



# **2021 Annual Report of the Participant and Plan Sponsor Advocate**

Pension Benefit Guaranty Corporation

December 30, 2021



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Office of the Participant and Plan Sponsor Advocate

The Office of the Advocate's 2021 Annual Report reflects a year of transition at the Pension Benefit Guaranty Corporation (PBGC). While participants and plan sponsors still face uncertainty due to the ongoing pandemic, single-employer and multiemployer plans received extraordinary relief from the American Rescue Plan Act of 2021 (ARP), allowing plans to better manage liabilities and pay promised benefits to retirees and beneficiaries. ARP tasked PBGC with implementing the Special Financial Assistance program to assist struggling multiemployer plans and setting up this program has consumed significant time and resources. Additionally, PBGC continues to operate in a mostly remote work environment, further changing the way that we work with each other on a day-to-day basis and heightening the importance of clear communication and supervision.

While the Advocate does not hear from every participant and plan sponsor that deals with PBGC, the parties who seek our assistance bring important attention to areas that need improvement. These areas of concern are not new and have been discussed in prior Advocate Annual Reports: communication challenges, coordination issues among PBGC departments leading to delays, outdated policies, processes, and procedures in need of review, and deficient case supervision and oversight. While PBGC's Office of Negotiations and Restructuring and Office of Benefits Administration can bring a plan sponsor or participant matter to a certain point, inevitably a "legal" issue develops, and the Office of the General Counsel (OGC) becomes involved and takes over the case. The business units step back, allowing OGC to become the decisionmaker when cases are inexplicably transformed from business decisions into "legal" matters.

The black and white decision-making employed by OGC frequently results in denying the request from the participant or plan sponsor, a decision that is communicated after months or years of the matter being open with the agency. Even more troubling, with participant matters the mantra is often, "well, the participant can appeal the decision to the Appeals Board." This method of thinking is problematic and presents questions about the independence of the administrative review process, as PBGC's Appeals Board falls within OGC and reports to the General Counsel. The practitioner community views this as a substantive governance flaw.

The two main cases highlighted in this Report present examples of workflow problems between PBGC Departments and the outdated policies and processes still being used by the agency. On the participant side, the Advocate is assisting a Western States Pension Assistance Project client with a matter involving PBGC's refusal to grant a qualified preretirement survivor annuity (QPSA) to a registered domestic partner from California. PBGC's position is based on its internal policy and guidance from other agencies that does not seem applicable for a benefit payable from a terminated, trusteed pension plan. Under PBGC's policy, it's unclear when the agency would ever grant a domestic partner a QPSA benefit, even when the state has given

domestic partners the same rights as spouses, such as is the case with California. OGC is heavily involved with this matter—yet another example of a case turning into a “legal” matter.

The plan sponsor case spotlight involves the distress termination process, a longstanding plan sponsor concern with many areas ripe for improvement. Although many distress terminations are brought under the business continuation test, meaning the sponsor is demonstrating to PBGC that it cannot remain a going concern without shedding its pension liabilities, it frequently takes years to go through the entire process and settle the matter with PBGC. The Advocate has long raised concerns about the process and PBGC represented that it had revised its distress termination process to facilitate closure of cases. The updated process, presented to the Advocate on four PowerPoint slides, did not have many substantive changes and it is certainly not being applied in this current case, which has been ongoing for years.

You will see that this Report provides an update on the Office of the Advocate’s Pension Plan Registry Project (Registry Project), which seeks to develop a searchable registry consisting of historical defined benefit pension plan information. During 2021, the Office of the Advocate entered into an interagency agreement with the General Services Administration’s Centers of Excellence to help develop a roadmap for creating the registry, and we continue to collaborate with PBGC to further the Registry Project.

The Office of the Advocate commends recent legislative proposals to help participants find and secure lost benefits, and we look forward to working with the Board agencies and our Congressional colleagues that bring such proposals to fruition. The Advocate’s Registry Project complements these proposals as well as ongoing initiatives to connect participants with their missing benefits, such as the data-sharing agreement between PBGC and certain U.S. Department of Labor Employee Benefits Security Administration (EBSA) regional offices. This arrangement originated with the Office of the Advocate and the EBSA Chicago Regional office and has continued to be a success over the years. In Fiscal Year 2021, EBSA Employee Benefits Law Specialists reunited 969 participants and beneficiaries with pension benefits valued at over \$47.7 million, bringing the total amount recovered since 2017 to over \$211 million. This agreement is an excellent example of federal agencies working together to help participants searching for their lost benefits.

