, so that the parties can resolve the matter without relying entirely on a cash settlement, since the sponsor's funds may be limited and restricted. While this new framework is a positive step, it would be helpful for the agency to consult with charity and not-for-profit plan sponsors and their advisors to seek input about any other relevant factors or considerations.

While the streamlined framework is useful during negotiations, one frequent concern from charity and not-for-profit plan sponsors involves the amount of time it can take PBGC to approve a distress termination, particularly when the sponsor's real estate is taken as security. Haggling over the value of the property can add months to the distress termination process which comes at a financial cost to the plan sponsor since delays can adversely affect the plan sponsor's creditworthiness. Delaying a decision on a distress termination application also has a financial cost to PBGC as its expenses and expended resources increase with the amount of time it takes to resolve the matter.

### *Case Tracking and Early Warning Program Improvements*

The Advocate has repeatedly recommended that PBGC establish a system for triggering management review when cases are open for more than six months. The Office of Negotiations and Restructuring has informed the Advocate that it is conducting this type of routine review and also using a system to track open cases and their statuses. The review occurs regularly at different levels and involves upper management as well as the analysts working on the case team. This active management should help ensure that cases progress and that resources are allocated accordingly in order to bring matters to resolution. While this is a positive change, there are still deficiencies when a case involves multiple PBGC departments and may often languish in a different department that is not conducting these types of regular case reviews.

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<sup>3</sup> See <https://www.pbgc.gov/prac/staff-responses-prac-questions>.

Additionally, PBGC is currently taking steps to update its Early Warning Program case process, with an emphasis on clarifying communications to plan sponsors regarding when a case is opened and closed. Past Advocate reports addressed challenges faced by plan sponsors when dealing with PBGC during an Early Warning Program case and recommended that PBGC provide the maximum possible transparency about its use of the program. Changing how it communicates with plan sponsors to make sure they understand the process and what information may be required in the event PBGC opens a case helps promote this transparency, and the Advocate is supportive of these changes.

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

### *Variable Rate Premium Exemption*

In early 2018, the Office of the Advocate received an anonymous inquiry regarding the use of a two-step “reverse spinoff” transaction as a strategy to avoid paying a portion of the statutory variable rate premium (VRP). PBGC’s regulations provide a VRP exemption for plans terminating in standard terminations as well as certain small new and newly covered plans.<sup>4</sup> The Advocate brought the issue to the attention of PBGC’s General Counsel and the agency subsequently issued informal, non-binding guidance on its Staff Responses to Practitioner Questions website stating it was “skeptical” of certain “two-step transactions to reduce premiums.” PBGC also modified its comprehensive premium filing instructions relating to the exemption. The Advocate acknowledged these items in the 2018 Advocate Annual Report, with the suggestion that PBGC should add the issue to its Regulatory Agenda.

The Office of the Advocate later received a request for assistance from a plan sponsor who had received an adverse final determination regarding claiming the VRP exemption and was contemplating litigation. As part of a larger de-risking strategy, the plan sponsor undertook a pension restructuring project which involved merging two plans and spinning-off and terminating another plan. During this year-long restructuring project preparation, which involved coordination among multiple parties and an over 170-item project plan with items such as sending participant notices and executing plan amendments, PBGC published its informal staff response and later updated its comprehensive premium filing instructions regarding its position on claiming the VRP exemption.

The plan sponsor, relying on its interpretation of the plain language in the regulation, claimed the VRP exemption on its premium filing and received an initial determination from PBGC that it did not qualify for the exemption. The plan sponsor filed a reconsideration request and specifically asked for a conference before PBGC issued its final determination. PBGC denied the plan sponsor’s request for reconsideration, citing its informal staff guidance and changes to the comprehensive premium filing instructions as part of its determination that the VRP exemption did not apply to the plan. It also included a footnote in its decision stating that PBGC’s reconsideration rules do not provide for a conference.

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<sup>4</sup> See 29 C.F.R. § 4006.5(a)(3); (4). PBGC’s regulations also list other categories that are eligible for a VRP exemption such as plans without vested participants and section 412(e)(3) plans.

