First Annual Report of the Participant and Plan Sponsor Advocate

Pension Benefit Guaranty Corporation

December 31, 2014

PBGC
Protecting America's Pensions

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Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington D.C. 20005-4026

December 31, 2014

To:

From: Constance Donovan, PBGC Participant and Plan Sponsor Advocate

Subject: Participant and Plan Sponsor Advocate Report of 2014

In 2012, as part of a package of pension funding and other reforms, Congress enacted legislation which created the role of the Participant and Plan Sponsor Advocate (the "Advocate"). The Advocate acts as a liaison between the Pension Benefit Guaranty Corporation (the "PBGC or Corporation"), and participants and plan sponsors of defined benefit plans. The Advocate assists participants and sponsors in resolving persistent problems with the PBGC. For years, PBGC stakeholders have sought to create such a role, and Senate HELP Committee Chairman Tom Harkin provided indispensable leadership in establishing this statutory role as a permanent addition to the PBGC.

In 2013, PBGC's Advisory Committee, pursuant to its responsibility under this legislative provision, sought candidates for the position of Participant and Plan Sponsor Advocate, – and in September of 2013, PBGC's Board – Chaired by the Secretary of Labor, and including the Secretaries of Treasury and Commerce – selected the first person to hold this new position.

I am honored to be that person.

Prior to this role, I was counsel to the Office of D.C. Pensions within the U.S. Department of the Treasury, and also worked at the U.S. Department of Labor and assisted with the agency's oversight of PBGC. So, I have had the unique experience of serving two Board agencies, and working with PBGC staff which has been helpful in understanding the perspective of both the Board agencies and the Corporation. I spent most of my career in private industry. After many years in business, I had the opportunity to become the Chief Executive Officer and General Counsel to three prominent public pension plans providing me with a wealth of experience in overseeing multi-billion dollar pension portfolios and handling benefits administration for thousands of participants and beneficiaries. Hence, the Advocate opportunity came at a good time in that it takes full advantage of my background in business, government, and pension plan investment and administration.

In this first year, my priority has been outreach – to the PBGC leaders and departments, to the participant groups and networks and individual participants who reach out to the Corporation for help with benefit entitlements, and to individual plan sponsors, and the actuarial firms, consultants, law firms, and trade associations with whom they work. I owe many thanks to individuals and groups with different perspectives who have spent time sharing with me their take on challenges ahead for the preservation of the defined benefit system, the role of the PBGC, and what they hope the Advocate can contribute.

Generally, participant advocacy groups and plan sponsors identify the greatest strength of PBGC as its people. PBGC staff are widely considered a dedicated group of professionals who conduct themselves with integrity and a passion for their work. It is heartening to be a part of a group that really cares about doing the best job it can and cares about public service.

These groups have also identified areas where there is room to grow. Specifically, I frequently hear about four areas where improvement is needed.

The first is communication. PBGC is constantly communicating with participants and plan sponsors. However, PBGC communications to both participants and plan sponsors require greater clarity, must be responsive to the questions raised, and be less voluminous and much less technical and legalistic, especially when communicating with participants. More importantly, PBGC needs to communicate more meaningfully with participant advocacy groups and plan sponsors about what is important to them and then make changes and adjustments accordingly. For example, plan sponsor trade groups tell me that pension plan de-risking is the single-most important pension issue on the minds of business executives in some of our largest corporations, and that rising premiums are contributing to employer decisions to de-risk and exit the defined benefit system. Participant advocacy groups also have other concerns about de-risking and the important role PBGC can play in mitigating this trend. PBGC needs to be a part of that conversation so the Corporation can consider what changes, if any, they may want to make given that pension de-risking may be the greatest threat to PBGC's single-employer program, as it has the potential to substantially reduce PBGC's premium base.

Second, is process, or rather a lack of process for handling those participant and plan sponsor issues that don't nicely fit into routine transactions that PBGC performs quite well, like the actual payment of benefits. By contrast, actions that require discretion and judgment can be elusive and result in participants being ensnared with trying to obtain a benefit entitlement that may take years of effort on the part of PBGC and the participant. In the case of the plan sponsor, resolving an issue that involves plan interpretation or discretion can have its own frustrations, along with significant legal costs. The bottom line is that PBGC actually pays benefits and collects premiums really well; however, when it comes to benefits administration or basic dialogue and fact-finding exchanges that could resolve an issue with a participant, plan sponsor, or their advisors, PBGC is often challenged.

Thirdly, there is lack of coordination among and between PBGC departments which has profound effects on servicing plan sponsors and participants. For example, there are instances where we may hold plan sponsors to a higher standard or the payment of a more costly benefit than we would adhere to with plans trusteed by PBGC, and several departments and different functional areas within PBGC must collaborate to make a reasonable determination. This can put the plan sponsor in a position where they attempt to obtain resolution through FOIA requests which are costly and inefficient for both PBGC and the plan sponsor. In terms of participants where we have to pay a benefit from a lost plan, several departments are involved and the payment can be delayed by weeks and months before it is determined how and where the benefit should be paid.

The good news story here is that we have an Acting Director who is highly motivated to break down these internal stove pipes to foster better coordination among and between PBGC departments so that PBGC's actions become more cohesive in our dealings with businesses and plan participants.

Fourth and perhaps most importantly, is the observation by plan sponsors and participants and their advocates that relates to a growing adversarial and over-reaching approach by PBGC which can in the long-term affect the retirement security of millions of Americans. For sure it is PBGC's job to enforce the law which at times may mean that we may not be popular with the persons that are the subject of that enforcement. That is a fact of life for any government agency with enforcement powers. But if we primarily view employers and participants through the lens of a potential adversary who needs to either pay more, or prove more to obtain their entitlement for a benefit, then we lose sight of the point that PBGC can only achieve success through the successes of those employers we serve and the participants we protect. If the private plan community is strongly against a PBGC position, as was the case in PBGC's enforcement of 4062(e), it may be time to listen, even if the plan sponsor community or participant advocacy groups' position is contrary to long-held PBGC perspectives.

When we hear that PBGC's enforcement actions are stopping company executives from engaging in business transactions for fear of triggering a 4062(e) event, or when we hear from participant advocacy groups that PBGC seems more interested in keeping assets in the trust fund of the Corporation, and only secondarily interested in helping a participant secure a benefit they may be entitled to, or at the very least, helping them discover why they are not entitled to a benefit, this is all commentary that should lead us to pause and reflect on why we are here and who we serve.

This is where I hope PBGC can grow. We need to listen and adjust more based on what we hear. Our passion can be a wonderful thing, but if its focus is perceived by the community we serve as against them, then we are not succeeding in the PBGC mission to preserve and protect defined benefit plans. If we at PBGC can listen more and act in partnership with plan sponsors and the participants in their defined benefit plans, then many of the substantive issues raised here would be resolved in a way that promotes a healthy private pension system and a financially sound PBGC.

My efforts at outreach are far from over, but in order to continue and be effective we will need to come to grips with the type and amount of resources needed to fulfill the mission of the Office of the Advocate. PBGC has made some staff time available to me, and its Acting Director has stepped up to the plate and committed a full-time slot for a junior staff member, and she is also committed to additional resources through "rotations" for loaned staff from the Board agencies which can help both PBGC and the Board agencies better understand each other. However, there will still need to be resources explicitly set-aside which is part of the larger PBGC budget, so that the Advocate can fulfill the statutory mandate. I have had discussions with several of the Advocate Offices in other agencies in order to explore the budgets and technical expertise that helped them launch an effective advocate function. That conversation about appropriate additional resources to fulfill the Advocate role is yet to come with PBGC.

In closing, retirement security is so important to the financial well-being of American workers and their families, and I am committed to doing my very best in the role as Advocate with my colleagues here at PBGC, the Board, and the members of our Congress, along with their dedicated staff. I am optimistic for PBGC in contributing to a financially secure retirement for all Americans, and look forward to the New Year where my relationship with my colleagues continues to evolve for the benefit of the participants and plan sponsors we serve.

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

Sincerely,

Constance A. Donovan

PBGC Participant and Plan Sponsor Advocate

December 31, 2014

STATUTORY AUTHORIZATION

DUTIES

The Participant and Plan Sponsor Advocate shall –

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

ANNUAL REPORT

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

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

Participant Issues, Observations, and Recommendations

Participants' Issues at a Glance

Individual requests for assistance deserve greater customer service attention even when non-routine:

PBGC has very specific customer service standards it applies to different types of routine participant inquiries. For example, PBGC has defined processes in place for responding to participants' calls about trusteed plan benefits. But participants often contact PBGC with complicated or uncommon issues and these requests for help seem to fall outside PBGC's customer service goals. These cases are relatively few in number compared to the total number of participants in terminated plans. These participants are often referred to as "woodwork" or "omitted" participants. These woodwork participants, who are inadvertently omitted from the processing of terminated plans, present special challenges for PBGC which does not always have complete or substantial records to assist such participants in securing their benefits. Nevertheless, these individuals need help; PBGC is the most likely place to go for that help; and PBGC's response can be greatly improved in several specific ways.

Participant organizations – and the PBGC – would benefit from the kind of frequent and continuing consultation that PBGC and sponsor-based organizations share:

Professional associations that represent plan sponsors, consultants, actuaries and others meet regularly with PBGC senior officials or offer PBGC the opportunity to attend professional events and provide updates that address, for example, modifications to enforcement policy, clarification regarding premium filing instructions, changes to intended dates for regulatory developments, and more. Participant groups have contacts within PBGC and are able to arrange for occasional meetings, or speakers, but both the participants and PBGC would benefit from a PBGC commitment to build the same regularized, continuing practice of communication with participant organizations that it has throughout the sponsor network so that participants' priorities are more frequently raised and more substantively reviewed with senior management and generate more timely and specific responses.