Finally, I would like to acknowledge the loss of our colleague, Karen Ferguson, and recognize the contributions she gave to ensure retirement security for all. Respectfully, I submit the 2021 PBGC Participant and Plan Sponsor Advocate Annual Report in accordance with my reporting duties under section 4004 of the Employee Retirement Income Security Act.

Sincerely,



Constance A. Donovan  
PBGC Participant and Plan Sponsor Advocate  
December 30, 2021

cc: Camille M. Castro, Senior Associate Participant and Plan Sponsor Advocate  
Dale A. Davis, Law Clerk

## **PARTICIPANT SPOTLIGHT: DOMESTIC PARTNER DENIED SURVIVOR BENEFITS**

The Office of the Advocate is currently engaged in a matter involving PBGC's position on whether to grant a qualified preretirement survivor annuity (QPSA) to a deceased participant's registered domestic partner. The participant worked in the airline industry and participated in two different pension plans until his sudden death in 2019. One of the plans is still ongoing and the other has been trusted by PBGC. The participant's domestic partner, K.D., engaged the Western States Pension Assistance Project after receiving a letter from PBGC informing the participant's estate that no benefits were due to anyone after the participant's death. K.D. provided PBGC with an official Declaration of Domestic Partnership filed with California's Secretary of State as proof of the union, but PBGC has indicated that the document is not sufficient to grant K.D. a benefit. Conversely, K.D. provided the same domestic partnership documentation to the ongoing plan, and the plan administrator determined that she was entitled to a QPSA benefit.

PBGC's determination relies on its internal policy, which states that the agency will not recognize arrangements, such as domestic partnerships, as marriages unless they are specifically denominated as marriages by state law. Although California law provides domestic partners with the same rights as spouses, there is no statutory provision specifically "denominating" California domestic partnerships as marriages, so the union apparently does not satisfy PBGC's policy. In subsequent discussions about the matter, the Office of the Advocate learned that PBGC has not granted a QPSA benefit to any domestic partners, and it is unclear whether any states with legislation allowing domestic partnerships would satisfy the policy's requirements to be recognized as a marriage.<sup>1</sup>

PBGC's policy is modeled after Internal Revenue Service guidance that addresses the application of the *United States v. Windsor* decision to "qualified" retirement plans.<sup>2</sup> PBGC claims that it must follow this guidance as the statute guaranteeing QPSA benefits refers to section 205(e)(1) of the Employee Retirement Income Security Act (ERISA), which has a parallel provision in the Internal Revenue Code.<sup>3</sup> The agency also pointed to a Technical Release issued by the Department of Labor which provided similar guidance to employee benefit plans on the definition of "spouse" and "marriage" post-*Windsor*.<sup>4</sup> It is unclear to the Office of the Advocate why PBGC is deferring to guidance designated as applicable only for federal tax purposes. When the Advocate questioned PBGC about its rationale, the agency claimed that it did not want to run afoul of guidance issued by its Board agencies.

Although PBGC's policy states that it must look at individual state law, PBGC is disregarding California law, which equates domestic partners with spouses. The California Family Code (CA Code) states that the definition of a "spouse" includes registered domestic partners. The CA

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<sup>1</sup> Few states still permit domestic partnerships. Other states that previously allowed domestic partnerships converted the unions to marriages by law. California expanded its domestic partnership legislation in 2019 to extend the union's availability to all adults.

<sup>2</sup> 570 U.S. 744 (2013). Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013); Notice 2014-19, 2014-17 I.R.B. 979 (Apr. 17, 2014) (codified at 26 C.F.R. § 301.7701-18).

<sup>3</sup> ERISA § 4022(e).

<sup>4</sup> U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., TECHNICAL RELEASE 2013-04 (Sept. 18, 2013).

Code also extends the same rights, protections, and benefits as are granted to spouses to domestic partners, a position that has been affirmed by California state and federal courts.<sup>5</sup> Despite this overwhelming California law equating domestic partners with spouses, PBGC refuses to recognize the domestic partnership as a marriage.

Although the Office of Benefits Administration is the business unit, it has deferred to OGC to make the benefit determination denying K.D. a QPSA benefit. The General Counsel has even been involved with the matter, presenting a conflict of interest in the administrative review process. K.D.'s next step for recourse once PBGC issues a decision is to appeal the benefit determination to PBGC's Appeals Board, a department that comes under the purview of the General Counsel. How can a participant expect impartiality and a fresh review if the ultimate decisionmaker is the same in both stages of the review? It is not surprising that domestic partners seeking QPSA benefits have consistently had their benefit denials affirmed by PBGC's Appeals Board.