Upon receiving this final decision, the plan sponsor contacted the Advocate for assistance. Additionally, the plan sponsor connected with other similarly-situated sponsors who had also received adverse final determinations regarding claiming the VRP exemption, resulting in the sponsors owing PBGC significant amounts of money for the premium. The group collectively, through the Office of the Advocate, requested a meeting and discussion with PBGC's General Counsel to explain its position on PBGC's interpretation and application of the regulation. PBGC initially denied the request for the meeting. However, after several weeks of persistence by the Office of the Advocate, PBGC agreed to this discussion, with the caveat that it would not debate the facts and circumstances of each individual plan sponsor at the group meeting with the plan sponsor cohort.

The parties met and PBGC listened to the plan sponsors' concerns about the agency's position on the VRP exemption. At this meeting, the plan sponsors' representatives pointed out to PBGC that it had, in essence, tried to operationally change its regulations, first by the issuance of the staff guidance in July 2018 with one interpretation, then by changes to the comprehensive premium filing instructions in September 2018 with another interpretation that was inconsistent with the first interpretation. PBGC expressed a willingness to settle each individual case and encouraged the plan sponsors to reach out for further discussion. After much contemplation and individual plan sponsor discussions with the Advocate, the plan sponsors negotiated individual settlements with PBGC to resolve the matter without litigation. Additionally, as this matter progressed, PBGC issued a proposed rule to amend the VRP exemption regulation.<sup>5</sup>

**Recommendation:** PBGC must be transparent with the plan sponsor community, particularly when it modifies or issues interpretive guidance outside the normal regulatory rulemaking process. Following the regular rulemaking process when changing an existing regulation ensures that plan sponsors receive notice and have the opportunity to comment on any proposed changes. Additionally, non-binding, informal guidance should not be cited as a definitive reason for the agency's decisions on matters. Plan sponsors rely on the certainty of knowing what a regulation says and fluctuating positions and interpretations by PBGC can cause confusion and lead to unintended financial consequences for the plan sponsor as it may take actions based on its reliance on a regulation only to find that the agency has changed its position.

This need for certainty is echoed in the public comments to PBGC's proposed changes to the VRP exemption regulation, as multiple commenters suggest that the changes to the regulation should have a prospective effective date, as "[s]ome plan sponsors have already completed transactions and related premium filings based on their reading of the language in the existing regulations, having concluded that the existing language clearly supported the reduced premium in these situations."<sup>6</sup> **The Advocate supports this recommendation regarding a prospective effective date for the changes to the VRP exemption regulation.**

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<sup>5</sup> 84 Fed. Reg. 30666 (June 27, 2019).

<sup>6</sup> Mercer comment letter on RIN 1212-AB34 "Miscellaneous Corrections, Clarifications, and Improvements" dated August 26, 2019. *See also* Aon comment letter on RIN 1212-AB34 "Miscellaneous Corrections, Clarifications, and Improvements, dated August 23, 2019: "In many cases, plan merger and spinoff transactions have already occurred during 2019, and plan sponsors have applied the rules as they exist in the current regulations..."

### *Insolvent Estate Faces Challenges When Dealing with PBGC*

The Office of the Advocate received a request for assistance from an estate seeking to resolve its pension liability with PBGC. The decedent, a sole owner of a company sponsoring a defined benefit plan, passed away in 2013. The executor of the estate, who was also the plan administrator and trustee of the plan, mismanaged the estate's assets and failed to contact PBGC regarding multiple reportable events. The court removed the first executor and appointed a third party administrator who marshalled the estate's assets. However, due to the mismanagement of the first executor, the business records of the estate were in disarray and the overall size of the estate was greatly diminished due to financial mismanagement.

Four years after the death of the decedent, PBGC sent the estate a Notice of Determination that the plan should be terminated. The plan was terminated and trusteed, and PBGC subsequently filed claims against the estate in state court for the termination liability, asserting that its claims were entitled to super priority. As the decedent owned multiple other businesses, PBGC determined these entities were part of a controlled group. Due to the lack of adequate financial records, PBGC and the estate disagreed about the controlled group's net worth. The parties also disagreed about PBGC's priority claim, as the court-appointed administrators who had been working on the case for years without payment from the estate asserted that their professional administrative costs took priority over PBGC's claim. Subsequently, the estate filed for insolvency.

