



2023 Annual Report of the Participant and Plan Sponsor Advocate

Pension Benefit Guaranty Corporation

December 29, 2023



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Since its inception ten years ago, the Office of the Advocate has acted as a liaison between participants and plan sponsors regarding their dealings with the Pension Benefit Guaranty Corporation (PBGC). During that time, the Office faithfully submitted its statutorily required annual reports to Congress, the PBGC Board of Directors, and the PBGC Director. Such Reports are replete with administrative and legislative recommendations to improve the experiences of participants and plan sponsors with the agency, and to enhance the agency's stature and useful purpose with those we serve in the pension plan community.

My hope is that after reading this ten-year anniversary Report, you will take away the fact that it is high time for the agency to consider and implement new processes and regulations to preserve and maintain the private voluntary pension system in our country. This sentiment is further enhanced as we approach the 50-year anniversary of the Employee Retirement Income Security Act (ERISA), which established PBGC.

In some respects, it is sobering to think that the Office of the Advocate has been in existence for a decade, working with participants and plan sponsors to sort through their benefit entitlements and business transactions with our PBGC colleagues, many of which were resolved in an amicable and professional manner based on a lot of hard work and strong effort from all parties. It has been a magnificent and remarkable experience! If recommendations to improve administrative practices and suggested legislative changes were perceived as criticisms rather than as a means of improving the experience of participants and plans sponsors with the agency, then that misunderstanding must rest with my inadequate expression and my enthusiastic advocacy on behalf of participants and plan sponsors.

In preparation for issuing this tenth Annual Report to Congress, the Office of the Advocate held discussions with various participant and plan sponsor stakeholders to discuss their experiences with PBGC over the past decade and areas for improvement in the future. There are many broad and common themes. Let me share some of the most salient with you now.

Universally, both participants and plan sponsors, including their advisors, shared a deep concern for the eroding of the defined benefit plan system from the landscape—a system that was once available to build economic security through a lifetime income stream in retirement. All forms of pension de-risking have led to a rapid decline of the defined benefit structure, leaving its mark on generations of people who now only have defined contribution assets and Social Security to rely upon for retirement income. The current retirement system is certainly not the three-legged stool people were taught to expect, particularly when the defined contribution scheme emerged promising to be an important part of the stool but was not originally cast as the sole source of one's retirement income other than Social Security.

Throughout the next year, the Office of the Advocate will engage with thought leaders committed to the defined benefit structure, in alignment with PBGC's statutory mission to preserve and maintain the voluntary private defined benefit structure. We preview some early comments in the attached white paper, "What Does Retirement Security Look Like in America?"

In addition to exploring the broad systemic issues regarding the retirement security structure in America, the Office of the Advocate has, over the years, helped participants with specific benefit entitlement claims and assisted plan sponsors with their issues such as the old ERISA 4062 (e) shutdown operation liability structure, a delayed standard termination, or, as always, hang-ups with the enduring distress termination process that seems to go on for months, if not years. The distress termination process has been an issue for plan sponsors since the inception of the Office of the Advocate. It is interesting that plan sponsor issues usually become clear and manifest almost immediately, while participant issues take time to materialize into common themes that show the true need for systemic improvement in PBGC processes, such as how PBGC handles benefit determinations.

Participants tell us that it takes PBGC far too long to make a benefit determination in complex cases. If a participant disputes the determination, they are subject to an inconsistent initial determination process that can vary depending on who at PBGC is responsible, usually staff in the Office of the General Counsel (OGC). If the participant's benefit claim is denied during the initial determination phase, which itself can take months or years, then the participant can take their claim to the PBGC Appeals Board, a department that also reports to the General Counsel, and is comprised of career employees whose continued employment is evaluated by the General Counsel. The Appeals Board can take upwards of a year to make a final agency benefit determination. If the benefit is denied by the Appeals Board, the participant's only recourse is to take their claim to federal district court. This is not a viable administrative review option for participants who are elderly, retired, and possess limited resources.

It is sad that the agency's administrative review is so marred by an ineffective benefit determination process and an appeal process that involves such significant governance issues, since the Office of the General Counsel often oversees, advises on, and may ultimately determine how PBGC responds to participant claims. Repeatedly, the Director has been made aware of these issues but has continued to evaluate the matter by seeking counsel from the entity in question.

One unfortunate underlying theme in both participant and plan sponsor encounters with the agency is an overall sense of mistrust by agency personnel who interface with the regulated community on a routine basis. That mistrust drives many of the adversarial encounters and leads to outsized and unreasonable demands by PBGC, contributing to lengthy delays in settlement of the matter, and extraordinary costs, both financial and personal, to participants and plan sponsors. Addressing and correcting this kind of mindset will take an unvarnished and fact-based approach that is relentless in its objective to basically restructure the culture of the agency. This approach will necessitate a strong presence and oversight from the PBGC Board of Directors and Congress.

Once again, for the sake of repetition, the Board must consider establishing a “Chief Executive Officer” (CEO) position that would provide daily oversight and management of senior leaders in the Corporation. This individual would have the accountability and authority to oversee the changes enumerated in this Report, and recommendations in all the other Advocate Reports for the last 10 years that have gone unnoticed.

Indeed, actions by some PBGC employees clearly demonstrate a lack of understanding that the agency exists to serve participants and plan sponsors and to help them solve the problems that they bring to us. To the contrary, PBGC frequently fails to understand how its interactions raise obstacles for participants and plan sponsors. PBGC often appears to look for reasons to deny a benefit entitlement or prolong negotiations with a plan sponsor in a distress termination, threatening whether the sponsor can even be a going concern. *PBGC takes a most adversarial approach in its dealings with participants and plan sponsors, and that must be closely investigated and managed to extinction.*

One ominous note that threatens the viability of the defined benefit system, completely contrary to the statutory mission of the agency to maintain and preserve the private defined benefit structure, is PBGC premiums. The agency has an extraordinary \$44.6 billion surplus that is far in excess of anything that the agency needs. This surplus is not taxpayer money, but money from plan sponsors who, for years now, have not only made significant contributions to their pension plans but have also overpaid PBGC premiums to cover a level of risk associated with the defined benefit system that simply no longer exists.

More troubling, the agency has not shown leadership to help policymakers and legislators come to terms with options to relieve this extraordinary financial burden that is driving plan sponsors from the defined benefit structure, threatening the retirement security of upcoming generations who lack the economic security of a lifetime income in retirement. This kind of surplus combined with debilitating premiums has led to an exodus of employers from the defined benefit system, a fact that was confirmed in a two-part de-risking study performed by the Office of the Advocate in 2017 and 2018. One plan sponsor representative summed it up nicely when he told us in focus groups in the 2018 study the following: “The higher the premiums go, the threshold of where we’ll de-risk, it just gets closer. It’s purely an economic thing.”

In last year’s Report, the Office of the Advocate raised the question “What Does Retirement Security Look Like in America?”—an important policy and economic security question that is quickly beginning to threaten upcoming generations. We decided to explore the question of retirement security, considering the decline of the lifetime income most easily offered through the defined benefit structure, and, more importantly, what could be done to preserve this system consistent with the mission of PBGC. As you read the beginning of the Report, you will see some of the preliminary work on this project, including discussions we have had with various interested parties who support looking at this issue. They have thoughtful suggestions for preserving the system.

We invite you to give serious consideration to the commentary on retirement security in the attached White Paper Report.

Respectfully, I submit the 2023 PBGC Participant and Plan Sponsor Advocate Annual Report in accordance with my reporting duties under section 4004 of ERISA.

Sincerely,



Constance A. Donovan
PBGC Participant and Plan Sponsor Advocate
December 29, 2023

cc: Camille M. Castro, Senior Associate Participant and Plan Sponsor Advocate
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RETIREMENT SECURITY POLICY INITIATIVE

The Advocate's 2022 Annual Report raised the question of retirement security in America considering the changing defined benefit landscape. While SECURE Act 2.0 and other legislation have provided numerous provisions to enhance and strengthen the system, the Office of the Advocate continually hears questions and concerns about its sustainability and future. In 2023, the Office launched its Retirement Security Policy Initiative (Initiative) to examine the private-sector defined benefit system and explore what PBGC can do, in accordance with its statutory mission, to preserve, promote, and protect the system.