This matter presents complicated questions about how much reliance PBGC must have on guidance from other agencies and the interplay between state and federal law. It is not black and white, as a senior leader in OGC characterizes the matter. It also raises embarrassing questions about PBGC's current policy on recognizing marriages, such as why the agency has a policy that appears to always result in a denial of QPSA benefits to domestic partners. While there may have been only one approach concerning the treatment of marriages and other types of arrangements post-*Windsor*, the law has evolved and PBGC cannot ignore state law, such as the CA Code, which grants domestic partners the same rights and obligations as spouses.

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<sup>5</sup> CAL. FAM. CODE §§ 297.5(a); 143; 11; *Reed v. KRON/IBEW Local 45 Pension Plan*, 770 F. App'x 374 (9th Cir. 2019) (mem.); *In re Rabin*, 336 B.R. 459 (Bankr. N.D. Cal. 2005); *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212 (Cal. 2005).

## **PARTICIPANT ISSUES**

The Office of the Advocate received a variety of assistance requests from participants and their advisors during 2021. Many participant cases brought to the attention of the Advocate continue to present the same problems raised in prior Advocate Annual Reports involving case delays, issues with the Customer Contact Center and Field Benefit Administration (FBA) offices when trying to resolve routine matters, and coordination challenges when a matter involves multiple departments. While senior leadership in PBGC's Office of Benefits Administration (OBA) is engaged in larger initiatives, such as modernizing its Customer Relationship Management (CRM) system and participant-facing login sites, the rollout of these technological improvements caused customer service disruptions that prompted participants to seek assistance from the Advocate. Other participants contacted the Advocate with matters involving simple benefit administration functions and questions after prior unsuccessful attempts to resolve the matters with the Customer Contact Center or FBA offices. The Advocate has observed continued basic customer service deficiencies, indicating that the positive changes reported in last year's Annual Report were only temporary.

The Office of the Advocate also assisted with participant cases presenting complicated benefits administration and plan interpretation questions. These cases often require exercising discretion and a heightened level of supervisory involvement and review. PBGC has made strides in the way it handles certain complex participant inquiries, such as those from potentially omitted participants seeking a benefit entitlement, but challenges remain when a matter is transformed from a business decision into a "legal" question, moving the case from OBA to the Office of the General Counsel (OGC).

### **Longstanding Issue: Unresolved Routine Inquiries**

The Customer Contact Center and FBA offices continue to be sources of participant complaints, particularly in matters involving routine requests, such as obtaining benefit estimates, requesting assistance with logging into PBGC's customer portal, or applying for benefits. These matters generally do not present complicated questions and should not involve the Advocate, but far too frequently in 2021, participants sought the Office of the Advocate's assistance when PBGC's customer service failed. Participants complained about a wide range of issues sharing common fact patterns such as multiple calls to the Customer Contact Center or FBA offices over a matter of weeks or months yielding no resolution, futile requests to escalate matters to supervisors, lack of follow through to ensure matters are completely closed, and incomplete or inaccurate communications from FBA and Customer Contact Center representatives.

For example, one participant contacted the Office of the Advocate after repeated unsuccessful attempts to obtain various benefit estimates from the Customer Contact Center and FBA offices. The participant initially received incorrect information from PBGC and called the agency multiple times only to have the request remain unfulfilled until the Advocate's involvement. Another individual, the daughter of a deceased participant who serves as the executor of his estate, requested the Office of the Advocate's help after multiple unsuccessful attempts to obtain information from PBGC about her father's final benefit payment. The individual needed to submit the documentation to the court to fulfill her executor duties, but she was unable to get a



response from PBGC despite multiple phone calls to the Customer Contact Center and FBA offices.

**Recommendation:** There is often a flurry of activity to address the immediate issue when the Advocate becomes involved with a matter, but little or no substantive follow up by OBA to ensure the case reaches completion. While PBGC's new CRM system has the capability to better track cases and run reports measuring and assessing case metrics, technology is not a substitute for active supervision and management. There are often further communication challenges as the Customer Contact Center and FBA offices are staffed entirely by federal contractors and can only provide limited information to participants. Contractor staff working at the Customer Contact Center and FBA offices are not allowed to provide their direct phone numbers or contact information, so participants routinely work with different customer service representatives on the same issue. Many participants end up contacting the Office of the Advocate to follow up on matters since they are unable to reach anyone else directly.