After the estate's insolvency filing, PBGC continued to pursue its super priority claim. The estate attempted to negotiate the matter out of court but PBGC refused to meet with the estate. After the involvement of the Advocate, PBGC and the estate met, but the parties were unable to come to resolution, with PBGC asserting that it would request discovery and continue to pursue the case in court despite the dwindling assets of the estate and lack of payment to the professionals who would be responding to such discovery requests. Despite the judge encouraging the parties to settle the matter, the case still remains unresolved.

**Recommendation:** Negotiations come at a considerable time and monetary cost to both plan sponsors (or estates) and PBGC. While PBGC must zealously pursue its claims, there must be a quantitative cost-benefit analysis that justifies the agency's expended resources, particularly in situations where the plan sponsor or estate clearly has a dwindling amount of financial resources. Adopting an overly adversarial approach during negotiations, which includes refusing to meet with a plan sponsor or estate or pursuing unnecessary litigation instead of attempting to settle a matter out of court, further increases this cost. PBGC should be mindful of the resources it uses when pursuing plan sponsors or estates for prolonged periods of time as these costs can quickly add up and often result in very little return for the agency.

### *Delays During Distress Termination Review*

A small-sized plan sponsor contacted the Office of the Advocate for assistance after 18 months of working with PBGC without resolution regarding a distress termination application. The plan sponsor's current owners purchased the company from its foreign owner in 2011 in order to keep the business going and maintain jobs. However, the plan sponsor struggled to support its frozen

defined benefit plan, which consisted entirely of terminated vested participants and retirees that had worked in now closed manufacturing plants and no longer had any relationship to the company. After unsuccessful attempts to secure financing, the plan sponsor contacted PBGC about plan termination options since it could no longer afford to stay in business while maintaining the plan.

The plan sponsor originally inquired whether PBGC would involuntarily terminate the plan. When the agency refused, the plan sponsor filed an application for a distress termination. Communications between PBGC and the plan sponsor regarding the application continued for months. At one point, PBGC changed analysts on the case team and subsequently informed the plan sponsor that it planned on denying the distress termination application since it believed the company had the borrowing and cash flow capacity to make contributions to the plan. When the plan sponsor asked to speak with PBGC about its impending decision, the agency refused, leading the sponsor to contact the Office of the Advocate.

Upon the Advocate's involvement, PBGC agreed to meet with the plan sponsor. This meeting gave the plan sponsor an opportunity to provide PBGC with clarifying information about its financial status. Following the meeting and upon receiving additional information from the sponsor, PBGC approved the distress termination application.

**Recommendation:** Open communication and regularly maintained contact between PBGC and the plan sponsor is necessary to facilitate prompt resolution of cases. Refusing to speak or meet with a plan sponsor only prolongs the matter which quickly becomes costly for both the plan sponsor and PBGC. Companies seeking assistance from PBGC are often facing other financial constraints, so resolving a matter expeditiously saves time and money.

Additionally, while regular case reviews are commendable, PBGC needs to coordinate and track matters accordingly when the case team involves multiple departments, particularly in cases that have been pending for longer than six months without substantive progress. Establishing a position responsible for operational oversight of the different departments within PBGC may help with this coordination. A Chief Coordinator position would add great value to plan sponsor cases which frequently involve working with multiple departments within the agency.

For example, one plan sponsor that contacted the Advocate for assistance provided plan and financial data to the Office of Negotiations and Restructuring and the Office of the General Counsel as part of its distress termination negotiations. Months after PBGC trustee the plan and settled the termination liability, the plan sponsor received a request from the Office of Benefits Administration for the same documentation it had already provided during its earlier negotiations with the agency. A Chief Coordinator overseeing the overall process could ensure the different departments are synchronized so matters move seamlessly throughout the agency, resulting in fewer duplicative requests for information.