These issues are more important than ever as we approach the 50th anniversary of ERISA and contemplate how to ensure retirement security for all generations. While there is still great interest in the defined benefit system and a recognition of the benefits pension plans provide to participants and beneficiaries, many plan sponsors are hesitant to reopen or adopt new pension plans based on prior negative experiences with volatility, risk, and the escalating costs traditionally associated with these types of plans.

Rising PBGC premiums are frequently cited as a major factor in plan sponsors' decisions to freeze, terminate, and/or de-risk their plans since it is often more cost-effective to purchase annuities than continue paying premiums. Given the well-funded status of the PBGC single-employer trust fund, along with greatly improved funded status of many ongoing plans, some sponsors question why they are paying such high premiums to insure for a risk that is no longer relevant.

The Office of the Advocate held a series of informal discussions to further explore these topics with a variety of defined benefit plan stakeholders, including participant and plan sponsor advocacy groups, actuaries, academics, and other industry experts. Notable topics raised during these conversations include:

- Alternative PBGC premium structures, such as automatically adjusting single-employer premium levels based on PBGC's average funded status and considering a PBGC premium holiday. One specific proposal raised by members of the plan sponsor community suggests automatic premium decreases or increases when PBGC funding climbs above or dips below certain levels.
- Taking PBGC premiums "off budget," to ensure that premiums are no longer counted in general fund revenue, as these funds cannot be used for governmental purposes other than funding PBGC programs.
- Capturing value and other potential uses for the surplus when a plan is above full funding, such as using the surplus to fund defined contribution plan benefits, which would require legislation since current law only permits such use if the overfunded plan terminates. Similarly, surplus amounts in Section 401(h) health arrangement accounts could be used to fund both defined benefit and defined contribution plans.
- Renewing interest in cash balance plans and exploring ways to promote the structure, including legislative and regulatory changes to facilitate administration of cash balance plans. This should include updating the accounting rules of cash balance plans to accurately reflect plan sponsors' future benefit obligations.

- Other alternative defined benefit structures that offer flexibility, portability, and limited risk-sharing between the employer and employee. This includes, for example, variable annuity plans, which protect plan sponsors from risk by adjusting benefits based on returns on the plan's assets, but also include participant protections, such as benefit stabilization by way of an asset reserve.
- Making defined benefit plans more attractive to plan sponsors, including reforming reporting and compliance requirements to reduce administrative burdens.
- Considering what activities PBGC can undertake **now** to help promote retirement security and showcase the value of the defined benefit system.

Additional topics from these discussions can be found in Appendix I. As a follow-up to these preliminary conversations, the Office of the Advocate will be holding a series of roundtables. The Office is finalizing a procurement for contractor support to help organize and facilitate the roundtables and expects to launch this next phase of the Initiative in early 2024. Potential roundtable discussion topics include ways to strengthen and preserve the defined benefit system, PBGC premiums, plan design, and other future considerations for the system.

PARTICIPANT ISSUES

The Office of the Advocate assisted with a variety of participant and beneficiary assistance requests throughout 2023, including both routine and complex matters. The Office has a cooperative relationship with the Office of Benefits Administration (OBA) and worked closely with OBA staff to resolve many of these cases and address other larger issues affecting participants.

Multiple participant assistance requests involved complaints about the fairness, impartiality, and thoroughness of PBGC's administrative review process. While past Advocate Annual Reports identified concerns about the Office of the General Counsel's (OGC's) heavy participation and influence throughout the participant appeal process, recent matters illustrate ongoing issues with the agency's Appeals Board and overall administrative review process. These process issues must be remedied immediately as they call into the limelight the fairness and equity of the agency's administrative review process and can adversely affect participant benefits.

Need for Overhaul of Current Administrative Review Process

Past Advocate Annual Reports have long highlighted concerns about PBGC's administrative review process for participants, particularly for claims involving novel and complex issues. There are often questions about which department is responsible for making the benefit determination, and the Office of the Advocate has observed substantial involvement by OGC in many complex cases and throughout every stage of the agency's review process.

While OBA officially issues the benefit determination, OGC plays a large role behind the scenes in the review of the case or issue. After a benefit determination is issued, participants can appeal to the agency's Appeals Board for further review of the matter. The Appeals Board is another internal department that is also within OGC and reports to the General Counsel, presenting governance and impartiality concerns. If the Appeals Board affirms the agency's decision, the participant's next step is to file a claim in federal district court, adding more time and expense to an already lengthy process.

PBGC appears to have little or no written guidance governing this process, other than high-level administrative review regulations drafted decades ago by PBGC staff. Consequently, the Office of the Advocate has observed inconsistencies in the review of participant matters by the Appeals Board. It is unclear what type of review the Appeals Board undertakes since members are given broad discretion and there is limited reporting and oversight. More troubling, there appear to be few constraints on how the Appeals Board interprets its own regulations absent other written internal procedures. Somehow, the Appeals Board has become unquestionable and not accountable to anyone in the agency. The Appeals Board's broad and unchecked discretion is particularly disconcerting in single-member decisions, as the agency's regulations allow single-member decisions in any case that "does not raise a significant issue of law or a precedent-setting issue."¹

¹ 29 CFR § 4003.61.

The following three Appeals Board decisions, which took place in the same timeframe, vary from each other dramatically, and seem to follow no particular process or procedure. They raise questions about the appearance of bias and have the potential to create reputational risk to the agency. Most importantly, they present concerns about whether participants are truly getting a fair and impartial review when they have disputes with the agency, including whether initial determinations are simply rubber-stamped when their claims reach the Appeals Board stage.

In one case presenting due process issues, the Appeals Board developed new evidence during its review and did not share the information with the participant or his counsel prior to issuing its final decision. The Appeals Board relied on the new evidence, which it obtained from a former service provider to the plan, to deny the appeal, and its failure to share the information deprived the participant of the opportunity to dispute the evidence or offer other evidence or arguments about its sufficiency. When the Office of the Advocate asked why the Appeals Board did not share this evidence prior to issuing its decision, the agency indicated that its regulation did not *require* it to share the new information (the regulation also does not prohibit the sharing of newly developed information).² PBGC indicated that the participant could have found the information independently, an unsubstantiated statement since it is unlikely that a participant, even one represented by counsel, would ever be able to obtain documents from a plan's former service provider with the same ease and efficiency as a federal agency.

Notably, this matter was decided by only one member of the Appeals Board. This was also the case in another participant assistance request the Office of the Advocate received in 2023 involving questions about credited service under a PBGC-trusted plan. After going through a lengthy administrative review process and receiving a denial from the Appeals Board, the participant reached out to the Office of the Advocate for further help.

Upon reviewing the participant's file and supplemental information about her employment, the Office of the Advocate immediately identified errors and deficiencies in the agency's review that had a significant impact on the outcome of the appeal, as well as a lack of meaningful documentary evidence to support the Appeals Board's assertions. The Office of the Advocate also located information in PBGC's files that supported the participant's benefit claim, but that the Appeals Board had not addressed in its decision denying the benefit. The Office raised questions about the decision to the Appeals Board, which indicated that it was done with its review. Subsequently, the Office requested OBA's review of the case under this department's longstanding practice of considering new information, if relevant to a matter. After independently reviewing the information, OBA agreed with the Office of the Advocate and corrected the participant's benefit calculation to give her credit for her service.

It is troubling that multiple levels of review missed information in the participant's file that was relevant to the decision. Additionally, this case evidences a lack of quality control measures or oversight over single-member Appeals Board decisions, as even a cursory review of this decision would have revealed the glaring errors in its analysis and information supporting the participant's position. This case stands in stark contrast to the previous example, in which the Appeals Board made extra effort to locate new information that supported a benefit denial. This

² 29 CFR § 4003.58(a).

is just one example of the lack of consistency across Appeals Board final decisions, and evidences the need for clear, standardized procedures.

The Office of the Advocate also observed these inconsistencies and process concerns throughout a longstanding case involving a claim from a surviving registered domestic partner for a qualified pre-retirement survivor annuity (QPSA) since her partner, a PBGC participant, passed away before commencing his benefit. The Advocate previously reported on this case in the Advocate's 2021 and 2022 Annual Reports. After years of pursuing the matter through the agency's lengthy administrative review process, the 76-year-old domestic partner finally received, in 2023, a final agency determination from PBGC's Appeals Board affirming the denial of her benefit claim. The Appeals Board decision, to the detriment of the actual appeal by the participant's counsel, primarily addressed a memo of support from the Office of the Advocate and gave convoluted reasoning for confirming the agency's denial of the QPSA benefit. Of course, the domestic partner's next step for recourse is to file a claim in federal district court.