Participants' and retirees' organizations – and PBGC – would benefit from improved communication about PBGC's finances and operations, particularly as the Corporation experiences significant changes in the status of its two insurance programs:

Participants' and retirees' organizations are as engaged as sponsor organizations in discussions around PBGC's current financial strength, outlook for the future, premium needs, and more. These discussions have accelerated in the recent past, around both the needs of the multiemployer program, including the outlook for at-risk plans and PBGC's guaranty capacity, and also the single-employer program and the increasing frequency of lump sum offers and annuity buy-outs. The organizations have raised with me their need to be able to call on PBGC for more information about its own financial situation, more translation of the different types of financial information it reports (the Annual Report and the Projections Report), and more explanation of the "mechanics" involved in the insurance programs. The groups would prefer more information-sharing, more of an understanding of current data and trends, and less rapid movement to summary and conclusion.

Participants have raised additional issues with the Advocate – issues which I expect to consider with them and with PBGC and other pension agencies next year:

Several of the participant and retiree organizations have questions around the increasing offers of lump sums and annuities to retirees and terminated vested participants in defined benefit plans that will remain ongoing. A variety of policy recommendations and requests for guidance have been provided by the participant groups – other recommendations have been put forward by the sponsor groups. I want to help raise the questions of participants to the level needed to get practical information out in a timely manner. I believe educational materials exist which could go a long way in assisting participants facing major changes in their retirement. I look forward to that larger conversation among participant advocacy groups and other agencies.

I have also been approached by a number of participants whose underfunded plan was terminated and trusteed by PBGC. Since that action, these individuals have read reports that PBGC received "a full recovery" on its claim for unfunded benefits. Consequently, they believe they should have the right to all benefit distribution options that existed prior to termination – including lump sums. Some preliminary fact-finding conversations with PBGC officials have begun, and there may be a question as to whether there has been a "full recovery." I certainly expect there will also be discussions about access to lump sums, and I suspect this issue will grow, so I want to bring it forward here to begin the consideration I believe it will require.

Finally, regarding continuing questions around church plan status, and when they are appropriately considered insured plans for purpose of PBGC coverage and premiums, several participant organizations are supportive of the work of PBGC to review carefully whether PBGC benefit protections should be eliminated notwithstanding prior characterizations of covered status by the sponsor who later seeks an exemption from covered status. Participants groups intend to continue discussions as to whether PBGC should refund premium payments to sponsors who have obtained exemptions from PBGC's protections after years of accepted coverage and insurance protection.

Participant Requests for Assistance

PARTICIPANT ISSUE #1: INDIVIDUAL CASES OUTSIDE THE "USUAL" NEED IMPROVED HANDLING AND ATTENTION.

PBGC has customer service standards it applies to "typical" inquiries from participants in terminated trusteed plans – for example, participants who call to change their address. PBGC monitors many of these typical activities against its customer service standards and reports on the results of this monitoring regularly. In addition to the employee performance responsibilities to meet these standards, PBGC also periodically surveys participants in trusteed plans regarding their experience with PBGC. PBGC recently reported very strong customer service scores and that is commendable. However, participant advocacy groups who assist individuals in finding lost benefits or establishing their entitlement to benefits under more challenging circumstances have brought to my attention a significant number of cases that fall outside any customer service goals for timely, efficient and courteous assistance, and that must be remedied.

BACKGROUND:

PBGC fields a great number of contacts from plan participants and beneficiaries of different types.

PBGC has a sizeable Customer Service Center set up to field calls, letters, and emails from participants in plans that PBGC has trusteed. Contacts through this network often address such issues as changes in the participant's personal contact information, payment inquiries, changes to bank and electronic deposit information, plan specific questions about benefit entitlement or eligibility, requests for income verification or for a benefit estimate calculation, and other relatively straightforward or routine transactions.

In addition, PBGC responds to requests for help from omitted or "woodwork" participants – that is, participants owed benefits from a now terminated plan that were mistakenly omitted from the list of participants entitled to benefits. Woodwork participants may be looking for benefits from plans closed out through a standard termination, or that end in distress or involuntary terminations, most often trusteed by PBGC. Any and all of these situations occur.

How do these woodwork cases typically arise? One path comes from Social Security. When workers apply for Social Security retirement benefits or disability benefits, the Social Security Administration (SSA) alerts them they may be owed a 401k or defined benefit pension. According to a November 2014 GAO Report, approximately 70,000 Potential Private Retirement Benefit Information notices are generated for new Social Security beneficiaries every month. This can be confusing for participants; according to a 2011 report by SSA's Office of the Inspector General, about a third of the individuals receiving a notice of potential private pension benefits were unaware that they were possibly eligible for the benefit. Helping to piece together someone's entitlement to a pension benefit in this situation is more complex and time-consuming than processing a change of address. Many plans that terminate do so in a standard termination and in those cases PBGC has limited information. Many have reported to me about the difficulties facing woodwork participants, and greater attention can and must address these problems.

Specifically, what I hear and see from many of these individuals, and from well-documented submissions provided by the Pension Rights Center and the pension counselors who staff the Administration on Aging's (AoA) six regional counseling projects, is that the experience in pursuing these benefits is often an incredibly frustrating, slow, and painful process. Counselors for these individuals have shown me examples of cases where they were asked by PBGC to resubmit previously provided information or asked for information that made no sense given the chronology of the case.

Given the urgency of improving assistance for these individuals, I believe it's appropriate to share some of the cases that have been brought to my attention. This is just a sampling, and each of these has been resolved, but pension counselors continue to call them to my attention as illustrations of the hurdles that individuals face in seeking benefits – hurdles that must be cleared away.

One case, brought to my attention by the New England Pension Assistance Project, concerned the widow of a plan participant who was notified by the Social Security Administration that she may be eligible for a survivor benefit from her now deceased husband's pension plan. PBGC was preparing to send a letter to the New England project attorney and the widow telling them that PBGC could not help because it had no records on the plan – yet we found the PBGC did have records showing the plan paid premiums to PBGC for ten years.

When the case was brought to my attention by the widow's attorney, I reached out to the Department of Labor (Labor) to find out if its collection of summary plan descriptions (SPDs), gathered under a now-expired disclosure obligation on plan sponsors, might contain the SPD for this plan and shed light on the possibility of a lump sum payment having been previously provided. Labor's collection did include this SPD, and the SPD described a plan that did not provide for lump sums, therefore it was not reasonable to assert that the applicant had likely already received the benefit. My involvement in this case lasted several months – discussions between PBGC and the widow and her attorney lasted four years.

Furthermore, with respect to the assets of the defined benefit plan, I learned from my own research that the sponsor had re-invented this company in other corporate forms which offered defined contribution plans, but there was no trace of the assets from the defined benefit plan that covered the widow's husband. In fact, the owners of the company were themselves just exiting bankruptcy unbeknownst to PBGC staff who were shocked to find that they had missed an opportunity to safeguard the assets of all the other defined benefit participants, while they were denying a survivor benefit to this one widow.

In another case, PBGC was contacted by an attorney for a widow whose husband had committed suicide at the age of 39 while still actively employed. Though she had appropriately completed paperwork electing a survivor annuity after his death, and the plan had been terminated in a standard termination several years after his death, she was omitted from the participants for whom annuities had been purchased from private sector insurers. PBGC requested tax returns from the widow for the year of the husband's death, the year after his death, and the year after plan termination. Her attorney had already submitted the relevant tax returns, and the attorney explained why a tax return for the year in which a 39-year old man committed suicide should be unneeded to rebut the concern that "he probably received a distribution," since the plan did not pay distributions to the dead. Moreover, when the deceased died in 1992, he was age 39 and there was absolutely no reason to believe he would have been eligible to receive his benefit in any form from the defined benefit plan at that time. PBGC went so far as to provide the widow's attorney with a booklet titled, "Finding a Lost Pension" which had been co- authored by the widow's attorney and PBGC. PBGC then asked the widow to chase down the plan sponsor which it believed was still in business. Efforts by the widow and her attorney confirmed that the company had been dissolved nine years earlier. PBGC agreed then to award a benefit to the widow but no SPD could be found to establish whether the plan's survivor benefit was payable on an "early retirement date." As a result, the widow will be waiting for payment until her late husband would have turned 65 – in February of 2016.

Each of these cases was resolved with PBGC providing the missing benefit. But each is an unfortunate illustration of a process that needs improved attention in order to avoid wasting time and resources – both the PBGC's and the participant's. Each was also resolved with the help of an experienced advocate made available through the AoA's pension counseling projects. It's hard to imagine that individuals working through this process on their own could produce submissions like those the counseling advocates are able to develop and work their way for months or years through the process that the advocates are encountering.

Therefore, although these individual cases I'm sharing are resolved, they serve to raise several issues that I will pursue with PBGC over the next year. PBGC struggles with these individual cases that do not fall within recognized and routinized procedures. The experiences that participants report include long delays in communication from PBGC, demands for quick responses from the participants, repeated requests for already-provided information, insufficient explanation of what they need to do and why, insufficient explanation about next steps and timelines, and an absence of centralized tracking to ensure that these inquiries don't end up languishing, for months or years, without sustained attention and closure. Clearly it is unacceptable for individuals to wait weeks, months, and sometimes literally years for responses to their requests; it is unacceptable that they should be delayed and burdened with requests to submit information they have already submitted; and it is unacceptable that they experience long delays and silence from PBGC followed by demands for quick responses to difficult or impossible requests.