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

The Pension Protection Act of 2006 gave PBGC authority to pay interest on premium overpayments on a retroactive basis back to August 17, 2006. However, PBGC has taken the position that it cannot act upon this authority until it issues regulatory guidance. While PBGC originally added interest on premium overpayments as a proposed rule in its Fall 2007 Regulatory Agenda, it subsequently designated the item as a long-term action in its Fall 2008 through 2016 Regulatory Agendas and withdrew the action in May 2017.

PBGC's May 2017 withdrawal stated that the agency "reformed the premium payment process that gave rise to most overpayments... and also instituted a process to rectify identifiable premium overpayments promptly. As a result, overpayments have declined significantly since the institution of this project, and it is no longer necessary or cost-effective."<sup>7</sup> While PBGC's changes to the premium payment process, including 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 prospective basis, there are still situations where a plan sponsor may overpay premiums. For example, plan sponsors may pay premiums while waiting for a coverage determination from PBGC, resulting in overpayments if the plan is not covered under Title IV. Additionally, inadvertent mistakes that may affect the premium calculation for several plan years can also result in plan sponsor overpaying premiums. Without regulatory action, these plan sponsors do not receive any interest on the overpayments.

**Recommendation:** The Advocate recommends that PBGC reinstitute the regulatory project to promulgate guidance allowing it to pay interest on premium overpayments. Paying interest, whether prospectively only or prospectively and retroactively back to August 17, 2006, may be cost-effective when all interests of the regulated community are considered. PBGC collects interest on premium underpayments and it would be equitable for the agency to calculate and pay interest on overpaid premiums in the same manner as interest is calculated for these underpayments.

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<sup>7</sup> See PBGC's current and historical Regulatory Agendas and Plans, available at <https://www.pbgc.gov/prac/pg/other/guidance/regulatory-agendasplans>.

## **MULTIEMPLOYER PENSION ISSUES**

The Office of the Advocate continues to receive outreach from participants and beneficiaries in multiemployer plans facing insolvency. These requests for assistance include retirees facing potential benefit reductions under the Multiemployer Pension Reform Act of 2014 (MPRA), as well as participants in insolvent plans receiving financial assistance from PBGC. As part of these inquiries, the Advocate frequently coordinated with PBGC's Office of the General Counsel and Multiemployer Program Division, as well as the U.S. Department of the Treasury, to provide responsive information to participants. The Office of the Advocate has great empathy for these participants and is supportive of efforts to address the solvency of the multiemployer system so these participants can enjoy a secure retirement.

Additionally, the Advocate consulted with PBGC as required under MPRA regarding the agency's first facilitated merger. With the many challenges facing the multiemployer system, mergers are another tool to help struggling multiemployer plans manage their liabilities. Mergers also benefit participants, as they allow the merged plan to preserve participants' benefits which may otherwise be subject to reduction.

The Advocate also follows legislative proposals to address multiemployer system issues such as H.R.397, Rehabilitation for Multiemployer Pensions Act of 2019, which the House of Representatives passed in late July 2019. There is a similar bill pending in the Senate, S.2254, Butch Lewis Act of 2019. Among other things, the bills establish a Pension Rehabilitation Administration within the U.S. Department of the Treasury to make loans to multiemployer defined benefit plans. Both pieces of legislation also create an ombudsperson role for the Advocate. The legislation appears to require the Advocate to become involved with disputes between private parties, as it states the Advocate "shall act as ombudsperson for participants and beneficiaries on behalf of whom annuity contracts are purchased or who are covered by a portfolio..."

Under the Advocate's enabling statute, ERISA section 4004, the Advocate is limited to assisting participants and plan sponsors resolve their disputes with PBGC. The Advocate's statutory authority does not extend to resolving disputes between participants and plan sponsors. As such, the Advocate recommends that the ombudsperson function reside within the Pension Rehabilitation Administration or another agency in the Treasury Department.

The Office of the Advocate supports continued attention and efforts, including the above-mentioned legislation and other proposals such as the Multiemployer Pension Recapitalization and Reform Plan, to solve the multiemployer pension crisis. Surely, we can come together to find a solution to provide retirement security for our American workers who labored under and contributed to a promise for a secure retirement in their senior years.