While the Advocate has long recommended that PBGC hire supervisory full time Federal employees to be on site at each FBA location, there have been no significant staffing changes as PBGC and the FBA offices continue to work remotely. In the absence of in-person supervision, all levels of leadership must take a more active role in day-to-day case management involving the Customer Contact Center and FBA offices. There must be greater involvement and oversight on an individual case level and an ongoing review of case trends and frequent participant concerns as repeated problems can indicate the need for increased training and guidance from PBGC staff. PBGC has represented that there is an escalation process for bringing a matter to the attention of federal staff, but participants have told the Office of the Advocate that they have been unable to escalate matters to supervisors.

Correcting these deficiencies will require hands on management by OBA leadership and constant assessment to identify areas needing improvement. Senior leadership must do more than just delegate to their staff and there must be daily involvement with cases, particularly ones that involve the Advocate. PBGC should also review the Customer Contact Center and FBA office contracts to make sure that the contractor vendor is meeting deliverables and other customer service metrics. The Advocate has detailed issues with these contractor-staffed offices for years, yet there is no accountability. Until there are material improvements to FBA office and Customer Contact Center oversight, participants will continue to seek assistance from the Office of the Advocate.

### **Longstanding Issue: Business or Legal Decision?**

The Office of the Advocate is also involved in complex participant cases presenting benefit, policy, and/or plan interpretation questions. Participants and their advisors often contact the Advocate after the matter has persisted for a long period of time, which can occur when a case involves coordination among multiple PBGC departments. The Office of the Advocate has observed delays when a matter is transformed from a benefit determination or business decision made by OBA into a legal issue involving complete, but misplaced, reliance on OGC. While OGC has a forced role in certain participant cases due to OBA's limited settlement authority, the

ambiguity about case ownership and coordination between OBA and OGC can result in a matter taking months to reach resolution.

A case involving a participant represented by the Western States Pension Assistance Project took over nine months to resolve due to delays associated with coordination between OBA and OGC. The participant's counsel contacted PBGC repeatedly after the agency trustee the plan in fall 2020 and reached out to the Advocate in January 2021 after receiving no response from PBGC. The participant had previously appealed to the prior plan administrator and was waiting for a decision when PBGC trustee the plan. The dispute involved a question about notice requirements, so OBA referred the matter to OGC as a "legal question." The Office of the Advocate followed the case's progress during its biweekly meetings with OBA and was repeatedly told that the matter was still under review in OGC and that no updates were available. When OGC finally issued a "decision," which seemed to extend beyond the initial question about notice, OBA had questions about OGC's rationale and determination. It was unclear to the Office of the Advocate whether OGC or OBA had responsibility for making the benefits determination.

**Recommendation:** PBGC must reassess OBA's settlement authority to give the Chief of Benefits Administration more authority and control over cases. Currently, OBA's ability to settle certain participant cases without the General Counsel's involvement and approval is limited to a low dollar limit, which means that OGC is constantly involved in participant matters. The Advocate has repeatedly recommended reevaluating the settlement authority and it is now time to act and make changes. The Advocate has observed OBA taking a passive role in complex cases, allowing OGC to make benefit determinations in the form of issuing legal decisions even though the matters often involve PBGC's own processes and policies or routine benefits administration questions.

Any discussions on revising settlement authority should include the workflow process between OBA and OGC to improve how cases are handled and tracked when they span across the two departments. OBA should take ownership of the cases since it is the business unit, and both departments must memorialize metrics and timelines for turning around work in staff performance plans. All too often, a case sits in OGC for months waiting for a "legal decision," and OBA loses control of the matter and is unable to provide updates on timing or when it will return to the business unit. There must be accountability and more oversight so that matters do not languish in one department. This accountability should start immediately, with OBA conducting an inventory of all outstanding cases involving OGC, identifying next steps, and providing expected timelines for closing the cases.

The business unit or customer-facing departments in PBGC should take the lead in resolving a participant or plan sponsor matter. A matter does not become a "legal" issue when a statute or guidance needs to be read. Non-lawyers can also read statutes, legal guidance, and policies. PBGC needs to learn what it means to be a benefits administrator rather than merely a payor of benefits. There is a role for OGC to provide advisory opinions, such as if a legal matter involves interpreting a split in case law. However, OGC should not take over the entire case and usurp the responsibilities of the business unit under the guise of something being a "legal issue."

## **MULTIEMPLOYER PENSION ISSUES**

The American Rescue Plan Act of 2021 (ARP) established the Special Financial Assistance (SFA) program to provide financially troubled multiemployer plans with funds to extend their solvency, allowing plans to pay promised benefits to participants and beneficiaries.<sup>6</sup> This historic legislation also included relief for plans that previously suspended benefits under the Multiemployer Pension Reform Act of 2014 (MPRA) by providing funds to reinstate and restore suspended benefits. Over the years, the Office of the Advocate spoke with countless retirees and beneficiaries facing benefit cuts under MPRA about the hardship and detriment related to the loss of their pensions. These individuals will now be able to enjoy a secure retirement under the relief provided through the SFA program.