I am particularly troubled to hear the discouraging impact that PBGC's insistence on tax returns has had on those seeking to be reconnected with benefits that were earned. According to information gathered by the Pension Rights Center, each of the pension counseling projects around the country has a steady stream of clients who are turned away unless they have years of old tax returns to show – in some cases, 20 years of old tax returns. These reports of individuals who reach a dead end without tax records understate the size of the population experiencing this challenge. Remember, I am only hearing about those individuals who reach out to the half dozen pension counseling projects and the Pension Rights Center. Many, many more individuals pursue these kinds of inquiries on their own, without access to resources like this, or not at all.

PBGC must be a prudent steward of resources to avoid improper payments. But is the demand to produce years of tax returns too high a hurdle to ask of individuals seeking benefits? The Pension Rights Center and the pension counseling projects report that many individuals have given up the effort to pursue benefits, knowing they can't produce the tax history PBGC will require. And they tell me that other participants are turning to PBGC FOIA requests to unearth standard termination documents that might help establish their benefit entitlement. The FOIA process is a lengthy, expensive, resource-intensive process for the individual and for the PBGC. Clearly there are significant costs involved in locating lost benefits in that way. I believe strongly that this area merits significant attention next year. I'm hopeful that we can develop a more compassionate and respectful approach, particularly for applicants who are elderly and often have limited resources to devote to the search for missing benefits.

RECOMMENDATION:

Next year I plan to work closely with PBGC staff and with the participant advocacy community to develop improvements to the assistance provided in these cases.

New reporting obligations for terminating plans and new annual reporting obligations for ongoing plans that reduce their participant populations through annuity or lump sum offers may help reduce the number of woodwork participants. But these requirements will of course apply in the future, leaving many individuals struggling to document the past.

It may also be helpful to convene a discussion that includes those who handle these cases within PBGC for trusteed plans and for standard terminations. Perhaps one department has experience that will help the other. And perhaps together they can review the experience of the advocacy network contacting me, conduct a thorough review of current procedures, and develop targeted customer service standards for these cases.

Similarly, perhaps responses could be streamlined and expedited if one unit could be assigned to receive complex cases. If most case processors now receive relatively few of these inquiries, have little experience in their unique challenges, and are evaluated on meeting targets which these cases don't help to satisfy for performance appraisal purposes but instead complicate or undermine, then perhaps establishment of a dedicated staff of processors whose performance requirements can be focused on woodwork cases would be a step forward.

Consult with Participant Advocacy Groups on a Continuing Basis

PARTICIPANT ISSUE #2: THE PARTICIPANT ADVOCACY GROUPS, LIKE THE SPONSOR TRADE GROUPS, SHOULD BE PART OF A CONTINUING CYCLE OF CONSULTATION AND COMMUNICATION THAT SPEAKS TO THEIR CONCERNS.

Like sponsor-based professional organizations, participants' organizations would welcome substantive and regular communication on key issues and the opportunity for input and feedback. Also, participant organizations would welcome the respect that comes from an agency-wide commitment to communication built on continuity and consistency.

BACKGROUND:

Participant/worker/retiree organizations have been voicing with PBGC personnel over the years certain priorities they recommend PBGC seriously consider. For example, these organizations have urged expansion of the Missing Participants program and a creation of a lost plan registry, with a reexamination of PBGC's approach to non-traditional requests for participant assistance. They have also suggested revisiting policies addressing document retention that could improve the ability to reunite participants with lost benefits. Another concern involves lump sum offers, including provision of educational materials to help participants fully understand the consequences of lump sum distributions.

Participants and the organizations that represent them need improved opportunities for regular and substantive discussion of issues of concern. Professional associations that represent plan sponsors, consultants, actuaries and others meet regularly with PBGC senior officials, or offer PBGC the opportunity to attend professional events and provide updates on the status of various activities. These activities include modifications to enforcement policy, to premium filing instructions, to intended dates for regulatory developments, and more. And these interactions can be a valuable means of detecting problems that sponsors are encountering, answering questions, alerting them to concerns from the Corporation, and updating them as regulatory or other due dates near or change.

Participant groups have similar needs and of course offer similar valuable input. However, they are fewer in number than the sponsor-related organizations and have fewer regularly-scheduled opportunities for PBGC to hear concerns, answer questions, or provide steady updates and feedback. Though many departments and individuals are often available to these organizations and attend meetings or answer questions, the level of dialogue – the detail, the frequency, the timely responsiveness – perhaps not surprisingly does not parallel what sponsors see. Yet participants should expect a similar system of ongoing – rather than episodic – collaboration: Perhaps a quarterly, regularly-scheduled multi-departmental gathering to engage meaningfully and in person to, for example, explore what challenges might exist in creating a Lost Plan Registry and how they might be overcome. A process like this could have and should have been used to explore options for preserving thousands of Summary Plan Descriptions that have been vital in a number of cases in reuniting participants with lost benefits. This was an urgent priority raised with me immediately upon my taking this position by the Pension Rights Center, AARP, and the New England Pension Assistance Project. **I am pleased to report – and more**

importantly, the participants and participant advocacy groups are relieved to see – that I found a solution and the documents will be preserved by the National Archives at a Federal Records Center in Massachusetts. Participants groups should be able to expect continuing discussion on the status of and options for priorities like these, rather than the haggling and resistance that dogged this project from the onset with misinformation and agency quibbling over who would assume custody.

Meetings like this may also help to facilitate a discussion among participants and sponsors together that might elicit productive possibilities that might not otherwise come to light. For example, participants had hoped that PBGC might beef up the documents it requires plan sponsors to provide upon standard termination in hopes of better addressing omitted participants or other inquiries from participants that come to light long after plan termination. In a recent revision to standard termination procedures PBGC accepted certain participant advocacy group recommendations. In addition, an experienced ERISA counsel who met with PBGC in one of the sponsor-oriented issue updates suggested that PBGC – and perhaps the other pension agencies – consider putting out guidance, even informally, to remind sponsors of the importance and value of plan data and document retention. Since that time, benefits publications have repeatedly quoted practitioners noting that populations of participants change, workers change jobs, and years go by before a former employee claims a benefit, making it increasingly evident that document retention must be adequate to the task.

RECOMMENDATION:

The Advocate believes PBGC and the participants' representatives would benefit from a regular, sustained, series of encounters with PBGC – as the sponsor groups expect – where mutual priorities are discussed, substantive information is exchanged, and participants' understanding of PBGC's next steps and timetables are made more concrete.

Clarity in Communication about the Numbers

PARTICIPANT ISSUE # 3: PARTICIPANT/WORKER/RETIREE ORGANIZATIONS AND PBGC WOULD BENEFIT FROM CLEARER COMMUNICATION ABOUT THE SHORT AND LONG-TERM FINANCIAL STRENGTH OF THE PBGC'S TWO INSURANCE PROGRAMS.

BACKGROUND:

Both participant organizations and sponsor organizations raise issues around PBGC's financial strength in slightly different ways. Several participant advocacy groups have raised this issue with me at various points during the past year, and it looms particularly large around the release of the Annual Report and the Projections Report as part of discussions around de-risking trends, premium needs for both the single-employer and multiemployer programs, and larger multiemployer reforms.

What the participant groups tell me is that release of the Annual Report each November that provides a current year snapshot of PBGC's assets and liabilities, always leads to questions about the PBGC's need for additional premiums or other resources that can be difficult to assess from the traditional presentation of its financial report. Similarly, participants find it challenging to draw helpful conclusions from PBGC's separate release of the Projections Report (formerly referred to as the Exposure Report) which does not purport to predict PBGC's future but instead projects the results of modeling thousands of possible outcomes.

The participant groups report that these challenges are a growing concern as the two insurance programs are each experiencing major changes, along with changes in the participant count of the plans they insure. Single-employer plans are experiencing major changes as they work to address funding volatility by offering lump sums to terminated vested participants and retirees, or distributing private sector annuities to retirees previously paid from the plan. Multiemployer plans are for the most part strong, as are most single-employer plans, but – as has been extensively reported – there is a segment of multiemployer plans that is concentrated among troubled industries and facing tremendous funding challenges. Given the different ways in which PBGC intervenes with single-employer plans compared with multiemployer plans, it can be incredibly challenging to appreciate what the numbers traditionally reported say about the immediate status of the two programs and what they need for the long term. Passage of significant multiemployer reforms in December, 2014 may increase – not lessen – the urgency of questions around the operations and outlook of the two separate insurance programs.

The Washington-based participant groups know PBGC officials and can of course call or meet with them and ask questions as traditional reports are released. However, many other interested organizations and individuals are not able to meet in D.C., and are nevertheless concerned, and would welcome a presentation that is more understandable from a layman's perspective, and more explanatory and less persuasive or conclusive, and more accessible and meaningful to the average participant and beneficiary.

One participant group has embraced a very specific approach to the numbers. The National Retiree Legislative Network, or NRLN, represents two million retirees from a variety of public and private plans, including many retirees from some of PBGC's largest trusteed plans (including Delphi, United Air Lines, Delta, and others). NRLN cites the American Benefits Council's (ABC) analysis of PBGC's financial reports, and questions whether PBGC overstates its liabilities, and understates the contribution of invested assets and investment gains to its claims paying ability. NRLN believes that if PBGC were to value its liabilities on a different basis and to examine its expected investment returns in a different way, it would mean that trusteed plans would not appear so underfunded. Instead, NRLN believes the trusteed plans' assets would be able to cover more of the participants' nonguaranteed benefits than they do under current operations. Furthermore, NRLN believes PBGC should reexamine – through legislative and regulatory changes – benefit distinctions that currently divide benefits among guaranteed and non-guaranteed categories and could consider much more of a plan's promised benefits to be guaranteed for PBGC purposes.