## **OUTLOOK: PENSION PLAN REGISTRY PROJECT**

In addition to assisting parties in resolving disputes with the corporation, the Office of the Advocate pursues research initiatives which further the missions of the Advocate and PBGC while also benefitting participants and plan sponsors. The Advocate's 2017 and 2018 Annual Reports included the results of a two-part study commissioned by the Office of the Advocate which analyzed the causes and effects of pension de-risking on PBGC, the defined benefit plan universe, and participants, as well as potential PBGC and Congressional actions that may slow pension risk transfers.

One important finding from the study is that de-risking will continue to pose an anti-selection problem where healthier plan 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. This anti-selection problem increases the overall risk and exposure to PBGC by putting it in a position where it may be left with plan sponsors who can't afford to make contributions to their plan, pay PBGC premiums, or otherwise shed their defined benefit plan liabilities. Additionally, de-risking coupled with other corporate transactions such as mergers, acquisitions, and asset sales, can adversely affect participants seeking a benefit from a plan that once existed but is now unlocatable. This also leaves plan sponsors and PBGC in a difficult position to help participants seeking a benefit to which they believe they are entitled.

To that end, the Office of the Advocate is focusing on creating a Pension Plan Registry using plan information available at PBGC as its next initiative. The Office of the Advocate often receives requests for assistance from individuals searching for their lost pensions. These inquiries range from potentially omitted participants described in past Advocate Reports who are seeking a benefit from PBGC, to individuals who believe they are entitled to a benefit but cannot locate their former employer or pension plan. The latter contact PBGC and the Office of the Advocate looking for information on what happened to their pension plan.

PBGC holds a variety of data that can be useful to participants searching for their lost pensions. While certain information such as PBGC's Insured Plans and Trusteed Plans lists are publicly available, there is other relevant data that is only available internally.<sup>8</sup> For example, PBGC's Financial Operations Division (FOD) retains current and historical premium filing information which includes plan sponsor, Employer Identification Number, and plan name changes as well as other data which can be useful when tracing the history of a pension plan. PBGC's Standard Termination Compliance Division (STCD) also maintains a database of plans that terminated under a standard termination and often has relevant information in its standard termination files. Currently, the Office of the Advocate coordinates with FOD and STCD when an individual contacts the Advocate seeking information about a lost pension.

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<sup>8</sup> PBGC's Insured Plans list includes current plan administrator contact information for plans insured by PBGC. The Trusteed Plans list includes plans trusteed by PBGC. Additionally, PBGC also holds information about certain unlocatable participants who may be due a benefit from PBGC on its unclaimed pensions list. All three lists are publicly searchable.

In addition to contacting the Office of the Advocate and PBGC, individuals often reach out to the Social Security Administration, the Internal Revenue Service, and the Department of Labor during their search, as these agencies hold and maintain information that may be useful to individuals during the search for their missing benefits. The 2018 Advocate Annual Report opined on the need for a National Pension Registry which would allow workers to track information about their retirement plans and locate their former plan administrators. Since there is currently no centralized location for individuals to obtain information about their missing pension benefits, creation of a larger National Pension Registry would require interagency data-sharing and collaboration. There is great interest in establishing such a registry, as it would benefit participants searching for their missing pension benefits as well as plan sponsors seeking information on lost participants due a benefit.

While the Office of the Advocate's Pension Plan Registry Project is not as wide in scope as a larger National Pension Registry, it will provide a service which is not currently available and may eventually become part of a larger Registry. Initially, on a pilot basis, the Pension Plan Registry Project will provide a tracing service run through the Office of the Advocate for individuals who are seeking information about a pension plan. The tracing service would search for plan information using data available at PBGC, relying heavily on the historical premium filing information held by FOD. The Office of the Advocate anticipates eventually creating a searchable database or system which combines information from the various databases at PBGC to provide a fuller picture of the genealogy of a pension plan.

Although the project is still in the nascent stages of its development, it is a priority for the Office of the Advocate in 2020 and holds great promise as an initiative that will benefit both participants and plan sponsors since it will be another source of information to reunite participants with their lost pensions, a most important tool in the wake of de-risking. The Office of the Advocate looks forward to working closely with our colleagues at PBGC, particularly FOD, on this important initiative.