It is unclear what type of review the Appeals Board conducted. While the matter was pending, the Office of the Advocate inquired about a provision in the agency's regulations permitting referral of appeals to the Director for decision.³ Given the sensitive and novel nature of this inquiry and the heavy involvement of OGC, it seemed appropriate for referral to the Director. However, PBGC staff indicated that this regulation section had never been utilized and declined to refer it, instead issuing a three-member appeal that was only signed by one member of the Appeals Board. Unsurprisingly, the decision denied the benefit consistent with the position of the other attorneys in OGC involved with the initial determination.

Following the Appeals Board decision, the Advocate requested that PBGC resolve the matter through alternative dispute resolution (ADR), in accordance with its ADR policy.⁴ The Advocate made an official request to the Director on November 6, asking for a decision in writing regarding whether PBGC will engage in ADR to resolve the dispute. **As of the writing of this report, the Director has yet to respond.** Is this how we should be treating a 76-year-old woman who has been seeking her benefit entitlement from her deceased partner's vested benefit for over four years?

Recommendations: PBGC must bring fairness, consistency, and independence to its administrative review process. The Appeals Board and its members cannot report to the Office of the General Counsel. OGC is intimately involved in the full spectrum of the administrative review process, including benefit determinations and final agency appeals, leading to questions about impartiality. OGC leadership evaluates the performance of the Appeals Board members, which affects compensation, bonuses, and ultimately the members' continued employment with the agency. At a minimum, Leadership must consider options such as:

- **Draft Written Procedures:** Establish a task force of diverse members, including knowledgeable individuals from outside of PBGC, to examine the entire administrative review process for participants and create written guidance for PBGC's Appeals Board,

³ 29 CFR § 4003.60.

⁴ 64 Fed. Reg 17696 (Apr. 12, 1999).

as it currently relies on regulations instead of having written processes and procedures. High-level regulations giving the agency unlimited discretion without constraint are not a replacement for strong day-to-day procedures ensuring fairness, consistency, and thoroughness. Absent internal guidance and procedures, the regulations allow individual members of the Appeals Board significant control over case outcomes with little oversight or input, creating ample opportunity for human error. Further, counsel representing participants have informed the Office of the Advocate of their frustrations and lack of confidence in the administrative review process.

The agency must establish strong and transparent operating procedures governing the Appeals Board's handling of cases to provide participants and beneficiaries sufficient protection against arbitrary and inconsistent review. Any guidance and procedures should be posted on PBGC's website and reviewed periodically to ensure efficiency and fairness in the review process.

- **Alternative Dispute Resolution:** PBGC's ADR policy statement recognizes that, in appropriate circumstances, there may be more effective methods to resolve issues that would otherwise be resolved through adversarial administrative or judicial processes, including issues with the "regulated community." The policy allows PBGC to use ADR to achieve consensual resolution of issues in controversy involving the agency, which include complex participant disputes subject to PBGC's administrative review process.

The agency can and should establish a mediation or arbitration option for participant disputes as an alternative to litigation in federal district court. PBGC offers mediation for certain plan sponsor disputes and should consider a similar structure for participant inquiries, bringing finality to disputes and expediting the overall review process.

- **Increase Transparency:** PBGC's benefits administration policies and procedures should be accessible to the public on the agency's website. Other federal agencies, such as the Social Security Administration and Office of Personnel Management, post such information online. Making this information publicly available would also alleviate the burden placed upon participants to make a Freedom of Information Act request to obtain the policies and procedures relied upon by the agency during its decision-making process.
- **Greater Oversight:** Require monthly written reporting on all Appeals Board cases to the PBGC Director and the Office of the Advocate. The Appeals Board only reports basic information in the agency's Annual Report and on its website, and publicly posted decisions are limited to those decided by a three-member panel.⁵ There must be more transparency and reporting on individual member decisions.
- **Review Administrative Review Regulations:** There should be an official review of PBGC's entire administrative review regulation (29 C.F.R. Part 4003). This review is particularly appropriate as Executive Order 14094 reaffirms the principles set forth in prior executive orders calling on federal agencies to modify outmoded and insufficient

⁵ See PBGC Appeals Board Data By Fiscal Year, *available at* <https://www.pbgc.gov/sites/default/files/documents/pbgc-appeals-board-data.pdf>.

regulations and procedures.

This review, which should be added to the agency's regulatory agenda/plan, should consider alternative review structures, such as an independent body that is responsible for the second level review of all agency decisions. **If PBGC does not undertake such review, then legislative options must be considered.**

PBGC leadership must act on these recommendations, which all directly support the agency's strategic goal of paying pension benefits on time and accurately. PBGC's Strategic Plan directs it to "[p]rovide a timely and efficient appeals process for PBGC benefit determinations" and "[r]esolve appeals quickly and fairly."⁶ Given the process inconsistencies and lengthy case reviews observed by the Office of the Advocate, more work is needed to fix the agency's processes for handling participant claims. Otherwise, the agency needs to drop this part of its Strategic Plan.

Reputational risk to the agency is perhaps one of the most consequential vulnerabilities regarding the agency administrative review of a participant's benefit claim if that process continues to remain unchecked.

Complex Cases Involving Poor Communications or Requiring Escalation

The Office of the Advocate often hears from participants who have contacted PBGC's Customer Contact Center (CCC) but are unable to resolve their inquiry or have it properly escalated for further assistance. Other participants question confusing written communications from the agency that are comprised of boilerplate and/or inaccurate information. These ineffective communications are often exacerbated by a failure to bring matters to the attention of appropriate staff, resulting in poor outcomes for participants and beneficiaries. Complaints included multiple cases in which PBGC repeatedly failed to follow up on requests for assistance or information, as well as other matters where the CCC was unable to explain conflicting written communications from the agency yet did not escalate it to OBA management.

These are the cases that find their way to the Office of the Advocate, and they have usually languished for long periods. During this time, the participant or beneficiary's financial situation has worsened, the matter has become significantly more complicated, numerous unhelpful communications have taken place between the impacted individual and the agency, third parties may have become involved, and the participant or beneficiary is understandably much more confused and upset. As a result, intervention becomes necessary and the Office of the Advocate and the senior OBA staff members with whom it liaises must then trace what went wrong, manage expectations and communications with the participant, and mitigate any new problems that have arisen because of the delay.

Recommendation: As the CCC is primarily staffed by contractors, the Office of the Advocate has long recommended increased federal oversight, such as daily or weekly meetings to discuss current matters requiring the attention of federal staff. Additionally, OBA has improved its

⁶ PBGC Strategic Plan FY 2022-2026, p. 17, available at <https://www.pbgc.gov/sites/default/files/documents/pbgc-fy-2022-2026-strategic-plan.pdf>.

customer relationship management software, providing for increased reporting and easier workflow management. Given the increase in OBA's technological tools for managing cases, OBA should review its internal processes for identifying and escalating stalled and complex matters to senior OBA staff. These individuals can expedite such cases, perform expert analysis, and authoritatively resolve outstanding questions.

Further, the Office of the Advocate has observed the existence of single-person dependencies and a lack of succession planning within OBA, and that the few staff who handle escalated cases are not provided with the level of administrative and substantive backup support they need. While there have been some efforts to train other staff to assume these unique roles, more must be done to ensure institutional knowledge is preserved and that there is a seamless transition as experienced, senior OBA staff leave the agency.

It is also worth noting that many of these same long-time employees play a significant role in helping to innovate new programs and process improvements at the agency that promote the interests of participants and beneficiaries. The development of these proactive, creative efforts within OBA to solve problems underscore the value that is brought to the agency by experienced staff with the resources and authority to implement changes, and the importance of supporting them and capturing their institutional knowledge.

Align PBGC Recoupment Rules with SECURE Act 2.0

SECURE Act 2.0 made changes to the rules for collecting inadvertent benefit overpayments, including granting fiduciaries discretion to decide not to pursue recovery. Specifically, section 301 of the legislation placed limits on a plan fiduciary's ability to seek recoupment of overpayments to the participant from any beneficiary of the participant, including a surviving spouse, former spouse, or other beneficiary.