NRLN has a very detailed set of legislative and regulatory changes which it has shared with me. They go far beyond this issue. I expect next year to talk more with the group – and other participant-based organizations – about the broader spectrum of recommendations they make, just as I expect to talk more with sponsors about specific issues beyond the priorities they emphasized this year. The key element I want to emphasize here is that organizations from varied perspectives are continuing to probe PBGC's traditional responses regarding its calculations, are continuing to raise their questions and recommendations with Congress, and will now increasingly bring the Advocate into these discussions.

My goal is not to recommend a particular change, but to highlight the fact that PBGC's financial picture was presented in a certain traditional way for decades. Just a few years ago, PBGC began making major changes – updating data and modeling approaches, and more. Simultaneously, PBGC has been reporting unprecedented changes in the two insured plan populations it covers as well as changing projections for future years. In order to follow these transitions with confidence and engage meaningfully with sponsors and other policymakers, participant advocacy groups want a more meaningful explanation than is currently characterized in PBGC's Annual and Projections Reports.

Additional Items to Explore

PARTICIPANT ISSUE # 4: ADDITIONAL ITEMS TO EXPLORE: CHURCH PLANS, LUMP SUMS, DE-RISKING.

Church Plans:

The Pension Rights Center (PRC) has requested that I help them with the National Taxpayer Advocate on what steps might be taken to identify a more targeted and responsive point of entry to the IRS in which to raise participant issues. The PRC notes that there are important issues in which both IRS and PBGC must be involved, such as efforts by sponsors and consultants to explore "church plan" status and, consequently, questions regarding PBGC coverage and premiums.

For example, both the IRS and PBGC worked to address a plan sponsored by a hospital in New Jersey to restore it to its coverage under ERISA. The PRC appreciated the hard analytical work done by each agency, and believes strongly that pension plan participants need an "advocate" at the IRS as they now have at the PBGC so that there is a dedicated point of entry for participant concerns even when the participants are not the "taxpayer." This is something I will raise with the National Taxpayer Advocate and with others she suggests be involved.

Further, the PRC feels strongly that PBGC should not return premiums paid by church plan sponsors when they seek to undo Title IV coverage after many years of ERISA coverage and insurance protection from the PBGC.

Lump Sum Distributions from Plans Trusteed by PBGC:

There is a small but growing group of plan participants whose plans are trusteed by PBGC who can generally be characterized as highly compensated individuals who were not in pay status (retired) when PBGC trusteed those plans who would like to take their benefit in the form of a lump sum. Under PBGC regulations, PBGC will pay lump sum benefits provided that the participant's benefit amount is $5000 or less. By regulation PBGC has taken the position they cannot make benefit distributions to participants in trusteed plans that are greater than $5000 and participants must elect an annuity form from various options offered under the regulation.

Participant organizations and others have strong recommendations for guidance addressing issues generated by "de-risking" transactions:

During the past year, both participant organizations and sponsors have spoken with me about de-risking from their respective viewpoints. Sponsors have shared with me, as I note in this report, the factors that lead them to undertake de-risking transactions to help mitigate funding volatility and rising premium costs. Participants insist that while de-risking may reduce certain sponsor risks, it simultaneously raises and transfers risk to participants. Participant groups have in some cases called for a moratorium on such transactions until regulatory guidance can be issued addressing risks they see to the participants leaving the plan, and perhaps participants in the plan that remains ongoing. Given the trend sponsors foresee, and the urgency participant groups continue to convey, I want to highlight the importance of these issues at the highest levels.

In addition, I would like to see PBGC and other agencies work closely with participant organizations like WISER (Women's Institute for a Secure Retirement) who can quickly share educational tools with participants facing challenging choices in the very near future – well before guidance can be issued by the regulatory agencies. WISER's educational publications are already widely shared among participant organizations, sponsors, and leaders in the financial services community. PBGC and the other retirement agencies have many new and exciting tools, including new technologies, for getting the word out on these well-accepted resources.

Sponsor Issues, Observations, and Recommendations

Sponsors' Issues at a Glance

The majority of the contacts from sponsors requesting assistance have involved outreach to the Advocate by individual companies whose executive management has expressed confusion and frustration at PBGC's approach to Title IV enforcement. These cases have involved varied aspects of the PBGC's reach, or what plan sponsors consider PBGC's over-reach without notice to the public.

Plan sponsors have also brought to my attention what they perceive as a gradual trend toward a more adversarial PBGC in its interactions with sponsors – both taxable companies and non-profit entities – of plans insured by the PBGC. These sponsors observe that in the past PBGC projected a more collegial partnership in working with them regarding their defined benefit plans. Their view now is that the business community relationship with PBGC has turned decidedly much more antagonistic and unwilling to negotiate with a free exchange of information from both parties, often with PBGC insisting that the plan sponsor be prepared to settle without first being told of PBGC's rationale for its enforcement action, *e.g.*, why PBGC sees the company and/or the plan as a threat to participants and/or PBGC. One General Counsel of a very large company with a household name remarked to me that he has negotiated with many federal agencies who always share the basis of their enforcement decisions with company representatives, but that his experience with the PBGC is the first time where he has ever worked with an agency so unwilling to share or discuss their rationale for their enforcement actions and the basis of their asserted liability.

This damaging and adversarial perception of PBGC held by plan sponsors is an area of great opportunity for PBGC to grow, if we can establish a partnership with the plan sponsors we serve.

PBGC's Enforcement of ERISA section 4062(e)

For several years the plan sponsor community has expressed concern and frustration with PBGC enforcement practices relative to ERISA section 4062(e)[1]. Initially sponsor concerns were

[1] ERISA section 4062(e) requires the plan sponsor to provide security to the PBGC when the employer ceases "operations" at a facility, and as a result of ceasing operations, more than 20 percent of the total number of employees who are participants in the defined benefit plan are separated from their employment. A company can satisfy a 4062(e) liability by placing the liability amount owed in escrow, or PBGC may require a bond for up to 150 percent of the liability. If the plan does not terminate within five years of the cessation of operations event, then the money held in escrow is returned to the company without interest or the bond is cancelled. However, PBGC's practice is not to take security in the form of a bond or escrow, but rather to negotiate with employers to accelerate funding of the pension plan by the large and disproportional amounts of money that would otherwise be required for security. Many of these plans are frozen defined benefit plans whose sponsors have made all required employer contributions or even exceeded the funding requirements, yet are faced with significant accelerated funding required by PBGC -- funding that could otherwise be used for business investments, including the creation of American jobs.

brought to PBGC, then to members of Congress, and finally in a letter to the PBGC Board where sponsors expressed concern that PBGC's enforcement of 4062(e) reflected an end run around what it perceived as inadequate funding rules adopted by Congress under the Pension Protection Act of 2006. While PBGC attempted to assuage plan sponsor angst over their 4062(e) enforcement by taking into account whether a company is "creditworthy," those actions actually heightened the business community's objections to 4062(e), and plan sponsors took umbrage with PBGC's characterizations that the "good companies pay for the bad companies;" plan sponsors perceived these characterizations as divisive. Plan sponsors, even creditworthy sponsors, realized that they too could be just one transaction or business cycle away from losing their credit rating, and they have repeatedly advised me that those kinds of characterizations further fuel the adversarial relationship between PBGC and the companies that pay premiums.

To that end, earlier this past year, at a meeting between practitioners and PBGC attorneys, practitioners urged PBGC to be more cognizant of how their actions can quell business transactions that would otherwise financially strengthen companies that sponsor defined benefit plans.

PBGC also announced a moratorium on 4062(e) enforcement through the end of 2014, to "work with plan sponsors to minimize the effects on necessary business transactions;" however, it does not appear that any effort was made by PBGC to reach out to plan sponsors during this moratorium. [2] Unfortunately for PBGC, an opportunity was missed to work in partnership with the plan sponsor community that would show PBGC was listening and intending to engage on the many substantive issues raised by 4062(e) with the expectation that they could be resolved in a way that promoted a healthy private pension system and a financially sound PBGC.

Finally, on December 13, 2014, Congress passed legislation that changed the statutory provisions of 4062(e) in a number of ways that would render downsizing liability more predictable and more reasonable. The President signed that legislation into law on December 16, 2014.

Communicating about the numbers and pension plan de-risking:

Plan sponsors report to us that PBGC has been soliciting Congress to raise premiums, and whether this is true or not, the perception of PBGC in that capacity should be a concern. A recent roundtable with plan sponsors revealed that the single-most important pension issue on the minds of the company executives is pension de-risking, and that rising premiums are contributing to employer decisions to de-risk and exit the defined benefit system. Sponsors would like to see PBGC engage more substantively on how it calculates its liabilities and whether they are effectively overstated, including how PBGC manages and invests its assets, and whether those might be managed differently to help close the reported deficit. Though these questions arise annually between sponsors and PBGC, sponsor calls for more substantive

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Once the sponsor experiences this interaction with 4062(e) it is not unusual that the sponsor pursues de-risking options so as to partially or completely exit the defined benefit system.