PBGC issued an interim final rule (IFR) implementing the SFA program on July 12 and is currently reviewing comments and finalizing the rule. The IFR establishes a system to prioritize applications, a formula for calculating the amount of SFA to be awarded to each applicant, and a list of requirements for applicants. The agency approved its first application on December 21, 2021 and is currently reviewing applications from the first two Priority Groups.

The Office of the Advocate has heard some feedback about the new regulation, much of which is echoed in numerous comments to the IFR. One fund contacted the Office of the Advocate about a situation involving two different plans that are almost identical yet face disparate options for relief due to past actions one plan took to preserve solvency that now make it ineligible for SFA under the IFR. PBGC's position in the IFR harms participants since one plan faces benefit cuts while the other is eligible to seek assistance under the SFA program, protecting benefits. The Fund argues that the IFR is contrary to the intent of ARP, which is to provide relief to troubled multiemployer plans and help as many participants as possible.

Other notable concerns expressed in the comments raise questions about the ability of funds to remain solvent through 2051 due to the IFR's calculation rules and investment mandate, which limits the investment options for SFA funds. While the Office of the Advocate's role in the rulemaking process and implementation of the SFA program is limited, the Advocate continues to monitor and listen to feedback.

As PBGC continues implementing the SFA program and reviewing SFA applications, clear communication and transparency is important. PBGC has made efforts to be communicative and provide information about the program and the rulemaking process. The Advocate also recently connected PBGC with a group of multiemployer fund retirees so the agency could address questions about the SFA program. We must continue to have open communications, especially as concerns and other questions about the SFA program are raised by the multiemployer plan community.

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<sup>6</sup> Pub. Law No. 117-2, Section 9704 (March 11, 2021).

## **PLAN SPONSOR SPOTLIGHT: LENGTHY NEGOTIATIONS YIELD NO RETURN FOR PBGC**

The Office of the Advocate is assisting a small plan sponsor with a protracted post-distress termination liability settlement matter. PBGC trustee the sponsor's three plans covering approximately 160 participants in 2019, and the sponsor and PBGC have been in negotiations over the outstanding liability for over two years. PBGC is currently focused on the sponsor's 84-year-old owner since the sponsoring company consisted of various trusts and other entities. The owner's advisor engaged the Office of the Advocate in February 2021 after receiving an outsized counteroffer from PBGC for \$2.4M over four months after the sponsor submitted an initial settlement offer for \$30,000.

Despite requesting and receiving voluminous amounts of documentation related to the company's various trusts, entities, assets, and liabilities, PBGC has fixated on the company owner's personal assets and requested that he provide tax returns and other detailed financial information. After numerous conversations among the Advocate, the owner's counsel, and PBGC, the matter is still unresolved since the agency remains unsatisfied with the personal financial information provided by the owner. Instead of reviewing the information gathered over the years and developing a reasonable settlement proposal, PBGC has taken an adversarial posture despite documentation indicating the owner's limited financial resources available for settlement.

To further complicate matters, it is unclear which PBGC department is responsible for overseeing the case since it currently involves both the Office of Negotiations and Restructuring (ONR) and the Office of the General Counsel (OGC). The Advocate repeatedly asked for case updates during monthly meetings with ONR and OGC leadership, highlighting process issues and other concerns about how long the matter has been open, yet no substantive actions have been taken to bring this matter to closure. Instead of having information readily available, each department head would need an "update" before they could discuss the substance of the case with us despite this case being the primary plan sponsor matter every single month. The longer PBGC takes a vague and/or adversarial settlement approach, the more money the owner will expend to resolve the issue, leaving less available for settlement. The owner is currently hospitalized, so the path forward and timing for resolution remains unclear.

This situation presents the same problems that have been repeatedly detailed by the Advocate in past Annual Reports. There has been no accountability for the repeated failure to address deficiencies and issues with the distress termination process. A lack of awareness about the time and resources spent by PBGC accompanies this lack of consequence, since we don't conduct a cost-benefit analysis to understand our costs compared to what we expect to recover. Why are we wasting the agency's resources, which are derived from premiums paid by plan sponsors, to pursue such matters where PBGC's recovery will be limited or futile? In fact, our Office has been involved with plan sponsor distress cases that languished for years where PBGC recovered very little despite spending thousands of sponsor premium dollars.