PBGC's current regulations allow it to continue recouping from any survivor portion of the benefit.⁷ In an inquiry raising the question as to whether PBGC would continue recouping from a surviving beneficiary upon the death of the participant, the agency confirmed its position that the changes in SECURE Act 2.0 do not apply to it and it must act in accordance with its rules and regulations.

Recommendation: PBGC should align its recoupment regulations and practices with the updated rules in SECURE 2.0, including limiting recoupment from any surviving beneficiary of the participant. If the agency does not amend its regulations, then consideration should be given to legislative solutions for addressing this issue. More importantly, PBGC trustees qualified plans that follow rules in SECURE 2.0 and participants will understandably expect this kind of consistency and that the agency will follow plan documents, if their plan is trusted by PBGC. Relying on the excuse that PBGC already has regulations that address recoupment is a non-answer to a serious question.

⁷ 29 C.F.R. § 4022.81(d)(1)(i).

PLAN SPONSOR ISSUES

Over the past decade, the Office of the Advocate has helped numerous plan sponsors navigate issues with PBGC. Although the larger issues have varied, plan sponsor complaints consistently involve repeat longstanding issues, such as case review delays, the absence of oversight and management, communication lapses, departmental coordination issues, and an overall lack of transparency about the agency's processes and procedures.

Plan sponsors applying for a distress termination under the business continuation test experience a lengthy and inefficient review process that routinely spans months, if not years, wasting time and financial resources for all parties. While the Office of the Advocate has raised concerns in past Annual Reports as well as directly to PBGC leadership, there is little internal urgency to improve these longstanding problem areas. Rather, the agency's attention appears predominantly focused on the implementation of the Special Financial Assistance Program for multiemployer plans, an important program that is just one aspect of PBGC's duties and functions. As PBGC's current plan termination case volume is at an all-time low, it is now an ideal time to address these deficiencies.

Further, as PBGC's own financial condition continues to improve, there is a question as to why the agency is spending so many resources pursuing drawn-out negotiations with plan sponsors, who are generally seeking to settle the liabilities in a fair and timely manner. Lengthy case reviews that waste time and money without any tangible benefit to plan participants reinforce this resource use question. Given the escalating cost of PBGC premiums, it is often advantageous for plan sponsors to exit the system entirely, allowing them to avoid such protracted and unproductive interactions with the agency.

Longstanding Distress Termination Process Issues

Many plan sponsors seeking the Office of the Advocate's assistance are pursuing a distress termination under the business continuation test, which means that the sponsor is trying to demonstrate to PBGC that it cannot both remain in business and maintain the pension plan. There should be a sense of urgency in reviewing and resolving these matters since the plan sponsor is indicating that it is in financial distress. Instead, PBGC does not give much priority to processing the distress termination application or dealing with settlement issues, as these business continuation test cases routinely take many months, if not years, to resolve. This is contrary to the Congressional intent of the business continuation test, which is to allow the business to continue.

The ability to continue as a going concern is dependent on how quickly the distress termination process can be completed. Unproductive and outsized demands from PBGC during negotiations also hinder this ability when the agency insists on extracting every dollar without consideration as to the costs required for the sponsor to continue in business.

More troubling, unresolved distress termination process issues can also adversely affect the plan sponsor's participants and employees. Plan sponsors are often required to make difficult choices to forgo research and development or reduce employee headcount to ensure that expenses

associated with this protracted process can be paid. Should a government agency really play such a role in eroding American businesses?

The Office of the Advocate discusses plan sponsor issues and recommendations with the PBGC Director monthly. The Advocate has repeatedly provided the Director with written recommendations to improve the distress termination process. Recently, the Director spoke with the General Counsel regarding ongoing failures in the distress termination process, a helpful intervention that will hopefully bring resolution to these longstanding issues.

Consequently, in forward-looking statements, the General Counsel committed to bringing much needed improvement to the distress termination process so that it is a more certain and predictable experience for the plan sponsor. The General Counsel signaled an understanding for the need for documented procedures, specific timelines for certain deadlines, and regular reporting on progress toward timely completion of the distress termination.

These improvements will take time and constant supervision and reinforcement to see how their implementation enhances the sponsor distress process with the agency. One repeated request from the sponsor community is that any timeline include regularly scheduled monthly or bi-weekly meetings with the PBGC team and the plan sponsor team to report on progress and items that must be timely addressed. To date, the PBGC response to this request from plan sponsors for regular meetings has been, “we don’t do that.”

In many cases, there is an attitude of condescension and mistrust of the plan sponsor’s motives by the PBGC case team that undermines the efficient resolution of distress terminations. The Office of the Advocate has been involved with numerous plan sponsor distress terminations that have stalled because of this pervasive mistrust, which often leads to the agency overreaching and making demands for settlement terms that the PBGC staff cannot even explain.

The General Counsel has committed to improving these processes in 2024, and the Advocate supports her in this endeavor. But this improvement will require considerable oversight and difficult decisions must be made.

Recommendation: 2024 must be the year PBGC substantively reforms its distress termination process. The Office of the Advocate has provided numerous concrete recommendations for improvement over the years, such as establishing a Distress Termination Officer position to lead and oversee the entire process. There are also small steps that PBGC can take now to make the process more predictable and efficient. While the General Counsel’s commitment to improving the process is promising, examples of process reforms must include the following:

- **Address Open Case Inventory:** Conduct an immediate inventory of all pending out-of-bankruptcy distress termination and post-termination collections or settlement cases. Triage issues that are holding back settlement and resolution. Establish bi-weekly case reviews. Reach resolution on all currently open matters within six months.
- **Establish Timeline:** There should be an established timeline for achieving different process milestones. When PBGC receives an out-of-bankruptcy distress termination

application, it should create a custom plan listing the different steps, requirements, and milestones, and the expected dates of completion for the entire distress termination and settlement process. This timeline should be discussed with the plan sponsor in a kick-off meeting occurring no later than one month after PBGC receives the distress termination application. The parties should continue to meet according to an agreed-upon schedule until the case is closed.

The entire process for reviewing and settling out-of-bankruptcy distress termination cases should take no longer than six months to complete. If the agency is unable to establish and adhere to its own timeline, then consideration should be given to potential legislative solutions, which include legislative timeframes that require a PBGC response, like the statutory deadlines placed on plan sponsors. Consideration should also be given to automatic binding arbitration/mediation if a case has been open for 18 months without resolution.

- **Increase Communication:** PBGC should regularly meet with the plan sponsor throughout the entire process on a scheduled basis. Further, PBGC should respond to all email or written communications from the plan sponsor within one business day, even if only to confirm receipt and discuss the timeframe for a more thorough response. It is unacceptable for weeks, months, or years to lapse without any communication from the agency, particularly for cases involving the business continuation test. For example, in one case, the plan sponsor's counsel made an offer to settle a distress termination and it took PBGC eleven months to consider and then respond with a completely outsized counteroffer. *This is not acceptable and now is the time when the Director and senior management of this agency must intervene.*
- **Draft Written Procedures:** Create a working group to draft written cross-departmental distress termination processes/procedures. In particular, the processes should address handling of business continuation test cases and plan sponsors that may have other unique considerations, such as charities or not-for-profit organizations. The written processes/procedures should be posted publicly on PBGC's website, and the agency should periodically refresh the information based on case experiences and plan sponsor feedback.
- **Greater Oversight/Board Agency Meetings:** Provide monthly written reporting on all distress termination and post-termination collections or settlement cases to the PBGC Director, the PBGC Board Representatives and staff, and the Office of the Advocate. The General Counsel should meet at least monthly regarding the milestones and obstacles to resolving the inventory of distress termination cases. These cases should be discussed with the General Counsel and the Board Agency staff with an objective toward resolution.
- **Automatic Involvement by the Office of the Advocate:** The Office of the Advocate should be notified when PBGC receives an out-of-bankruptcy distress termination application. PBGC should also provide distress termination applicants with the Office of

the Advocate's contact information.

- **Engage Outside Practitioners for Feedback:** Establish a quarterly Distress Termination Roundtable with practitioners to discuss current areas of concern and common issues that arise during the process. The Office of the Advocate coordinated this type of forum in May 2022 and is willing to assist PBGC with reprising the discussion.

These are just some proactive changes PBGC can take now to improve the predictability of the process for plan sponsors. If the agency does not take such measures, then legislative solutions must be considered because these are not only “process” changes, but they also really represent cultural changes in the way the agency does business with the regulated public. Cultural change is much more difficult to effectuate.