[2] A trade association reported that a plan sponsor contacted them in November with questions regarding the 4062(e) moratorium. The plan sponsor recently had an asset sale and PBGC contacted them about the transaction, asking specifics about the transaction but citing no legal authority for the PBGC inquiry. The sponsor indicated that although PBGC staff who contacted them never referenced "4062(e)," the basis of the PBGC questions was along the lines of a 4062(e) inquiry.

responses from PBGC are growing, and PBGC needs to be a part of that conversation for several reasons, including:

- We as a country need more pension plans, not fewer, and promoting the voluntary pension system is part of the PBGC's mission.
- As large institutional investors, defined benefit plans strengthen the global capital markets and contribute to a vibrant economy which can help workers and their families.
- In the view of many, pension plan de-risking is the greatest threat to PBGC's single-employer program, as it has the potential to substantially reduce PBGC's premium base. The perception that PBGC may be advocating for premium increases and risk-based premiums presided over by PBGC only further facilitates the exodus from the defined benefit plan system by sponsors.
- There are also concerns with PBGC's methodology in valuing liabilities in its Projections Report in that it explicitly does not take into account either plan terminations or de-risking transactions.

So, the take-away here is that PBGC needs to understand what is driving companies to de-risk, including increasing premiums and other PBGC-related issues, such as how PBGC values its liabilities, which plan sponsors and some participant advocacy groups believe are overstated and thus lead to premium increases which leads to plan de-risking.

Coordination Among and Between PBGC Departments - Effects on Plan Sponsors

There are times when plan sponsors request guidance and consultation from experts within PBGC on transactions they are contemplating that may involve matters such as the valuation of accrued benefits under a standard termination, or withdrawal from a multiple employer plan, or a determination of plan coverage under Title IV of ERISA, and more.

These questions and requests for discussion with PBGC often involve complex issues that require judgment, discretion, and interpretation which can start out as an individual case pending before PBGC, but can raise policy and benefits administration issues for the broader plan sponsor community. Some of these cases can remain for months and years within PBGC, precluding the plan sponsor from moving forward on certain plan or business transactions. In other cases, PBGC's non-responsiveness to the questions raised by plan sponsors and refusal to meet and discuss complex issues that cross various departments and functional areas within PBGC can end up tossing the sponsor into PBGC's adversarial administrative review process.[3]

Recently, PBGC took the position that regardless of whether a pending PBGC decision could have broad consequences for plan sponsors that could raise plan qualification and other significant compliance issues, PBGC would not meet with the sponsor community until a

[3] Since 1999, PBGC has had a published policy (64 Fed. Reg. 17696 (Apr. 12, 1999)) that supports Alternative Dispute Resolution (ADR). However, outside of the internal labor and employment relations arena, PBGC has made little use of ADR in lieu of its adversarial administrative review and litigation approach, which can be costly both to PBGC and plan sponsors. Although there is no entitlement to ADR, it is often faster, less expensive and more effective in resolving disputes in a consensual manner, and PBGC would be well-advised to use ADR far more broadly in its dealings with sponsors.

particular case in which the issue in question had arisen, and which was undergoing PBGC review, had been formally decided and all appeal rights and all litigation claims had been exhausted. Under this scenario, not only is PBGC refusing to accept input from nationally recognized actuaries and industry representatives, but it will take sponsors months, if not years, to be able to discuss this issue with PBGC. PBGC explained its position by noting that they are not required to meet in these circumstances. The refusal to meet has caused concern among the plan sponsor community, which has reached out to Congressional offices regarding this refusal. This was an opportunity to work with the regulated community that we serve; instead, unfortunately, it has added to the view of PBGC as an adversarial agency.

We should note also that questions are being raised by plan sponsors about whether the PBGC is requiring plan sponsors to adopt expensive practices that in parallel situations are not being applied by the PBGC with respect to the plans it trustees. In other words plans that engage in a standard termination may be required to pay higher benefits than PBGC is paying in the same situation with plans it trustees. We do not know if the plan sponsor concerns are correct, nor do the plan sponsors. But the lack of transparency is leading to perceptions like this, which is not healthy for the system.

Setting aside the plan sponsor view that PBGC has become more adversarial in their dealings with sponsors of defined benefit plans, PBGC needs to be more responsive to the business community when these requests come to us, otherwise they risk becoming less relevant in any dialogue with policymakers that seeks to preserve and maintain the defined benefit plan system. PBGC should be open to a dialogue before they adopt a position that could have profound adverse consequences.

Premium Penalties

PBGC's approach to assessing premium penalties in the eyes of the plan sponsor resembles an automatic process without the opportunity for genuine communications with the company and their actuary. Premium payments are now no longer "just pennies on the dollar." The assessment of penalties on top of costly premium payments is just one more frustration faced by those many sponsors that are compliant organizations and that want to abide by the multitude of rules and regulations that govern the administration of defined benefit plans. Given the significant costs associated with premium payments, it may be time for PBGC to study the effect of penalties on the system, and give some consideration to making sure the penalty is proportionate to the violation, which is often nothing more than an entirely innocent mistake that is not discovered until after a very large penalty has built up over time.

PBGC Must Improve Working Relationships with Sponsors

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

BACKGROUND:

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

What are those persistent problems as presented by the sponsors?

Section 4062(e) and other transactions:

Sponsors report that 4062(e) discussions with PBGC's financial analysts and negotiators often present demands for security or accelerated funding based on preliminary analysis of the sponsor and a particular transaction, and give little time to engaging with the sponsor on the impact of the transaction, which may actually have improved the credit rating of the company. Sponsors say that too little response is given to their efforts to demonstrate the stability of the plan and the company, and to their efforts to elicit substantive grounding for PBGC's concerns. As a result, sponsors report that PBGC appears to be seeking excessive "compensation" for an increase in risk that sponsors insist is often modest, or even non-existent. In the case of one company who was due to exit the five-year protection period within several months, the PBGC extracted an additional $1.25 million that was contributed to their long-frozen pension plan even though the plan had been advance-funded beyond that five-year period. PBGC also threatened this company with tax liens that by statute can only apply once a pension plan had been terminated, which PBGC determined was the same as "a cessation of operations at a facility" when the company did not agree with PBGC's asserted liability. The company had no choice but to make the contribution to the long-frozen plan.

Furthermore, sponsors dealing with distress termination issues, multiple employer withdrawal liability inquiries, and coverage questions say that long periods of time go by in which PBGC does not respond to their submissions, even in cases where the sponsor is facing deadlines with significant financial consequences and needs closure. Then PBGC reappears with a demand to which it allows a very short response-time for the sponsor. Sponsors also report that PBGC may seek relief or comfort that the insurance program is protected by liens that can be counter-productive and can call into question whether the plan sponsor company can be a going concern causing the very issue of financial collapse the company and PBGC are trying to avoid. For example, plan sponsor advisors have described circumstances to me where PBGC has suddenly and without any notice threatened the company with liens in order to pressure them to pay the liability without any deliberative process or consultation with the company despite repeated requests for such communication by the sponsor. In some circumstances this has resulted in the sponsor simply filing for bankruptcy since the liens present such a threat to the company as a going concern.

There are other parts of PBGC that touch plan sponsors that can quickly escalate into an adversarial administrative review or an appeal/reconsideration process when PBGC decides that they are done communicating with a plan sponsor about a complicated issue and then issues an adversarial determination letter on a transaction which then starts a lengthy and costly appeal process.

For example, after a plan sponsor has exited the defined benefit system, terminated its pension plan, and, working with its own actuaries, has paid out all benefits from the pension plan, the plan termination comes under the oversight of PBGC's Standard Termination Compliance Division (STCD). The STCD is charged with auditing terminated insured plans to confirm that all promised benefits are paid. All very reasonable so far; however, in some instances, this means PBGC may interpret a plan's terms differently from that of the sponsor. However, if that interpretation runs counter to long-standing interpretations and practices of the sponsor and of the larger defined benefit community and causes potentially very serious issues across the country, PBGC's refusal to meet with the sponsor community to discuss the issues only adds to the adversarial perception of PBGC by the plan sponsor community.

For example, earlier this year, sponsors and their actuarial experts reported that they have encountered PBGC interpretations of plan documents that differed from widespread interpretations and plan practices regarding the calculation of late retirement benefits. According to the American Society of Pension Professionals & Actuaries, ASPPA:

> "Most small defined benefit plans provide that the present value of the accrued benefit (PVAB) is payable upon death prior to retirement. Since there is no forfeiture of benefits upon death, there is commonly no adjustment for pre-retirement mortality in determining either early or late retirement benefits payable from the plan."

PBGC has interpreted the plan in an odd way that runs counter to the common practice described above by ASPPA, and would result in increased costs, based on converting the normal retirement benefit into an actuarially inequivalent and a more costly benefit in the case of late retirement. This is also not an issue where participants' and plan sponsor interests diverge. Participants were not expecting a more valuable or generous benefit, and have every interest in ensuring that only the promised benefits are paid to all participants and beneficiaries under the terms of the plan. However, the issues raised here by PBGC's interpretation would adversely affect plans across the country both retroactively and prospectively, thus triggering broader interest from plan sponsor trade groups such as the American Benefits Council (ABC) and leading actuaries at the major firms.

ABC asked for help in setting up a meeting with the team here at PBGC to discuss this fairly complicated actuarial issue. PBGC refused to meet until after the specific case this involved is fully resolved including any litigation, and that could take years. Therefore, if the plan sponsor wanted to contest this issue in court, PBGC would not meet with ABC on the issue until after the litigation was resolved, despite the near-term adversarial effect on the plan sponsor community. The refusal is focused on the fact that PBGC was not required to meet in these circumstances, in light of the pending case. The plan sponsor community acknowledged that PBGC was not required to meet, but they were hoping that PBGC would meet in order to discuss the extremely broad implications raised by the PBGC's approach on this issue, so as to better inform PBGC's decision. This kind of reaction and treatment of the plan sponsor community does nothing to quell the adversarial relationship that the plan sponsor community believes exists between themselves and PBGC.