More plan sponsors are de-risking and shedding their defined benefit pension plan liabilities, leaving PBGC with a smaller pool of premium paying sponsors. Unfortunately, PBGC continues

to pursue matters without considering the cost, as demonstrated by these protracted distress termination cases that show up in every single Advocate Annual Report.

## **PLAN SPONSOR ISSUES**

While the pandemic continues to present challenges for companies, single-employer plan sponsors received relief from the American Rescue Plan Act of 2021. The Office of the Advocate had previously heard from plan sponsors facing steep pension liabilities about the need for funding relief, so this legislation, which extended amortization of funding shortfalls and enhanced interest rate stabilization, was very well-received. As companies were able to manage their liabilities and continue maintaining and sponsoring their plans without the involvement of PBGC, the Office of the Advocate received fewer plan sponsor requests for assistance during 2021. However, the sponsors that did seek the Advocate's involvement presented the same enduring issues detailed in past Advocate Annual Reports that also show up on the participant side. Case delays, often exacerbated by coordination issues when a matter involves multiple departments, inadequate communications, and questions about case ownership continue to cause problems for plan sponsors seeking resolution of matters with PBGC.

Further, the distress termination process remains an area of concern and the most frequent type of plan sponsor assistance request received by the Advocate. While past changes, such as offering a pre-filing consultation for sponsors considering distress termination applications, have helped, the rest of the process needs to be reassessed and improved. It routinely takes years for distress termination cases to fully resolve, which is not in the interest of plan sponsors or the agency since it wastes time and resources.

### **Longstanding Issue: Case Delays Due to Coordination and Oversight Lapses**

Case delays have been an area of focus in many past Advocate Annual Reports. The Advocate has long recommended increased managerial oversight so that cases are routinely reviewed and evaluated when a matter remains open for a prolonged period. The Office of the Advocate has repeatedly observed a lack of managerial oversight that worsens these delays, with matters dragging on at a cost to the plan sponsor and agency. While PBGC has often represented that it does conduct frequent internal case reviews, plan sponsors continue to contact the Advocate with matters that have been open for more than six months.

Plan sponsor cases primarily involve PBGC's Office of Negotiations and Restructuring (ONR) and the Office of the General Counsel (OGC). However, some matters, such as Freedom of Information Act or coverage determination requests, can involve the Standard Termination Compliance Division (STCD), the Disclosure Office, or the Financial Operations Department (FOD), leading the sponsor to interact with multiple departments. As with participant matters, it is often unclear which department owns the case and is responsible for moving it toward completion.

Coverage cases are one area where the Advocate has observed a breakdown between departments, as these types of requests involve STCD, OGC, and FOD. For example, a plan sponsor seeking a decision on a coverage determination request contacted the Advocate after PBGC failed to communicate with the sponsor for almost a year. Despite repeatedly asking for updates, the sponsor was unable to get any response from PBGC stating when it would issue a decision or if it needed any additional information to review the request. PBGC finally

responded to the plan sponsor once the Advocate became involved with the matter, but it remained unclear which department had responsibility for resolving the case.

**Recommendation:** Addressing case delays requires hands on management and daily accountability to ensure matters move forward in a satisfactory and efficient manner. Management must stay apprised of every step of a case until a matter is brought to finality. This tracking can become challenging if multiple departments are involved in a matter, so there must be some coordination at a supervisory level. If a matter remains open for six months, it should be escalated to the Director, with departmental leadership required to report weekly on the reasons for the delay and the action plan for settlement until it is resolved. Without this level of active managerial oversight and involvement, these delays will endure, costing all parties time and money.

Management must review case inventories, identify open matters, and deploy resources and oversight accordingly to bring the matter to resolution. There must be clear case ownership so there are no questions as to who is responsible for a case. There are too many excuses for why matters remain open for long periods, and no willingness by PBGC to reassess its processes and increase oversight to address these aging cases. It's not enough to just triage cases when the Advocate brings matters to the attention of leadership.

There is a need for the assessment of areas where the agency's business practices, procedures, and decision-making processes are outdated and contribute to the delays. There may be value in an outside review of PBGC's current practices to identify other areas for improvement, yet on the other hand, this is basic management and supervision. It's time to act on this recommendation and make changes to mitigate case delays and ongoing concerns, which includes addressing these incredibly territorial stovepipes like OGC, FOD, STCD, ONR, and the like. Every little fiefdom gets to weigh in at PBGC, and there is no Chief Executive Officer to pull all these disparate units together. The Office of the Advocate often ends up playing this role since we frequently coordinate with multiple departments and monitor cases until they reach completion. This is not the Advocate's role.