Need to Formalize Interagency Excise Tax Coordination

Plan sponsors applying for distress terminations often have other unresolved obligations that can impact the sponsor's settlement resources, such as excise taxes owed to the Internal Revenue Service (IRS). Specifically, section 4971(a) of the Internal Revenue Code (Code) imposes a ten percent excise tax on sponsors who fail to meet the minimum funding contributions for their pension plans. This tax acts as a deterrent so ongoing plan sponsors do not ignore their required minimum plan contributions under Code section 412, a plan qualification requirement.

However, when the plan is undergoing a distress termination, especially under the business continuation test, imposing the excise tax is contrary to the original Congressional intent of this provision of the Code and it acts as a punitive and retaliatory measure. This excise tax can also arise when there are delays in the agency's review of the distress termination application, leading to missed contributions while the application is under review, an even more egregious situation when caused by a government agency.

The IRS excise tax issue has been repeatedly raised as a notable area of concern by plan sponsors and their advisors. These constituents have expressed frustration with the lack of a defined process and confusion both within the agency and in the regulated community as to the process for obtaining excise tax relief. The Office of the Advocate has also independently observed internal process inconsistencies involving the excise tax, the treatment of which varies based on the case team's practices and attitudes. While the final decision to settle the excise tax rests with the IRS, PBGC plays a significant role as it can liaise with the IRS and recommend waiver.

In the past, these two ERISA sister agencies coordinated when a plan sponsor going through a distress termination also owed outstanding IRS excise taxes. The IRS would often waive the tax, allowing money that would have been used to pay the excise tax to go to PBGC through an increased settlement. While PBGC has represented that such interagency coordination is still occurring, in some cases it has not, and there is a lack of consistency and transparency for the plan sponsor around the overall process, including the amount of discretion PBGC exercises when deciding whether to raise the issue with the IRS.

Resolving this issue is often a significant point of contention between plan sponsors and the agency, further delaying an already lengthy settlement negotiation process. In a matter involving a financially distressed community hospital, negotiations stalled because PBGC refused to raise the excise tax issue to the IRS. Instead of coordinating with the IRS to see whether it would consider resolving the excise tax issue with the plan sponsor, PBGC ended up reducing its settlement with the hospital. PBGC accepted a settlement amount that was \$250,000 lower than it could have been so as to allow the plan sponsor to pay funds to the IRS to satisfy the excise tax liability – resulting in dollars that could and should have instead gone to help fund the plan termination insurance program to perhaps benefit participants. Rather those dollars went into the general treasury fund.

PBGC also refused to recommend waiver of the excise tax to the IRS in another community hospital plan sponsor matter. The agency claimed that it was too late to receive relief since the excise tax issue was not timely raised during negotiations to terminate the plan, something that the hospital denies since the settlement was expected to be a global resolution to all liabilities, including the excise tax. Since the community hospital cannot afford to pay the excise tax, PBGC indicated that it could renegotiate its settlement agreement with the agency. It is unclear why PBGC would not recommend waiver, and instead seems willing to accept a lower settlement amount.

Following these cases, the Advocate contacted appropriate representatives at the IRS to set up a communication channel between the two agencies. Despite these efforts, the Office of the Advocate continues to hear from practitioners about issues when the plan sponsor has outstanding excise taxes, reflecting the need for a more formal arrangement.

Recommendation: PBGC must memorialize its process for addressing the excise tax issue in out-of-bankruptcy distress termination cases. PBGC should engage the IRS and explore options for a formal interagency agreement. It should also develop written internal procedures to bring consistency and transparency to the process. PBGC staff has raised concerns that formalizing an agreement with the IRS could potentially remove PBGC’s flexibility to respond to plan sponsor needs based on individual circumstances, possibly resulting in fewer plan sponsors obtaining a waiver. Although this statement by PBGC represents another hypothetical parade of “horribles” that could happen, this is not an excuse for PBGC’s failure to produce its own consistent internal guidance and procedures, which it could share with the plan sponsor community and revise from time to time based on experience and feedback.

Other Post-Termination Issues

The Office of the Advocate continues to hear from practitioners about issues involving required filings when the plan is going through the distress termination process, such as Final Form 5500 filings to the Department of Labor and the reporting of deferred vested retirement benefits to the Internal Revenue Service. There are questions regarding whether PBGC will reimburse the plan sponsor for required filings and whether certain filings are even necessary given the plan’s terminated and trusteed status.

Recommendation: PBGC should explore potential coordination with its sister agencies regarding post-termination filing requirements for trustee plans when a plan sponsor has outstanding compliance requirements. Further, PBGC should include information about expense reimbursement in its distress termination and settlement processes/procedures so there is consistency when these issues arise during cases. Plan assets at termination may affect recoveries for plan participants.

ERISA Section 4010 Filing Relief

In an example of receptivity to plan sponsor practitioner concerns and proactive problem-solving, PBGC issued a technical update providing a one-time waiver of the ERISA section 4010 filing requirements for certain filers.⁸ This change took into consideration recent atypical market conditions that would have resulted in many well-funded plans being required to submit the filing. PBGC's timely relief helped plan sponsors avoid unnecessary costs and the administrative burden of completing this complex reporting. The Office of the Advocate commends PBGC's responsiveness to practitioner feedback in this matter and hopes that the agency will continue to address challenges raised by plan sponsors this proactively in the future.

⁸ PBGC Technical Update No. 23-1, available at <https://www.pbgc.gov/prac/other-guidance/tu/one-time-4010-filing-waiver>

CONNECTING PARTICIPANTS WITH THEIR LOST BENEFITS

The Retirement Savings Lost and Found database established in SECURE Act 2.0 will be a tremendous resource, yet there are actions PBGC can take now to help connect participants with their lost benefits, particularly as PBGC holds significant valuable historical data in its internal records and systems, not to mention so much of other peoples' money in its Missing Participants database. For years, the Office of the Advocate has used this data to assist participants with their pension searches as part of its Pension Plan Tracing Service (tracing service) and through its work with potentially omitted participants, particularly when all other resources have been exhausted.

It is often difficult to track down what happened to a plan and locate the party responsible for paying benefits, particularly when there are plan name and plan sponsor changes, mergers, spin-offs, standard terminations, bankruptcies, and other corporate transactions that may have affected the plan or plan sponsor. The challenge continues even after a plan is located, as participants must prove benefit entitlement, which can involve producing old documentation that may no longer exist. For example, PBGC routinely requires that potentially omitted participants provide decades-old tax return information to prove they did not receive a distribution, records that are so old they are not even retained by the Internal Revenue Service.

Throughout 2023, the Office of the Advocate engaged in various activities to help participants with their lost pension searches, including creating an internal pension plan tracing research dashboard tool, conducting outreach to promote the Office's tracing service and other assistance areas, and working with PBGC to update its resources for lost retirement benefit searches. The Office also continued to coordinate with PBGC's Office of Benefits Administration (OBA) on potentially omitted participant issues. This has included novel inquiries involving participants searching for the responsible payors of their group annuity contracts, a notable trend given the rise in de-risking through the transfer of liabilities to an insurance provider.

Pension Plan Tracing Service and Dashboard Development

The Office of the Advocate is working with PBGC's Office of Information Technology and the Quality Management Division to finalize the development of a pension plan tracing research dashboard. The research dashboard displays select data elements from various PBGC systems, including annual premium filing records and case management system data, which captures standard termination and trusteeship information. Collectively, these sources can provide a roadmap and retroactive perspective on what might have happened to a now missing pension plan.

The dashboard provides a streamlined, user-friendly tool for searching these important data elements, which are currently housed in different internal systems. While the dashboard is currently limited to internal PBGC users, the Office of the Advocate will be exploring options for sharing access with select external parties that assist with lost pension plan searches.

The Office of the Advocate also continues to offer its tracing service, which, depending on the complexity of the request, involves extensive research using other external and internal data

sources not included in the dashboard, such as historical Form 5500 filings. These documents often contain useful plan history, making them an important primary source of information, especially for participants pursuing benefit claims with ongoing plans. The Office of the Advocate has developed a coordination process with PBGC's Disclosure Office to facilitate the release of select information located during plan tracing, making it easier to share this plan history with participants and their representatives.