RECOMMENDATION:

When we hear that PBGC's enforcement actions are stopping company executives from engaging in business transactions for fear of triggering a 4062(e) event, or when we hear that a PBGC plan interpretation will lead to plan qualification and compliance issues and costly correction programs, and PBGC refuses to meet with the sponsor community to talk through this issue, that should lead us to pause and reflect on why we are here and who we serve.

This is where I hope PBGC can grow. We need to listen and adjust more based on what we hear. Our passion can be a wonderful thing, but if its focus is perceived by the community we serve as against them, then we are not succeeding in the PBGC mission to preserve and protect defined benefit plans. If we at PBGC can listen more and act in partnership with plan sponsors and the participants in their defined benefit plans, then many of the substantive issues raised here would be resolved in a way that promotes a healthy private pension system and a financially sound PBGC.

Lessons from 4062(e)

SPONSOR ISSUE # 2: ERISA SECTION 4062(e): A CASE OF LONG-OVERDUE REFORM

ERISA Section 4062(e) requires a plan sponsor to provide additional financial security when the employer ceases "operation" at a facility and as a result of ceasing operations more than 20 percent of the total number of employees who are participants in the defined benefit plan are separated from their employment. A company can satisfy a 4062(e) liability by placing the liability amount owed in escrow with PBGC, or PBGC may require a bond for up to 150 percent of the liability. If the plan does not terminate within five years of the cessation of operations event, then the money is returned to the company without interest or the bond is cancelled.

However, PBGC's practice is not to take security in the form of a bond or escrow, but rather to negotiate with employers to accelerate funding of the pension plan by the large and disproportional amounts of money that would otherwise be required for security. Many of these plans are frozen defined benefit plans whose sponsors have made the required employer contributions, and once the sponsor experiences this interaction with 4062(e) it is not unusual that the sponsor takes subsequent de-risking steps that may now be within reach because of the accelerated funding required by PBGC. This was the case with at least two pension plans that PBGC was showcasing as 4062(e) success stories that recently announced this year their intent to de-risk by offering lump sum buyouts.[4]

There are also no demonstrated results that can show whether any 4062(e) settlement amounts ever reach participants or their beneficiaries as touted by PBGC as one of the benefits of 4062(e). **The statute governing 4062(e) primarily focuses on PBGC rather than on the protection of participants' benefits.** Settlements under 4062(e) do not serve to reduce losses for participants or PBGC (premium payers) in the common situation where the pension plan remains ongoing, and would have remained ongoing absent the settlement. PBGC announced at the Enrolled Actuaries Meeting in March of 2014 that since 2007, it had settled over 130 cases under 4062(e), and that over that 7-year period, only one sponsor had filed for bankruptcy, and in that case the pension plan did not terminate. What this shows is that 4062(e) is not a particularly good predictor of a likely future distress or involuntary termination.

Even if a pension plan were to terminate in a distress or involuntary termination at a point in time when it is still better funded as a result of a 4062(e) liability settlement then: (a) the 4062(e) liability settlement would not serve to reduce losses for participants in the common situation where their benefits are fully guaranteed by PBGC; (b) the 4062(e) liability settlement would serve to reduce losses for PBGC, not participants, where the resulting increase in the plan's funding level falls (as is common) entirely in "Category 4" (guaranteed benefits); (c) even if the

[4] The PBGC Office of Inspector General completed a study of PBGC negotiated settlements, including 4062(e) settlements, which was released in March of 2014. The report concluded that PBGC lacked metrics that would demonstrate the success of such of negotiated settlements under provisions like ERISA section 4062(e). The report can be found on the PBGC OIG website.

resulting increase of the plan's funding level would improve funding of "Category 3" benefits (for participants who retired or could have retired three years ago), in many cases participants' benefits would be unaffected by that increase; and (d) even where the resulting increase in the plan's funding level in connection with a distress or involuntary termination would fall in "Category 3" and would result in higher participant benefits, the increase would generally be shared with PBGC.

Considering all of the premium payers' money PBGC spends on enforcing 4062(e) and the expenses the plan sponsor incurs in defending themselves, PBGC would have been wise to have questioned the value of these costs given the dubious benefits which seem to be primarily providing incentives for the plan sponsor to de-risk and shed themselves of their pension liabilities and premium payment costs.

In the long-run, PBGC's expansive and inappropriate use of section 4062(e) was also very troubling in another respect because it placed the companies that were the target of PBGC's 4062(e) enforcement at a competitive disadvantage. Requiring employers to increase funding of pension plans by large and disproportional amounts to supplement what PBGC perceived as inadequate pension funding rules created a substantial unfairness for these companies as compared to their competitors because they were forced to divert hundreds of millions of dollars to their already compliant pension plan that could have been put toward growing their business and creating jobs to support that business growth.

BACKGROUND:

Section 4062(e) authority has been part of PBGC's authorizing language since ERISA's beginning in 1974. However, it had been used rarely – if ever – until around 2006. At that point, PBGC developed a regulation to establish how it would go about calculating the amount of the demands it would assert in cases of this kind. In 2010, PBGC published a proposed regulation attempting to add specificity to the many terms in the short statutory provision that could benefit from interpretation. Extensive comments were submitted urging that PBGC return to the drawing board and try again and the agency did announce that it would take a different approach. That approach took the form of an "enforcement guidance" document issued by PBGC that would take into account the credit rating of the sponsor, among other things, in assessing whether the sponsor posed a 4062(e) liability along with the provisions of the 2010 proposed rule that PBGC purported to pull back after overwhelming negative feedback.

Throughout 2014, and even prior to that, PBGCs enforcement of section 4062(e) had become a significant problem. During that period, the sponsor community, sponsor consultants, Hill staff, and other policy makers urged PBGC to "dial down" their over-reaching enforcement of 4062(e). On June 3, 2014, the sponsor community wrote their concerns to the PBGC Board of Directors, with copies to appropriate Congressional Committees of Jurisdiction regarding PBGC's enforcement of 4062(e). On September 16, the Senate approved, *by unanimous consent*, a bill that would significantly reform ERISA section 4062(e). On December 13, 2014, Congress passed the Senate-passed legislation. On December 16, 2014 the President signed that legislation into law.

Very briefly, the legislation returns section 4062(e) to its original purpose by (1) only imposing liability where there has been a major downsizing, and (2) making the liability imposed on employers more predictable and reasonable.

This issue has been resolved for now; however, understanding this issue is still important to (1) provide more meaningful background on the current perceptions of the plan sponsor community of the adversarial relationship with the PBGC, (2) provide examples of how PBGC's enforcement positions can in some instances hurt companies, plans, and even itself, and (3) provide lessons to be mindful of in the future.

PBGC's enforcement of 4062(e) was a very real problem for many companies, and, absent any legislative change, because of the trends in PBGC's enforcement of 4062(e), every year this issue would have affected more and more companies. Perhaps the best way to demonstrate the harm caused by PBGC's enforcement of 4062(e) is by example as set forth below, and it is important to note that the examples below only illustrate one component of the problem, and that is, the companies that PBGC has sought to impose this liability on. However, there was another equally serious effect – that across the country, there were companies that needed to sell unprofitable facilities or consolidate redundant operations, but absent the recently passed legislation were precluded from doing so by the threat of PBGC's assertion of liability under section 4062(e). Further, as illustrated below, this liability, under PBGC's rules and practices in effect before the recent legislative change, was often completely out of proportion to the transaction being considered, making the business transaction a non-starter.

What follows are examples of the damage that PBGCs overly aggressive enforcement of 4062(e) caused that ultimately led Congress to act and reform 4062(e) to its original intent. Although PBGCs overly aggressive 4062(e) enforcement tactics ultimately led to legislative reform, these companies incurred significant costs and expenses defending their business transactions that ultimately strengthened the companies, and those are sunk costs that could have been spent on growth and revenue generating activities, and American job creation. Perhaps most importantly, PBGC's overly aggressive enforcement approach damaged its relationship with plan sponsors generally, and caused some of them to pursue partially or fully exiting the voluntary pension system.

The Harm of 4062(e) to the Voluntary Pension System

Large Hotel and Entertainment Company

This company in 2012 reorganized its business into a Real Estate Investment Trust ("REIT") whereby it would own its existing hotels and hand over management operations to another well-known hotel company, while still maintaining day-to-day management rights over operation of its entertainment assets. The company made the change in their corporate structure to take advantage of cost savings and revenue enhancements which would improve cash flows and expand the reach of their hotel business. They chose a prominent worldwide hotel operator to take over operations of the hotel because of its worldwide sales force and transient customer base. This REIT conversion was largely technical in nature and had little effect on the company's assets and liabilities and had absolutely no effect on the pension plan in question.

Under the new REIT structure the company still owns all of the business activities of the hotels, those businesses have been in continuous operation under the company's brand, and the company bears all the risk of operating all of the assets, profits and losses. The vast majority of individuals who are employed at the various operations still fulfill their same job functions. The management agreement that the company has in place with the hotel operator may be terminated under certain circumstances and all of the obligations relating to the employees would fall back to the company. With respect to the pension plan in question, there have been no changes to the plan and it continues to be administered by the company consistent with past practices. The company has made all required contributions to the plan, at or in excess of minimum funding requirements, and will continue to do so. The plan has been frozen for many years, accruing no additional liabilities, and the plan was so well-funded that there were no projected contribution requirements for post-2014 plan years throughout the remainder of the five-year period that 4062(e) is designed to provide protection for. Because of the changes in the company structure, the firm is in better financial shape today than it has ever been.