### **Longstanding Issue: Distress Termination Process Concerns**

Distress termination cases continue to be an area requiring immediate managerial attention and improvement. The Office of the Advocate has been involved with a variety of plan sponsors struggling through different stages of the distress termination process, as detailed in every Advocate Annual Report starting with the 2014 Inaugural Report. While PBGC has made some positive changes, such as the distress termination pre-filing consultation option, delays and process concerns endure. Plan sponsors applying for distress terminations under the business continuation test generally do not have unlimited amounts of time and financial resources to embark on years-long discussions with PBGC regarding the termination of their pension plans and the subsequent post-termination settlement negotiations.

PBGC indicates that it has revised its distress termination process, but briefings to the Office of the Advocate suggest that the changes are things that PBGC had represented it was already doing, such as conducting regular case reviews with management. PBGC's updates appear to

have focused primarily on the first part of the distress termination process, which involves the agency's decision on whether to approve the distress termination application. Most of the assistance requests to the Advocate come from sponsors in the second part of the process, which is the post-termination liability settlement phase. PBGC and the plan sponsor frequently disagree on valuations and other assessments of liabilities, and negotiations can languish for years without resolution, as detailed earlier with the distress termination case spotlight. The Office of the Advocate has observed prolonged negotiations involving all types of plan sponsors, including organizations like charities and not-for-profits that have limited resources to address such matters.

**Recommendation:** PBGC must conduct a comprehensive assessment and review of its distress termination process and identify an inventory of open cases in each phase of the process. In the Advocate's experience, it is routine for cases to take years to resolve, even when the plan sponsor has financial constraints such as with charities and not-for-profits. It would be beneficial for the agency to engage with plan sponsors and their advisors to understand areas that could be improved. Many advisors have given the Office of the Advocate various suggestions based on their experiences with different types of plan sponsors such as charities, small employers, and not-for-profit organizations.

The bifurcated nature of the process remains a large concern, as it can take years to settle a matter, which is detrimental to a company with limited financial resources. One frequent suggestion to improve the process involves scheduling routine calls or meetings between PBGC and the plan sponsor until the matter settles. All too often, there are large gaps of time between communications, causing financial documentation to become stale which triggers another request from PBGC. This repeated back and forth contributes to the overall time and cost of the matter. Holding meetings or calls would bring accountability by setting expectations and timelines for case review, while also providing a forum to address any questions, outstanding information requests, or other complications that may delay the case. These are just some examples of improvements, many of which come directly from plan sponsor advisors, that could enhance the distress termination process for all parties. PBGC should be receptive to these suggestions from its regulated community and their advisors.

Concerns have also been raised about the skillset at PBGC in the distress termination process, particularly in the valuation of distressed entities. This is a reasonable question, which the Advocate raised to PBGC, and further review is warranted. Financial settlement discussions belong in ONR, but the financial advisors in this department must have the appropriate skillsets to analyze plan and financial information. The Advocate has observed that ONR often defers to OGC, allowing the attorneys to lead discussions when it is more appropriate for the financial analysts to be involved. Settling the unfunded benefit liability is a business and financial negotiation, not a legal matter.

PBGC has had over two years to address the failings associated with the distress termination process. How long must it take for the agency to implement an improved process that makes this type of plan termination more business-like and efficient for sponsors who want to continue as a going concern?



## **PENSION PLAN REGISTRY PROJECT**

During 2021, the Office of the Advocate entered into an interagency agreement with the General Services Administration's Centers of Excellence (COE) to assist with the next stage of its Pension Plan Registry Project (Registry Project). The Registry Project seeks to create a searchable pension plan registry database using information that is currently only available internally at PBGC. This type of data is useful for participants searching for their lost pension plans since it provides a genealogical history for tracing what may have happened to a plan. The interagency agreement's scope of work involves COE's development of a roadmap document for creating this registry database, with this main deliverable expected in March 2022. The roadmap will include the results of the COE's requirements gathering, an assessment of needed resources, and detailed next steps for building the registry database. The Office of the Advocate collaborated with PBGC to develop the interagency agreement's statement of work and expects to continue its coordination with the agency throughout the COE's engagement, which is currently ongoing.