When combined with other data supporting proof of a benefit entitlement, the information found through the Office of the Advocate's tracing research can help lead participants to benefits they may not have otherwise received. For example, the Office helped a potentially omitted participant after PBGC initially denied his benefit claim from a trustee plan since it could not locate the participant in the plan records. The Advocate's tracing uncovered information showing that the participant's plan had merged into the PBGC-trustee plan. Upon reviewing this supplemental research, PBGC reversed its original decision and granted the participant a benefit with a present value of over \$86,500. This is just one example of how PBGC's historical data can connect participants to their lost benefits, again highlighting the value of the agency's internal information and why it is essential to organize and preserve it.

Lost Retirement Benefit Search Resources and Outreach

The Office of the Advocate engaged in outreach activities in 2023 to increase awareness about the Office's services, including pension plan tracing. The Office's efforts primarily focused on educating professionals and service providers so they can identify when it may be appropriate and helpful to seek assistance from the Advocate and to make participant referrals. To that end, the Office authored a blog post about the Office's role and assistance areas for the Adult Protective Services Technical Assistance Resource Center, an online resource for practitioners serving vulnerable older adults. The Office of the Advocate also conducted a training session on pension plan tracing for the Pension Counseling and Information Program National Training Conference, which included attendees from the pension counseling projects, which assist participants with lost pension searches.

Throughout 2023, the Office of the Advocate worked with staff from PBGC's Communications Outreach & Legislative Affairs Department and OBA to update the agency's Finding a Lost Retirement Benefit booklet (previously titled "Finding a Lost Pension"). The revised content provides new information on lost retirement benefit search resources for participants, including the Office of the Advocate's tracing service.

Interagency Coordination to Help Connect Participants with Unclaimed Benefits

PBGC holds unclaimed benefits for over 80,000 people. The Office of the Advocate has long questioned the efficacy and level of PBGC's search efforts to locate these participants, a sentiment echoed by the agency's Inspector General.⁹ While PBGC's efforts to update its lost retirement benefit search resources are commendable, it must proactively search for the

⁹ PBGC Office of Inspector General Evaluation Report, "PBGC Can Improve the Effectiveness of the Missing Participants Program," Report No. EVAL-2002-04, Jan. 7, 2002, available at <https://oig.pbgc.gov/pdfs/EVAL-2022-04.pdf>.

individuals in its unclaimed pension database, just as plan sponsors are required to diligently search for their missing participants.

PBGC recently renewed its data-sharing agreement with EBSA to help locate participants in PBGC's unclaimed benefit database. The interagency coordination continues to be a success, with EBSA Benefits Advisors connecting 200 participants and beneficiaries with pension benefits valued at almost \$7 million in Fiscal Year 2023. This arrangement, which originated with the Office of the Advocate and the EBSA Chicago Regional office, has recovered almost \$229 million in pension benefits for participants and beneficiaries since its inception in 2017. It is an excellent example of effective coordination between PBGC and one of its sister agencies, demonstrating a proactive approach for searching for missing participants, which supports PBGC's core mission of paying benefits.

PBGC also relies on interagency coordination with the Social Security Administration (SSA) to assist with its review of potentially omitted participant claims. PBGC and SSA's existing data-sharing agreement allows PBGC to obtain a participant's earnings data directly from SSA without any cost to the participant. Further, the Office of the Advocate and OBA are currently exploring ways for PBGC to directly obtain Notice of Potential Private Retirement Benefit Information from SSA, another helpful data source for demonstrating entitlement to a benefit.

The success of these interagency agreements gives hope that much more can be done in locating missing participants owed a benefit that could financially change their lives forever. PBGC has extensive data unique to its pension insurance and premium collection responsibilities. PBGC in cooperation with its ERISA sister agencies and other federal agencies paying benefits should coalesce and identify opportunities to engage in similar coordination to proactively assist plan administrators address their missing participants. The plan sponsor community would welcome this kind of cooperation.

CALL FOR REFORM FROM CONGRESS AND ASSISTANCE FROM THE BOARD

As we conclude this tenth annual Advocate Report to Congress, it is troubling to see the enduring nature of the issues that have been highlighted over the past decade—in particular, the distress termination process for plan sponsors and the administrative review process for participants. PBGC has not been able to satisfactorily address these issues on its own over the past ten years and there is no indication that it will be able to address them in the future, despite forward-looking commitments to improve processes for participants and plan sponsors.

It is now time for consistent intervention and assistance from the PBGC Board of Directors and PBGC’s Congressional Committees of Jurisdiction to help the agency in making the recommended changes to improve these two process areas, through legislation and by greater oversight and management. The Office of the Advocate is ready to assist with this undertaking and, as a minimum, recommends the following:

PBGC Chief Executive Officer (CEO) Position: This career appointed individual would possess that consummate general management skill set such that they will provide day-to-day supervision of the PBGC leadership team, ensure that participant and plan sponsor matters that transcend PBGC departments do so seamlessly, and will hold PBGC senior staff accountable for certain and predictable outcomes to enhance the regulated public’s experience with agency. The CEO will provide simultaneous quarterly reporting to the Board and the Director.

PBGC Distress Termination Process Reforms:

- Establish timelines/milestones (ideally on a statutory basis), so that the entire out-of-bankruptcy distress termination application review and post-termination settlement process takes no longer than six months to complete. Cases exceeding this deadline automatically trigger binding mediation/arbitration to resolve the outstanding issues.
- Require monthly written reporting on all distress termination and post-termination collections or settlement cases to the PBGC Director, PBGC Board staff, and the Office of the Advocate.
- Each PBGC Board Meeting must include a written and verbal report on pending distress termination cases and constructive proposals for resolution.
- Conduct an immediate evaluation of all pending out-of-bankruptcy distress termination and post-termination collections or settlement cases and close all open cases within six months.
- Establish a working group to develop written cross-departmental processes/procedures for reviewing out-of-bankruptcy distress termination cases.
- Develop a formal written process and/or agreement with the Internal Revenue Service to memorialize interagency coordination on excise tax issues for plans that are terminated and trusted by PBGC. Consider other legislative options to address this issue.

PBGC Administrative Review Process Reforms:

- Establish a task force to examine the entire administrative review process for participants and create written guidance for PBGC's Appeals Board. This guidance should be posted on PBGC's website.
- Add a formal review of PBGC's entire administrative review regulation (29 C.F.R. Part 4003) to the agency's regulatory agenda/plan. This review should consider alternative review structures, such as an independent body that is responsible for the second-level review of all agency decisions.
- Establish a mediation or arbitration option for participant disputes as an alternative to litigation in federal district court. PBGC has the authority under its current Alternative Dispute Resolution Policy to allow this option now.
- Require monthly Appeals Board case reporting to the PBGC Director, PBGC Board staff, and the Office of the Advocate.
- A written and verbal report will be made at each Board meeting on pending Appeals Board decisions. Concise issues to resolution will be noted with reasonable recommendations to resolve and settle cases prior to the next Board meeting.
- Increase transparency by posting PBGC's benefits administration policies and procedures on the agency's website.

ERISA § 4004: PARTICIPANT AND PLAN SPONSOR ADVOCATE

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).



WHAT DOES RETIREMENT SECURITY LOOK LIKE IN AMERICA? A Retirement Security Initiative by the Office of the PBGC Participant and Plan Sponsor Advocate December 29, 2023

Short Summary

Pension plans are a highly effective means of ensuring retirement security for American workers and their families, while also supporting the larger economy. Despite its important economic role, the U.S. defined benefit system is currently in decline. The Pension Benefit Guaranty Corporation (PBGC) is a federal agency that insures pension plans sponsored by private employers, and its mission statement includes the protection, promotion, and preservation of these pension plans.

PBGC's Office of the Participant and Plan Sponsor Advocate (Office of the Advocate) is launching a new initiative bringing various pension industry groups, government staff, retirees, and other stakeholders together in a dialogue to address challenges to the preservation of America's private-sector defined benefit pensions, and to explore how PBGC can protect and promote the continuance of these plans for future generations of Americans.

The 2022 Advocate Annual Report to Congress first raised the question of retirement security in America given the changing defined benefit landscape. The Office of the Advocate is examining this question and exploring what PBGC can do in accordance with its statutory mission to preserve, promote, and protect the private-sector defined benefit system. There are many proposals and areas worth addressing as we review these important issues.

Background

The United States has a voluntary employee benefits system, allowing employers to choose whether to offer retirement and other benefits to their employees. One form of retirement benefit, defined benefit pension plans, can be an effective employee recruitment and retention tool for employers, while offering employees the prospect of lifetime income, which far increases the likelihood of financial comfort and security in retirement compared to a single lump sum payout. The steady stream of income for life provided by pension plans also decreases the degree to which a retiree will need to lean on family members or public assistance in old age.