In light of these circumstances, the company was quite frankly puzzled with PBGC's continued insistence that it "ceased operations" at any particular facility. All of the company's facilities are up and running and doing very well, but PBGC was not interested in discussing the facts – they were just insisting that the company put additional tens of millions of dollars into its pension plan that has been frozen for many years and is completely compliant with the funding requirements. It was clear that PBGC is using a broad interpretation of "cessation of operations" that relied upon proposed rules in both determining that a "cessation" occurred and in calculating the number of employees that lost their job because nearly every employee in the pension plan that was "let go" from the company was immediately rehired by the hotel operator.

Finally, it is interesting to note that the same REIT conversion that apparently concerned PBGC enough to cause it to pursue a claim in the tens of millions of dollars against the company resulted in credit rating upgrades for the company.

Large Commercial Printer

This company is a large commercial printer that operates multiple facilities across the United States and provides tens of thousands of U.S. employees with family-supporting wages and benefits.

The print/mailing industry is an important part of the U.S. economy, as it employs over 8 million people and accounts for over $1 trillion in economic activity. However, the industry, much like all mature industries, suffers from declining volumes and excess capacity, much of it aging and inefficient. For the industry to thrive, it is imperative for the company and the industry's platforms to adjust to the realities of today's marketplace. This particular company has led this effort by acquiring a number of other printers with the clear objectives of retaining the work, using its most effective printing plants, and removing the unnecessary and idle capacity from the market completely, creating significant efficiencies in the overall print production and distribution processes. This acquisition strategy will lead to a stronger company, a transformed industry and continued cost savings for their customers but will also create obvious redundancies that must be dealt with as the companies integrate operations.

This company's experience illustrates the unintended but far-reaching and harmful impact of overly aggressive 4062(e) enforcement. In 2010, as part of its acquisition strategy discussed above, the company acquired another company that had just emerged from bankruptcy. If the company that was acquired did close its doors, their defined benefit pension plans would have reverted to the PBGC. However, the company acquired the print company that exited from bankruptcy, and in so doing took on the print company's pension liabilities. As part of the integration strategy, it was imperative that the less efficient and now redundant capacity be eliminated, which ultimately led to plant closures. In making this difficult but necessary decision, the company in question here triggered a 4062(e) event. By triggering this event, the company was potentially going to be forced to divert funds from its capital improvements, salaries or other business growing strategies, resulting in valuable resources not being available for economic development and result in a weaker company overall.

Unfortunately, PBGC's enforcement stance does not take into account the fact that this necessary move to more efficient platforms and processes actually made the company much stronger and helped to ensure that the smaller print company that was acquired had their pension liability no longer in danger of reverting to the PBGC. Rather than pursuing punitive measures against these necessary transactions, the PBGC ought to be looking for ways to provide incentives for financially strong companies to acquire companies that are struggling financially. The acquisition by this company of the smaller print company resulted in a win-win-win. The acquiring company is a stronger more diverse company, the employees' pensions are secure, and finally the PBGC was relieved of the potential liability it would have faced if the smaller print company had closed its doors permanently.

Now, fast forward to 2012, when the company was negotiating to acquire another company that was a prominent communications/branding company. That company was also struggling financially, and was unable to convince the market to come in with capital to help keep the company running as it emerged from bankruptcy. The company was clearly in danger of being forced to close its doors and turn its pension liabilities over to the PBGC. The company successfully acquired this communications company as part of an asset deal as the communications company emerged from bankruptcy. Due in no small part to its previous experience with the PBGC's enforcement of section 4062(e) and its belief that the PBGC's enforcement of 4062(e) would prohibit it from making the necessary decisions to grow its business and create jobs, the company left the pension liabilities of the newly acquired communications company behind. The PBGC is now the trustee of those pensions from the communications company. If divesting itself of the defined benefit pension liabilities had not been an option, it is likely that the acquiring company would have passed on the opportunity to acquire the communications company – likely resulting in the communications company shutting its doors permanently. The end result is that the enforcement stance by the PBGC provided a clear disincentive to accepting the pensions of the newly acquired communications company, which certainly was not the Congressional intent when the law was originally enacted.

During previous acquisitions, the first question that the company would ask is “does this acquisition target have any leaking underground storage tanks or other environmental liability?” More recently, the first question the company asked itself was “does this acquisition target have a defined benefit pension liability?” If the recently passed 4062(e) legislation had been the law while the company was acquiring the communications/branding company, it would have provided the acquiring company with the confidence that making the right decisions for the good of the company would not be impeded or cause an unexpected and undue penalty. Due to that confidence, the acquiring company may very well have accepted the pensions as part of the communication company acquisition – much like it did while acquiring the print company described above – thus saving the PBGC from having to become the pension trustee and providing its employees with assurances that their pensions are secure.

Prominent New Media Company

In 2013, a prominent newspaper company sold, in an asset sale, a number of distinct and different media business entities at various geographic locations. As a result of the asset sale none of the various and distinct business entities closed, and all of the employees retained their positions with the acquiring company.

Prior to the sale, employees of the companies that were sold were participants in two frozen defined benefit plans, fully funded in accordance with the funding rules of the Code. Because the sale was structured as an asset sale, and solely for that reason, the PBGC informed the company of its position that a Section 4062(e) event had occurred with respect to both plans and that the company had liability under Section 4062(e) that was over $100M greater than, and well more than double, the full purchase price in the asset sale.

This prominent news media company is a household name and is a publicly traded company listed on the New York Stock Exchange with a market capitalization in the billions of dollars and significant cash holdings in the hundreds of millions of dollars. The company had two pension plans that were involved in this matter and both of them had been frozen for many years, and were extremely well funded such that there were no projected contribution requirements throughout the five-year period that 4062(e) was designed to provide protection for. These plans were so well-funded in large part because the company made hundreds of millions of dollars in voluntary contributions to the plans in excess of required amounts.

After the PBGC’s initial communication regarding their asserted 4062(e) liability, the company had extensive discussions with the PBGC, trying to ascertain PBGC’s rationale for asserting a 4062(e) event had occurred for both plans, given that the 20% threshold could not be met for the larger plan without aggregating separations at multiple locations involving multiple different businesses. After months of discussion and a great deal of time and expense for the company, PBGC finally conceded that there was no statutory or regulatory authority to support the aggregation approach that PBGC had pursued to reach the 20% threshold for the larger plan. Even though PBGC then conceded that one of the pension plans did not suffer a 4062(e) event, PBGC continued to assert that the sale, insofar as the second plan was concerned, did trigger a 4062(e) event, and sought liability that was still many millions of dollars more than the full purchase price in the asset sale.

RECOMMENDATION:

PBGC needs to learn from the lessons of section 4062(e), which are to listen more to the plan community and attempt to reach reasonable middle ground on critical issues.

Further, PBGC's Office of the Chief Counsel (OCC) which currently reports administratively to the Office of Negotiations and Restructuring (ONR) should report directly to the Office of the General Counsel, as they now do for all legal matters. OCC reporting administratively to the Office of the General Counsel, which would include all performance appraisals, bonuses, and compensation decisions, will ensure greater independence regarding consultation with and legal advice provided to the program offices of ONR.

Communicating PBGC's Numbers

SPONSOR ISSUE # 3: SPONSORS WILL NOW INCLUDE THE ADVOCATE IN THEIR QUESTIONS ABOUT PBGC'S NUMBERS

When I first began my outreach as Advocate, a variety of sponsor organizations shared with me their longstanding issues with the presentation of PBGC's financial situation. They are issues that are raised annually with PBGC and typically discussed with Congressional audiences and the benefits press following the release of each year's Projections Report and the Annual Report. However, since it is clear they will be raised with me annually as each Report comes forward and there is an aspect of these issues that involves presentation and communication choices rather than statutory or policy decisions, perhaps it is constructive to recap the arguments made to me.

Set forth below are some of those points made to me by the plan sponsor community, and in particular, their actuarial advisors, that generally show the strength of PBGC's single-employer plan program, and draw inferences which tend to indicate that PBGC's valuations and projections very likely understate the strength of the PBGC's single-employer plan program.

BACKGROUND:

PBGC issued its Projections Report in June and these projections, which were based on data as of September 30, 2013, show PBGC's estimate of its deficit for fiscal year 2023. The deficit is reflected as are a range of projections, suggesting possible future outcomes. For example, the *median* 2023 deficit is $4.4 billion, while the *average* 2023 deficit is $7.6 billion. These compare favorably to the much higher numbers that were projected a year earlier for 2022, showing that the median deficit declined by 85% while the average deficit declined by 77%. However, even under PBGC's extremely conservative assumptions (discussed below), PBGC projects a 42.5% chance that it will have a surplus in 2023.

The projected improvements are attributable to a recovery from the temporary adverse economic conditions that make the PBGC's current financial condition look far worse than it is. The 2013 PBGC premium increases played a relatively small role in reducing the deficit, accounting for only $4.7 billion of the $24.9 billion reduction in the average deficit, e.g., less than 19% of the reduction. The biggest changes by far were simply the continued recovery of the economy, increased interest rates, and "data changes" from 2012 to 2013, accounting for $18.3 billion of the reduction, e.g., over 73% of the reduction. Sponsors tell me that this confirms the point that has been made consistently about the PBGC deficit: it is a product of temporary adverse economic conditions and will fade away as the economy recovers.