The Office of the Advocate frequently assists participants searching for information about their lost pension plans. Many of these tracing requests are from participants who worked for a company long enough to vest in the pension plan but left before retirement, and now the company no longer exists. In the absence of a centralized database with plan information, participants end up contacting various government organizations and often find the Office of the Advocate after they have exhausted all other sources. After working with participants on these types of searching requests, the Office of the Advocate realized that multiple PBGC databases contain information that can be instructive when piecing together the history of a plan. PBGC's Financial Operations Department's historical and current premium filing records are the main sources used by the Office of the Advocate when conducting pension tracing research as these records often capture changes such as mergers, plan sponsor or name changes, and other transactions which impacted the pension plan. The Office of the Advocate also reviews other sources such as PBGC's Case Management System, historical Form 5500 filings, standard termination records, and the historical summary plan description collection, when researching the history of a plan.

The Office of the Advocate's pension tracing research has helped countless participants, such as one participant who contacted the Office for assistance after years of searching for his missing pension. The Advocate traced the plan to an ongoing plan and connected the participant with a Senior Benefits Advisor from the Employee Benefits Security Administration's Chicago regional office for further assistance. The Senior Benefits Advisor helped the participant with his claim to the ongoing plan sponsor, successfully reuniting him with an over \$10,000/year benefit.

While there are many success stories of the Office of the Advocate's tracing research providing finality and useful information to participants, the data is not perfect. There are often issues with the integrity and accuracy of PBGC's information for certain years and plans, especially when the data is older and incomplete. Creating a registry database will likely require data cleansing and it is possible that certain information will never be completely accurate or fully accessible to the public. The COE is reviewing these data quality concerns as part of its assessment research to develop the roadmap.

As the Office of the Advocate continues to receive pension tracing requests from participants and their advisors, the Registry Project remains a priority for the office.<sup>7</sup> The roadmap will guide the Office of the Advocate's next steps in developing a pension registry and the office will be exploring procurement options to obtain outside contractor/consultant support to implement the COE's recommendations. There is currently great interest from both participant and plan sponsor organizations in connecting participants with their missing benefits, and the Office of the Advocate anticipates that its Registry Project will complement current legislative proposals that support a registry for all types of retirement plans.

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<sup>7</sup> Individuals seeking defined benefit pension plan tracing research assistance can contact the Office of the Advocate at [PensionTraceService@pbgc.gov](mailto:PensionTraceService@pbgc.gov).

## **OUTLOOK**

We look forward to the New Year and all the hope and promise it may bring, and we expect a few challenges tossed our way just to keep us on our toes, like figuring out how to live and thrive with a pandemic. The world of work and how we account for productivity will change, but for the better, and with an eye toward the future. Plan sponsors will transform themselves as the economy and the competition demands, and so too will the American worker, the backbone of our capital markets.

Sponsors who intend to keep their defined benefit plans will find support from the Office of the Advocate, and we stand ready to assist with obstacles, differences, and disputes that may arise with PBGC. I have no doubt that our Director will lend support to meritorious plan sponsor and participant claims as I have seen in the past.

I am optimistic for PBGC under the continued leadership of our Director. Both he and my colleagues may have been consumed by the American Rescue Plan Act's Special Financial Assistance program that falls to the agency for implementation, but PBGC will engage and act decisively to address the issues identified in this Report. I look forward to working with my colleagues, participants, plan sponsors, practitioners, and interested outside organizations, to assist in transforming the agency into one that serves sponsors of defined benefit plans and the participants in those plans.

## **ERISA § 4004: PARTICIPANT AND PLAN SPONSOR ADVOCATE**

### **DUTIES**

The Participant and Plan Sponsor Advocate shall—

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

### **ANNUAL REPORT**

- (1) In general—Not later than December 31 of each calendar year, the Participant and Plan Sponsor Advocate shall report to the Health, Education, Labor, and Pensions Committee of the Senate, the Committee on Finance of the Senate, the Committee on Education and the Workforce of the House of Representatives, and the Committee on Ways and Means of the House of Representatives on the activities of the Office of the Participant and Plan Sponsor Advocate during the fiscal year ending during such calendar year.
- (2) Content—Each report submitted under paragraph (1) shall--
  - (a) Summarize the assistance requests received from participants and plan sponsors and describe the activities, and evaluate the effectiveness, of the Participant and Plan Sponsor Advocate during the preceding year;
  - (b) Identify significant problems the Participant and Plan Sponsor Advocate has identified;
  - (c) Include specific legislative and regulatory changes to address the problems; and
  - (d) Identify any actions taken to correct problems identified in any previous report.
- (3) Concurrent Submission—The Participant and Plan Sponsor Advocate shall submit a copy of each report to the Secretary of Labor, the Director of the Corporation, and any other appropriate official at the same time such report is submitted to the committees of Congress under paragraph (1).