Defined benefit plans – as part of a proverbial *three-legged stool* along with Social Security and personal savings – have a long track record of ensuring retirement security for significant numbers of American workers. Additionally, when retirees spend their pension income in the communities where they live, that pension income has the power to shore up local economies, particularly at times of economic difficulty. Retirees with pensions feel secure in their spending, whereas retirees relying on 401(k) income are reluctant to spend those funds during a market downturn. In fact, retiree income from defined benefit pension plans played an important role in stabilizing the U.S. economy during the COVID-19 pandemic.

America's pensions are worth preserving. Unfortunately, in recent decades, the private pension system has been in decline. PBGC's most recent Pension Insurance Data Tables indicate that the number of covered participants in defined benefit plans has decreased by 30% over the past decade, while the overall number of plans has modestly declined. Escalating PBGC premiums, funding volatility, and administrative burdens, such as reporting and disclosure, are often cited as reasons for this shift away from traditional pension plans. Employers prefer defined contribution plans, such as 401(k) plans, despite research showing that defined benefit plans are a more cost-efficient way to provide retirement benefits to employees. Many plan sponsors have begun to terminate, freeze, and/or de-risk all or part of their pension plans, posing questions about the long-term effects on the defined benefit system when employers exit entirely, extinguishing PBGC's guarantee of the benefits.

Defined contribution plans are often viewed as easier and more affordable for employers to administer. Many plan sponsors have cited burdensome administrative requirements and escalating administration costs, including PBGC premiums, as impediments to maintaining a defined benefit plan. Defined contribution plans are also more attractive to employees who favor portability over traditional defined benefit plans. Given the shift from defined benefit to defined contribution plans, it is common for many stakeholders to view the decline of the defined benefit system as inevitable. However, current research suggests that pensions are more cost-efficient for employers than defined contribution plans, and that many of the economic factors that motivated employers to move away from defined benefit plans in decades past are no longer present.

Research shows that 401(k) plans and other defined contribution plans are nowhere near as effective as defined benefit plans at providing retirement security because they are not designed to offer lifetime income. Rather, they allow employees access to an individual account with a balance that changes depending on investment performance, rendering employees' retirement savings susceptible to market volatility, with the employee bearing the entire financial risk. By contrast, the lifetime income provided by defined benefit plans protects employees (and their surviving spouses) against the possibility of outliving their retirement savings, particularly as this lifetime income is insured by PBGC.

Additionally, the defined contribution system places greater general responsibility on employees to fund their own retirements at least partially, whereas most private sector defined benefit pension plans are fully employer-funded. Employees must also figure out how best to decumulate their defined contribution plan savings to make them last throughout retirement, a responsibility that is not present in defined benefit plans since the employer pays the benefit for life.

Leakage resulting from participants withdrawing funds from their defined contribution plans prior to retirement as a means of funding pre-retirement expenses, particularly common in times of financial distress, is another challenge. This trend may be accelerating, as data shows that a third more people took hardship withdrawals from their defined contribution plans in the second quarter of 2023 than in the second quarter of 2022. As a result of all these factors, the shift away from defined benefit plans has coincided with a significant retirement savings gap for individuals with lower incomes.

Stakeholders throughout the retirement space are aware of the potential impacts of a shrinking defined benefit system on Americans' overall retirement security, which include declines in older Americans' ability to afford housing, healthcare, and long-term care, and to pass on intergenerational wealth. Much of the existing dialogue among retirement industry professionals focuses on improving the defined contribution system by incorporating more pension-like features. However, missing from the national conversation is robust discussion around transforming, and thus preserving and protecting, America's defined benefit pension system.

The Office of the Advocate is undertaking this project to encourage greater discussion around how PBGC can promote, preserve, and protect the defined benefit system, in accordance with its mission. This discussion is especially relevant given the upcoming 50th anniversary of the Employee Retirement Income Security Act of 1974 (ERISA). The retirement landscape has evolved over the past fifty years and consideration must be given to how PBGC can ensure and promote retirement security for all future generations.

Proposed Solutions

There are numerous reports, publications, and proposals highlighting the importance of retirement security and offering suggestions to strengthen the defined benefit system (see *Recommended Reading* section in Appendix I). In addition to reviewing this literature and attending public presentations, the Office of the Advocate engaged in informal discussions with interested industry stakeholders, including plan sponsor organizations, participant advocacy groups, pension plan professionals and service providers, and academics, regarding the decline of the defined benefit system and PBGC's role in its preservation.

During these discussions, the Office of the Advocate learned that, while some stakeholders believe that the key to stronger retirement security among Americans is a focus on improving the defined contribution system, many others continue to support reinvesting in the defined benefit system through a variety of potential approaches. The following considerations and approaches raised during the discussions warrant further consideration. Note that these proposals relate specifically to PBGC's Single Employer Program.

Reform PBGC Premiums

Single-employer PBGC premiums have grown exponentially over the last fifteen years. These increases coupled with low interest rates have made annuity purchases attractive and cost-effective options for plan sponsors seeking to manage liabilities. Premiums are frequently cited

as a major driver of plan sponsors freezing, de-risking, and/or terminating their defined benefit plans.

Unsurprisingly, many stakeholders raise reducing PBGC premiums or considering alternative structures as necessary solutions, particularly considering the significant funding surplus currently enjoyed by PBGC's Single Employer Program. Current premium levels are viewed as burdensome, arbitrary, and unrelated to any rational measure of the agency's need, not to mention antiquated since they are insuring for risks that no longer exist. While any changes to the premium structure must be made by Congress through legislation, PBGC provides technical advice to Congress, and the agency should have a vested interest since its mission also includes keeping pension insurance premiums at a minimum.

There are numerous approaches to reforming the PBGC single-employer premium structure, such as:

- *Premium Holidays.* Suspending plan sponsors' obligation to pay premiums in light of surplus PBGC funding is one means of addressing PBGC premiums as a disincentive to continued sponsorship of defined benefit plans. When, for how long, and the conditions under which a plan sponsor may qualify for a premium holiday are variables that merit further examination.
- *Alternative premium structures, such as automatically adjusting PBGC premium levels based on PBGC's average funded status.* Single-employer plans must pay a flat rate per-participant premium and, if a plan is underfunded, it is required to pay a variable-rate premium (VRP) based on the plan's unfunded vested benefits (subject to a cap based on number of participants).

This structure not only renders PBGC premiums more costly for even well-funded plans that are simply not 100% funded – when there is no expectation that plans must be 100% funded to be healthy – but also creates an even greater cost burden for those plans and sponsors facing the most financial difficulty. SECURE Act 2.0 improved the burden by eliminating the indexing on the VRP, a change that was well-received by the plan sponsor community.

One proposal by the American Benefits Council suggests automatic premium decreases or increases when PBGC funding climbs above or dips below certain levels. Under this proposal, current premium levels would apply if PBGC's funding level falls below 90%, with lower flat rate and variable premiums if funding is between 90% and 100%, and further reductions in both flat rate and variable premiums if funding exceeds 110%, with \$500 per-participant caps on variable rate premiums for all scenarios when funding is above 90% and not above 125%. The proposal recommends a premium holiday if funding exceeds 125%.

Tying premiums to the funded status of PBGC's Single Employer Program would provide a rational basis on which to hinge premiums, while also creating opportunities to reduce sponsor costs when PBGC enjoys a significant surplus and can afford lower or no

premium revenue. This creative solution merits further consideration and discussion.

- *Taking PBGC premiums “off-budget.”* Even though PBGC premiums are earmarked for PBGC programs and cannot be used for other purposes, they are still counted as revenue for the purposes of the federal budget. Ceasing to treat PBGC premium increases or decreases as revenue for federal budget purposes is an important consideration because it eliminates misleading information about both PBGC financing and the federal budget.

Encouraging and Promoting Defined Benefit Plans

The decades-long and accelerating trend of shifting away from defined benefit plans in favor of defined contribution plans has made it culturally and logistically challenging for plan sponsors to turn back. While investment officers and plan administrators closely familiar with the retirement space may see the value of giving defined benefit plans a second chance, it is other corporate executives, such as a CFO, who have ultimate decision-making authority. For many key decision-makers, a retirement plan is just one measure on a corporate balance sheet, and they have long been told that defined benefit plans are an outsized liability.