Sponsors also continue to criticize PBGC for continuing to use overly conservative interest rates that greatly overstate their liabilities. General sponsor commentary is as follows:

- For purposes of valuing its obligations, PBGC uses the interest rates underlying commercial annuity purchase rates, even though PBGC does not buy annuities.

- These interest rates are based 30% on a composite corporate bond rate and 70% on the 30-year Treasury bond rate; Congress has long rejected the use of 30-year Treasury bond rates because they overstate liabilities.
- For purposes of discounting future PBGC obligations and other future amounts to a present value, PBGC uses solely 30-year Treasury bond rates, which further inflates future liabilities.

Taking these factors into account, the sponsor community believes that PBGC will not run out of money.

The sponsor community is also critical of PBGC's investment policy and attributes PBGC's low asset returns as reflecting either overly conservative assumptions or overly conservative investment strategies. The sponsor community consistently puts forth that higher returns could easily create a large surplus. Sponsors observe that PBGC projects investment income of approximately $4.2 billion on assets that commence at $83.2 billion and end at $85 billon (on a present value basis), e.g., assumed rates of return of approximately 5%, significantly below the 6.6% return that PBGC assumes for plans. Based on those factors, the sponsor community is led to believe that either PBGC's projections are low, or its investment strategy needs to be revisited, because PBGC is foregoing many billions of dollars of growth.

Sponsors also criticize PBGC's use of contradictory assumptions for the same issue. For example, for purposes of determining how well funded plans are, PBGC assumes that all employers contribute only the minimum amount required. This could possibly overstate the plan liabilities that could be turned over to the PBGC. On the other hand, for purposes of determining variable rate premium income, PBGC states that this is an unrealistic assumption and thus makes an adjustment to reduce expected variable rate premiums.

Sponsors tell me that they believe that the single-employer program remains consistently strong and cite to the following from the most recent Annual Report from PBGC. Specifically, as of September 30, 2014, total single-employer PBGC assets were $88 billion (up from $83.2 billion in 2013), while only $5.5 billion of benefits were paid (roughly equal to the $5.4 billion paid in 2013). With $3.9 billion in premium income, the sponsor community believes that PBGC needs to only earn roughly $1.6 billion in investment income (a 1.8% return) in order to cover its claims without even invading its principal of $88 billion. Sponsors strongly believe that this demonstrates the strength of the PBGC single-employer program, and more importantly, that this demonstrates how misleading the $19.3 billion deficit number is. This begs the question; if the program can be reasonably projected to never have to touch its principal, how can it claim to have a deficit?

Finally, sponsors and their actuarial advisors have discussed with me their concerns regarding PBGC's methodology. Specifically they tell me that PBGC's unrealistic assumptions overstate liabilities and that a secondary glaring problem with PBGC's methodology is that it explicitly does not take into account either plan terminations or de-risking transactions. Plan sponsor advisors conclude that if higher PBGC premiums and funding volatility can be projected to drive employers out of the defined benefit plan system, and erode PBGC's premium base dramatically, PBGC would not take this into account at all.

RECOMMENDATION:

Sponsor organizations believe that PBGC's presentation of their financial condition gives the impression of overstated liabilities, and that assets are underutilized. The result, they say, is an overstatement of the deficit PBGC must face and therefore an overstatement of the gap in necessary resources that must be closed. Sponsors insist that the combination of these factors facilitates the perception that additional premiums are needed, quickly, and makes additional premium increases an easy target as a revenue-raiser to assist passage of non-pension legislation.

Some will feel these issues go beyond the scope of the "persistent problems" that the Advocate was created to tackle. However, these issues are not only legislative and policy positions held by sponsor-based trade associations – it is also clear that they are strongly held beliefs shared almost universally by the individual sponsors whom I'm sure the Advocate is intended to hear. I'm sharing these comments here in the hope that the Advocate can contribute to the discussion between PBGC, the plan sponsor community, and other appropriate stakeholders, to help facilitate a deeper sense of acknowledgement and engagement on the fundamental financial challenges facing PBGC and the premium payers who sponsor defined benefit plans.

Premium Penalty Procedures

SPONSOR ISSUE # 4: PREMIUM PENALTY PROCEDURES PRESENT OPPORTUNITIES FOR IMPROVEMENT, AND IN THE INTEREST OF FAIRNESS, CONSIDERATION SHOULD BE GIVEN TO THE PAYMENT OF INTEREST ON PREMIUM OVERPAYMENTS

BACKGROUND:

All plan sponsors are keenly aware of the escalating costs associated with maintaining a defined benefit plan; however, most sophisticated plan sponsors are also keenly aware of how efficient defined benefit plans are in delivering a life-time annuity as an important part of retirement security for their employees. Yet an increasing number of plan sponsor officials and representatives, including CEO's and CFO's, are telling me that the volatility around pension funding primarily driven by fluctuations in discount rates and returns on plan assets can significantly impact both profit and loss statements and cash requirements from year-to-year, creating a huge disincentive to maintaining such plans. Moreover, sponsors say, that when you add in the skyrocketing premium costs which seem to be tied to no comprehensive retirement policy whatsoever, combined with automatic-like premium penalties for honest mistakes, the sum total of all of these things are driving sponsors to de-risk and enhance benefits payable under their defined contribution plan to serve as the mainstay for their workers' retirement security.

In the first week of starting in my new role as Advocate and thereafter, I received a small but steady stream of premium payers calling as they encountered issues around premium penalty notices they received for issues related to confusion or misleading premium filing forms and instructions and other frustrations with PBGC not recognizing the unique circumstances as to why the sponsor did not make timely premium payments.

To address some of these concerns, PBGC took an important first step last year, by announcing a new streamlined premium filing for large plans so that they now submit one final filing rather than both an estimated and a final filing. In addition, PBGC simplified filing due dates for all plans; implemented a "7-day rule" which automatically waives penalties if a premium filing is received with 7 days of its due date; and developed other process improvements which are intended to track and better service sponsor requests.

However, despite these changes, plan sponsors see the overall experience with PBGC premium penalty administration as punitive. One large telecommunications giant described a situation to me where they actually were owed a multi-million dollar credit by PBGC for the overpayment of premiums. Upon requesting a refund from PBGC, they were hit by a six-year review of their prior payment history, which is apparently a PBGC practice when the plan sponsor requests a refund of an overpayment. This nine month review meant that millions of dollars of the company's assets were held by PBGC. The review resulted in a purported transgression that was resolved when the sponsor pointed out to PBGC that their premium filing instructions were silent on the very issue upon which PBGC was seeking to levy additional premiums and a penalty; however this was not without forcing the sponsor to go through the reconsideration process and explaining why the company should not have to pay back premiums or any penalty. The sponsor had to go to considerable time and expense to prepare materials for a request for reconsideration. Moreover, the sponsor contends that such materials were already available to PBGC, if they had looked carefully enough at the documentation that they had already requested from the plan sponsor during the nine month review process. If PBGC had substantive discussions with the sponsor during this period of time when they were exchanging information, exercised some modicum of discretion and judgment, the sponsor believes that this issue could have been resolved in an informal manner and at much less cost for both parties, rather than simply tossing the sponsor into the reconsideration review process.

During this 9 month review, the company finally gave up on its request for a refund and asked PBGC to use the multi-million dollar credit for their 2015 premium filing payment, but PBGC resisted the request and suggested that the money be held by PBGC pending the outcome of the sponsor's reconsideration request, just in case PBGC were to deny the reconsideration request which would then require additional payments and penalties. Finally, PBGC issued a determination granting the company's request for reconsideration, but that was not without tying up hundreds of thousands of dollars of the company's assets which could have been deployed toward growth and revenue-generating activities.

To PBGC's credit they announced this year that they were dropping a provision in their penalty waiver authority that only allowed them to exercise waiver authority in "narrow circumstances." PBGC did this because the word "narrow" did not capture the scope of that exercise of authority and thus may be misleading. Although I have not seen any indication that PBGC has expanded its authority to waive penalties beyond "narrow circumstances," it's my sense that additional improvements can be found that could benefit the plan sponsor community without compromising PBGC's penalty waiver authority.

For example, provisions in the Pension Protection Act of 2006 allow the payment of interest on premium over payments (even on a retroactive basis). PBGC believes it must adopt regulations implementing its authority to pay interest on premium overpayments. Considering PBGC already has had eight years to think about this perhaps they could now start drafting that regulation. This would go a long way in balancing the scales when PBGC exacts interest on late premiums and may even cause PBGC to work more expeditiously in resolving premium overpayments without tying up sponsor funds for months at a time.

In addition, perhaps we could explore: How often are premium penalties triggered? Are there common misunderstandings that can be clarified? It seems the answer to the latter question is yes. Are there interpretations PBGC hasn't yet codified that should be posted and circulated more broadly among practitioners? What about the process for applying for a penalty waiver? Requesting a penalty waiver seems to be interpreted to permit discussion between the sponsor and PBGC, so why then require a formal penalty assessment followed by a formal on-the-record request for reconsideration in order to waive a penalty? That may be a good way to document the facts and create a record for review regarding consistent decision-making, but is it the only way to do so? Or is there a way in which this process can be shortened or accelerated? Plan sponsors and their advisors are generally a compliant group that may not be at all affected by automatic-like penalties. Should relief be provided for honest mistakes made either by the plan sponsors or their advisors who are generally a responsible and compliant cohort? Regarding the penalty cost itself, which can be very disproportionate to the offense, should some consideration be given that the penalty must be proportionate to the mistake – especially an honest mistake. Furthermore, is it necessary that any request for a refund of a premium overpayment be met by a six-year review of past premium payments? These are practices and policies which deserve a fresh look.

RECOMMENDATION:

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

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