Increased outreach and education in the plan sponsor community among key decision-makers such as CFOs and chief executive officers have the potential to soften the current culture of pessimism toward defined benefit plans. It is important to understand what incentives may encourage CFOs with ongoing plans to maintain such plans, and for companies who maintain frozen plans, what triggers may prompt leadership to reopen or “unfreeze” the plans. PBGC is in a prime position to lead such dialogue with the executive community, as well as encourage the significant economic benefits of defined benefit plans.

Education For Participants, Beneficiaries, and the General Public

Likewise, the general workforce may not be aware of the benefits of defined benefit plans, as these plans have diminished in popularity and availability over the years. Stakeholders noted that plan sponsors do not view defined benefit plans as offering a strong value proposition because, in addition to seeing them as costly and administratively burdensome, they do not see a significant demand for defined benefit plans among their employees.

Additionally, stakeholders noted that workers, who switch jobs more frequently today than in the past, value the portability offered by defined contribution plans. Meanwhile, the vesting requirements of defined benefit plans generally require workers to stay with one employer for five years to collect a benefit, removing flexibility. Greater education among the public of the significant economic value of defined benefit plans could increase employee demand, in addition to examining the factors that prevent employees from vesting. PBGC has an important role to play in increasing public awareness of defined benefit plans, particularly since it holds unclaimed retirement benefits for over 80,000 people.

Hybrid Structures and New Platforms That Reduce Sponsor Risk and Offer Greater Portability

Multiple stakeholders have suggested that defined benefit plans should continue to be adopted but in a modernized form that makes them more palatable to plan sponsors and more appealing to employees. Risk sharing among all parties is a common theme, suggesting that hybrid and alternative defined benefit structures offering adjustable benefits features may be attractive to employers while also providing lifetime income to participants who often cannot afford to bear risk during retirement and need the stability of a defined benefit.

There are numerous hybrid plan structures worth exploring further. For example, the hybrid structure offered by cash balance plans is currently seeing a resurgence in popularity and adoption. Over the years, while other types of defined benefit plans have declined in number, cash balance plans have grown. IBM, a benefits bellwether that led the shift from defined benefit to defined contribution plans, recently announced that it is ending its 401(k) matching and replacing it with a cash balance component in the company's previously frozen defined benefit plan. This change is prompting renewed interest in the cash balance structure and defined benefit plans in general.

Cash balance plans are attractive vehicles for retirement since they offer a more institutionalized plan structure than defined contribution plans while reducing employer risk and providing greater clarity and portability to plan participants. However, stakeholders indicate that legislative and regulatory changes are needed to help facilitate administration of these plans. While SECURE Act 2.0 provided helpful legislative changes to address "backloading" test concerns and bring certainty to how the test works, further changes could help promote adoption of the structure. A 2023 proposal from the American Benefits Council suggests updating the cash balance plan accounting rules to more accurately reflect plans sponsors' future benefit obligations.

A different hybrid plan type proposed in a 2007 report by the Pension Rights Center's Conversation on Coverage, called the Guaranteed Account Plan (GAP), works much like defined contribution plans but would require the plan sponsor to guarantee a minimum return on investment. Benefits would be paid out as an annuity with a guaranteed survivor benefit. This plan type could be insured by PBGC at a reduced premium. The Conversation on Coverage report also proposed other potential simplifications and features that could be used to modernize traditional defined benefit plans – suggestions that are worth further evaluation and consideration. A link to the report is in the Recommended Reading section in Appendix I.

Multiple stakeholders are enthusiastic about variable annuity plans, which operate like defined benefit plans but offer flexibility, portability, and limited risk-sharing between the employer and annuity. These plans insulate plan sponsors from risk by adjusting benefits based on returns on the plan's assets, but also include participant protections, such as benefit stabilization by way of an asset reserve. The American Benefits Council offers specific proposals to facilitate the growth of this type of plan, such as allowing plan sponsors more time than is currently allowed to make benefit adjustments based on assets and providing clearer regulatory guidance as to the calculation of lump sum benefits under such plans.

Additionally, many sources have noted the value of exploring multiple employer plans or other plan types or platforms that offer a defined benefit structure but tie the plan less closely to the employer-employee relationship. This type of platform offers the potential benefits of removing employer risk while increasing portability. Further discussion would be required as to the risk-sharing structure associated with such a platform and the role of services providers in administering them.

It is also worth considering successful international models that provide examples for improved defined benefit structures that enhance retirement security. For example, the CAAT Pension Plan, which was originally created to support the Ontario, Canada college system, now covers over 360 participating employers and over 91,000 active and retired members. This hybrid plan provides participants with lifetime retirement income at an affordable cost for employers in all sectors.

The United Kingdom's (UK) National Employee Savings Trust (NEST) is another example of a successful plan that provides for the accumulation of retirement funds in a UK trust for all UK citizens with or without a pension plan and offers distribution in the form of a lifetime annuity. This is an amazing form of coverage and offers retirement security to all citizens of the UK to provide some opportunity for a secure retirement.

Suggested Changes to Enhance and Preserve Defined Benefit Plans

Legislative changes providing funding relief and current economic conditions have resulted in many plans experiencing a funding surplus. Under current law, these overfunded plans can only use the surplus funds if they terminate. Many plan sponsors and their advisors have suggested that this captured surplus may result in a wave of plan terminations in the coming years. However, there are numerous suggestions for legislative changes that would allow plan sponsors to recapture value from the surplus without the need to terminate the plan by allowing use of the surplus to enhance retirement security and provide other benefits to participants.

Suggestions include legislation to allow surplus funds to be used to fund defined contribution plans. Such legislation would require participant protections to ensure that defined benefit plan benefits are preserved. There are similar proposals involving surplus amounts in 401(h) health arrangements. These proposals, which would require legislation, also involve using the 401(h) surplus to fund both defined benefit and defined contribution plans. Overall, these proposals provide strong incentives for plan sponsors to maintain well-funded plans since they could use surplus funds for other retirement security-related purposes.

Another suggestion to improve the current defined benefit system includes conforming defined benefit plan vesting rules to the defined contribution plan rules (requiring 3 years to vest or a 2-6 year graded vesting), as a means of simplifying administration and enabling portability. Coupling this provision with higher mandatory cash-out limits would likely address potential plan sponsor concerns about having to administer and paying premiums for participants with very small benefits. These changes could also prevent dramatic increases in the number of missing participants and lost plans.

Conclusion and Outlook

There are many strong suggestions and proposals to help enhance the defined benefit system and promote retirement security for Americans. The Office of the Advocate will be continuing its research into these topics in 2024. The Office of the Advocate looks forward to holding a series of roundtable discussions to explore areas of interest related to defined benefit system preservation, single-employer premiums, plan design, and future considerations for the system.

These dialogues will help identify opportunities to strengthen the existing defined benefit system, particularly regarding the actions, guidance, procedures, and policies PBGC can implement toward that end.

Appendix I - Recommended Reading

[*Proposals for Enhancing Retirement Security by Strengthening the Single-Employer Defined Benefit Plan System*](#)

American Benefits Council, October 31, 2023

[*Americans are Pulling Out of Their 401\(k\) Plans at an Alarming Rate*](#)

Alicia Wallace, CNN.com, August 2023.

[*2020 Pension Insurance Data Tables*](#)

Pension Benefit Guaranty Corporation, July 2023.

[*Pensionomics 2023: Measuring the Economic Impact of DB Plan Expenditures*](#)

Ilana Boivie and Dan Doonan, National Institute on Retirement Security, January 2023.

[*Pension Defrost: Is it Time to Reopen DB Pension Plans – or at Least Stop Closing and Freezing Them?*](#)

Jared Gross and Mike Buchenholz, J.P. Morgan Asset Management, January 2023.

Office of the PBGC Participant and Plan Sponsor Advocate De-Risking Study: [Part I \(2017\)](#) | [Part II \(2018\)](#)

[*Retirement for the Ages: Building Enduring Retirement-Income Systems*](#)

American Academy of Actuaries, January 2014.

[*Covering the Uncovered, Final Report of the Conversation on Coverage: Common Ground Proposals to Expand Retirement Savings for American Workers*](#)

Pension Rights Center, 2007.

[*A New Benefit Platform for Life Security*](#)

ERISA Industry Committee, May 2007.